

Local Government Regulation of Religious Land Uses Under RLUIPA

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A Practice Note that provides an overview of regulating religious land uses under the Religious Land Use and Institutionalized Persons Act (RLUIPA) for local government attorneys. This Note discusses different ways local governments can regulate religious uses, the types of claims that can be brought, and strategies for training staff and handling applications under RLUIPA.

The Religious Land Use and Institutionalized Persons Act (RLUIPA), enacted in 2000, is a federal law that prohibits local governments from implementing zoning and other land use regulations that infringe on a person's or group's religious exercise. A prevailing plaintiff can receive injunctive relief and recover its legal fees, which along with the government's own legal fees can reach the hundreds of thousands or millions of dollars.

Local governments should view RLUIPA as a federal zoning ordinance that is part of any local zoning code. As a federal statute, RLUIPA takes precedence over conflicting state and local laws under the Supremacy Clause of the US Constitution. This often creates unfamiliar territory for zoning agencies and officials, as many considerations that go to the heart of any RLUIPA analysis are not relevant to zoning applications submitted by secular organizations.

Affording religious land uses certain protections under RLUIPA is also the source of much confusion because it appears to run counter to the First Amendment's admonition that government is not to advance religion over non-religion (known as the Establishment Clause). This confusion appears overblown to some extent, as courts have found that protecting religion under the First Amendment's Free Exercise Clause is in fact a secular purpose and not the illegal advancement of religion over non-religion. (*Tenaflly Eruv Ass'n, Inc. v. Borough of Tenaflly*, 309 F.3d 144, 176 (3d Cir. 2002).) However, as one court recently described, this analysis can be considered

"a circumstance akin to that faced by Odysseus when he traversed the narrow waters between Scylla and Charybdis" (*Chabad Lubavitch of Litchfield Cty., Inc. v. Borough of Litchfield*, 2017 WL 5015624, at *1 (D. Conn. Nov. 2, 2017)).

This Note discusses how local governments can regulate religious land uses, focusing on RLUIPA. For information and tips on avoiding liability under the statute, see Practice Note, *Avoiding and Defending Against RLUIPA Claims* ([W-002-9215](#)).

WHEN DOES RLUIPA APPLY?

In the land use context, RLUIPA applies where, both:

- The challenged law is a land use regulation (see *Is the Challenged Law a Land Use Regulation?* ([W-012-6036](#))).
- The use in question is religious exercise (see *Does the Use Constitute Religious Exercise?* ([W-012-6036](#))).

RLUIPA therefore does not apply if, either:

- The challenged law is not a land use regulation.
- The use at issue does not constitute religious exercise under the statute.

IS THE CHALLENGED LAW A LAND USE REGULATION?

To determine if RLUIPA applies, local counsel should first determine whether the challenged law is a land use regulation. "Land use regulation" is defined by the statute as "a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest." (42 U.S.C. § 2000cc-5(5).)

This definition specifically calls out zoning and landmarking laws, but environmental laws have also been found to invoke RLUIPA's protection (*Fortress Bible Church v. Feiner*, 694 F.3d 208 (2d Cir. 2012)). Courts have reached conflicting decisions about whether safety codes, building codes, and the use of eminent domain constitute land use regulations. The regulated land is not just any land affected by regulation, but the regulation must be directed at or applied to land where the claimant has a legal interest. (*House of*

Prayer Ministries Inc. v. Rush Cty. Bd. Of Zoning Appeals, No. 21A01-1707-MI-1693, 2018 WL 414862, at *1 (Ind. Ct. App. Jan. 16, 2018).)

DOES THE USE CONSTITUTE RELIGIOUS EXERCISE?

Zoning agencies and officials must determine whether the use in question constitutes religious exercise, after determining that the law in question is a land use regulation (see *Challenged Law Is a Land Use Regulation and What is a "Religious Use"?*). RLUIPA defines "religious exercise" to "include[] any exercise of religion, whether or not compelled by, or central to, a system of religious belief." (42 U.S.C. § 2000cc-5(7)(A).) RLUIPA also provides that religious exercise applies to "[t]he use, building, or conversion of real property for the purpose of religious exercise" (42 U.S.C. § 2000cc-5(7)(B)) (see *What is a "Religious Use"?*).

For more information on determining whether a use constitutes religious exercise, see Practice Note, *Avoiding and Defending Against RLUIPA Claims: Is the Proposed Use Religious Exercise?* ([W-002-9215](#)).

RLUIPA CLAIMS OVERVIEW

There are four types of RLUIPA claims available to potential plaintiffs:

- Substantial burden claims (see *Substantial Burden Claims*).
- Equal terms claims (see *Equal Terms Claims*).
- Nondiscrimination claims (see *Nondiscrimination Claims*).
- Exclusions and limits claims (see *Exclusions and Limits Claims*).

Different Circuit Courts of Appeal interpret and apply these claims in different ways, and some federal courts have yet to consider some claims entirely.

Regardless of the specific claim, RLUIPA challenges can be classified as either:

- **A facial challenge.** A facial challenge contests the legal validity of laws, including zoning ordinances, based on their plain text. For example, facial challenges may arise where a zoning ordinance is not neutral and not generally applicable but specifically targets and applies to religious uses. Facial challenges are ripe for adjudication at any time. No application needs to be submitted before a plaintiff proceeds to court.
- **An as-applied challenge.** As-applied challenges involve local governments' application of zoning ordinances to a particular use and user. RLUIPA claims challenging decisions on applications for zoning relief fall under the as-applied variety, as do cease and desist orders.

SUBSTANTIAL BURDEN CLAIMS

Substantial burden claims are the most common of all RLUIPA claims. RLUIPA's substantial burden provision forbids governments from imposing or implementing land use regulations that create a substantial burden on the religious exercise of a person (including an assembly or institution) unless the government can show that the challenged action is both:

- Taken to advance a compelling governmental interest.
- The least restrictive means of achieving that compelling governmental interest.

(42 U.S.C. § 2000cc(a)(1).)

Courts consider certain factors to assess if a substantial burden exists, including whether:

- Governmental action is arbitrary and capricious.
- There are ready and feasible alternatives available for religious use.
- There was a reasonable expectation to receive government approval for religious use.
- Any conditions have been imposed that limit the religious use.

(*Chabad Lubavitch of Litchfield Cty., Inc. v. Litchfield Historic Dist. Comm'n*, 768 F.3d 183, 195-96 (2d Cir. 2014).)

A substantial burden might exist where a religious land use applicant must redevelop property for religious use because the property where it currently operates is unable to accommodate all of its religious needs, and there are no alternatives available for the desired use (see *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007)). But there will be no substantial burden if the alleged burden is merely a matter of convenience for a particular site or preference for a larger house of worship (see *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1228 (11th Cir. 2004); *Living Water Church of God v. Charter Twp. of Meridian*, 258 Fed. App'x 729, 738 (6th Cir. 2007)).

Effect of a Substantial Burden Finding

Where a substantial burden is shown, the government must demonstrate that any burden is meant to advance a compelling interest in the least restrictive means possible (known as the strict scrutiny judicial standard of review). No government wants to find itself in the position of having to come forward with compelling interests, which are interests of the highest order (for example, public health, safety, and general welfare). To have any chance, a government must at least consider whether there are any alternatives that would protect the compelling interests of particular concern while lessening the burden on religion. (See *Westchester Day Sch.*, 504 F.3d at 353.)

For more information on avoiding and defending against substantial burden claims, see Practice Note, *Avoiding and Defending Against RLUIPA Claims: Avoiding and Defending Substantial Burden Claims* ([W-002-9215](#)).

EQUAL TERMS CLAIMS

The equal terms provision prohibits government from imposing or implementing land use regulations in a way that treats religious assemblies or institutions on lesser terms than nonreligious assemblies or institutions (42 U.S.C. § 2000cc(b)(1)). These claims are the second most common of all RLUIPA claims.

An equal terms violation may exist where a zoning district appears to treat religious uses worse than analogous secular assembly uses based on the text of the zoning regulations, such as if a religious use is subject to a different, more rigorous permitting process than a secular assembly use. For example, a local government using different permitting requirements and standards for review depending on the type of use. (See *Corp. of Catholic Archbishop of Seattle v. City of Seattle*, 28 F. Supp. 3d 1163 (W.D. Wash. 2014).)

Governments must justify any difference in treatment based on legitimate zoning concerns. If secular uses allowed in the same zone adversely affect the same zoning concerns to the same degree, the purported government interest would likely fail.

For example, in *Tree of Life Christian Schools v. City of Upper Arlington*, the plaintiff argued that there was a facial violation of the equal terms provision because religious schools were prohibited in a business zone while other secular assembly uses were allowed. The city justified the prohibition based on the business zone's stated purpose to generate tax income. The court found that there was no violation, because, among other things, the plaintiff's proffered comparator (daycare centers) generated more tax revenue than religious schools, meaning that daycare centers comported with the zone's purpose. (2017 WL 4563897, at 13* (S.D. Ohio Oct. 13, 2017).)

An equal terms violation may also exist where a religious land use application is denied, but the same or similar application sought by a secular assembly use is approved (an as-applied challenge) (see *Konikov v. Orange County*, 410 F.3d 1317, 1328 (11th Cir. 2005)). There, the issue is whether the plaintiff can identify a similar secular assembly use that obtained the same zoning relief denied the plaintiff. If the plaintiff is able to do so, the government must then come forward with legitimate zoning concerns to justify the difference in treatment.

For more information on equal terms claims, see Practice Note, *Avoiding and Defending Against RLUIPA Claims: Avoiding Equal Terms Claims* ([W-002-9215](#)).

Cautionary Example

In 2013, Church of Our Savior in Jacksonville, Florida, which had been leasing space from a museum four hours per week for worship services, nursery, and Sunday school, sought to establish its own place of worship because the current facility could not adequately accommodate its growing population. After finding a suitable vacant property in the residential, single-family zone, the church applied to the planning commission for a conditional use permit. It was twice denied based on concerns over:

- Consistency with the largely residential neighborhood.
- Consistency with the city's comprehensive plan, which requires that churches be located outside of low-density residential areas.
- The potential exceedance of the city's lot coverage requirement.

Shortly after, the agency approved the expansion of a private school in the same zoning district, subject to conditions that it be developed in accordance with the site plan, use a staggered drop-off and pick-up time schedule, and provide a crosswalk guard during those times to alleviate the planning commission's concerns, conditions that the commission failed to even consider when reviewing the church's proposal. The court found that the city's treatment of the proposed religious school, as compared to the secular school, violated the equal terms provision since both schools were located in neighborhoods that were "not strictly low-density ... and faced objections by the neighbors and questions from the commissioners about traffic, fit with the neighborhood, and the impact on property values." Approval of the secular school affirmed that the commission could have properly addressed its stated concerns by imposing conditions on approval of the religious school, but the commission

refused to do so. (*Church of Our Savior v. City of Jacksonville Beach*, 69 F. Supp. 3d 1299, 1323 (M.D. Fla. 2014).)

For more information on equal terms claims, see Practice Note, *Avoiding and Defending Against RLUIPA Claims: Avoiding Equal Terms Claims* ([W-002-9215](#)).

NONDISCRIMINATION CLAIMS

RLUIPA's nondiscrimination provisions forbids a government from imposing a land use regulation that discriminates against an assembly or institution based on its religion or religious denomination (42 U.S.C. § 2000cc(b)(2)).

Few nondiscrimination claims have been adjudicated. Unlike other RLUIPA claims, a nondiscrimination claim requires evidence of discriminatory intent. The US Court of Appeals for the Second Circuit has found that the nondiscrimination provision codifies equal protection jurisprudence, where a violation may be a facially:

- Discriminatory law.
- Neutral law that was:
 - adopted with discriminatory intent and has a discriminatory effect (a gerrymandered law); or
 - enforced in a discriminatory manner.

Courts look to many factors to assess discriminatory intent, including:

- Events leading up to the land use decision.
- The context when the decision was rendered.
- Whether the permitting process strayed from set norms.
- Statements made by:
 - the decision making body; and
 - members of the public.
- Reports issued to the decision making body.
- Whether a discriminatory impact was foreseeable.
- If less discriminatory alternatives were available.

(*Chabad Lubavitch*, 768 F.3d at 199.)

RLUIPA's nondiscrimination provision prohibits discrimination on the basis of religion or religious denomination. To a large extent, this provision codifies equal protection precedent and presents a similar analysis to an intentional discrimination claim brought under the federal Fair Housing Act (see *Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 580 (2d Cir. 2003)). While the Second Circuit has noted that a religious comparator is unnecessary to show a nondiscrimination claim, a local government's treatment of certain religious denominations better than others could still be evidence of discrimination and used to support a violation (*Chabad Lubavitch v. Borough of Litchfield*, 768 F.3d at 200 (2d Cir. 2014)). Treating one religious denomination better than another could also run contrary to the Establishment Clause's admonition against advancing one religion over another religion (*Prater v. City of Burnside*, 289 F.3d 417 (6th Cir. 2002)).

For an overview of equal protection claims brought against local governments and officials, see Practice Note, *Section 1983: Equal Protection Claims* ([W-002-6708](#)).

EXCLUSIONS AND LIMITS CLAIMS

RLUIPA's exclusions and limits provision forbids a government from imposing a land use regulation that either:

- Completely excludes religious assemblies from a jurisdiction.
- Unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

(42 U.S.C. § 2000cc(b)(3).) As with nondiscrimination claims, claims under the exclusions and limits provision are not frequently adjudicated.

This provision imposes two separate requirements on local governments:

- **Local governments may not entirely prohibit religious uses from locating within a jurisdiction.** Religious uses must be allowed to locate somewhere, whether it is in a single zoning district or multiple zones. A total exclusion claim is defeated where religious uses are allowed, even if exclusively as special permit uses. (*Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 990 (7th Cir. 2006).)
- **Local governments must provide reasonable opportunities for religious uses to locate.** A violation of the unreasonable limits provision was found where religious uses were subject to heightened frontage requirements (300 feet of main road frontage compared to 200 feet for other assembly uses). This meant that religious uses had to aggregate five properties to satisfy the frontage requirement at an additional cost of between \$880,000 and \$2.5 million. The court stated that “[w]hile it is true that religious assemblies cannot complain when they are subject to the same marketplace for property as are all land users, religious assemblies are not participating in the same marketplace when they are required to aggregate anywhere from 2-7 times the number of properties as the average land user and required to obtain more frontage than any other non-residential uses in the same district.” (*Chabad of Nova, Inc. v. City of Cooper City*, 575 F. Supp. 2d 1280, 1290 (S.D. Fla. 2008).)

ANATOMY OF A RELIGIOUS LAND USE CONTROVERSY

In its relatively short existence, RLUIPA has changed the landscape of religious land use controversies across the nation. The statute is now being used as a sword by aggressive religious land use applicants and property owners to cut through zoning requirements. Local governments need to be on high alert whenever dealing with these controversies. Not only are these disputes emotionally charged and polarizing for communities, but they can also be expensive for governments aggressively defending against claims of religious discrimination.

TYPICAL RLUIPA DISPUTES

The typical RLUIPA dispute occurs when a religious group applies for zoning relief and argues that failure to grant the full extent of relief it sought will expose the government to liability under RLUIPA. In terms of the application process, the typical religious land use dispute arises when an individual or entity applies for a zoning permit to use property in accordance with its religious beliefs and the local government:

- Denies the permit.
- Grants the permit, but not to the extent that is desired (for example, an applicant seeks a 30,000 square foot house of worship, but is allowed only 20,000 square feet).

- Grants the permit, but subjects the use to onerous conditions, such as, extreme buffering or setback conditions.
- Issues an order (such as a cease and desist order) because the religious use is nonconforming in some respect.

At this point, a local government often feels it must either:

- Cave to the demands of the religious applicant to avoid costly and time-consuming litigation, no matter how it might affect community character or a comprehensive zoning plan.
- Dig in its heels and deny the application in whole or in part, standing ready to defend against a lawsuit.

The second option is often chosen where there is strong public opposition to the proposed use. For political reasons, governments are willing to spend the time and money to litigate the matter to enhance public perception. In these situations, governments would prefer that a court order them to allow a religious land use rather than agreeing to do so on their own.

COMMON PLAINTIFF STRATEGIES

Common strategies for plaintiffs in RLUIPA litigation include:

- **Pounding the case file with billable hours because an unsuccessful government may have to pay the plaintiff's legal fees (42 U.S.C. § 1988).** Plaintiffs are eager to inform defendants of the legal costs they have incurred (sometimes hundreds of thousands or millions of dollars) in an effort to pressure governments to settle to avoid the threat of having to pay plaintiffs' legal costs on top of their own if they lose.
- **Attempting to bury governments with document production and other discovery requests.** In controversies that have spanned the course of just a few years at the local level, there can easily be thousands and thousands of documents that must be produced. This can prove debilitating for communities to cypher through the relevant documents and costly for attorneys to review the documents for privilege and responsiveness.
- **Using an official's comments, regardless of platform.** In the age of e-discovery, costs mount quickly since the assistance of outside vendors is often needed to properly gather electronic data. Local board members should also be aware that their personal devices, text messages, and social media accounts are also subject to discovery. There is rarely shortage of insensitive and discriminatory comments that come to light through the discovery process, even from local officials themselves, which will invariably follow governments all the way to court. For example, a religious land use dispute in Illinois, where a government official stated that a Jewish group's rezoning application was “un-kosher” and that “parting the Red Sea would be easier” than approving the application (*Joan Dachs Bais Yaakov Elementary Sch. v. City of Evanston*, 2015 WL 1000317, at *3 (Ill. App. Ct. Mar. 6, 2015)). Even non-discriminatory comments can easily be taken out of context and weighed in favor of a RLUIPA violation. For more information on how plaintiffs use comments in RLUIPA litigation, see Practice Note, *Avoiding and Defending Against RLUIPA Claims: Public Statements as Evidence of Discrimination* ([W-002-9215](#)).
- **Using the media to create political pressure.** Many plaintiffs use the media to advance their cause. In this modern age, media giants like the New York Times and Wall Street Journal are quick to report

on religious discrimination controversies. No government wants to be under the national microscope facing scrutiny from individuals across the nation on top of their own constituents. The more national attention, perhaps the greater the willingness of governments to settle. Increased media attention also increases the likelihood that the US Department of Justice (DOJ) Civil Rights Division, the entity charged with enforcing the RLUIPA statute, will begin to investigate or prosecute a government for religious discrimination.

RLUIPA TRAINING AND PREPARATION

RLUIPA TRAINING MUST BEGIN NOW

Too often land use agency members have not even heard of the RLUIPA statute until a religious land use application is submitted and the statute is raised by the applicant. It is too late to wait until the review process to educate agency members about RLUIPA. As the initial decision makers, agency members' actions are critical to any successful defense in a religious land use controversy.

Local governments must educate agency members about RLUIPA now. If agency members do not know when the statute applies or what it requires, they:

- Will not know whether their actions are legal or illegal.
- May disregard certain factors that, while not relevant to the normal zoning process, are important to RLUIPA compliance.

A skilled attorney providing real-time counsel to agency members can only do so much. Given that there is confusion among different circuit courts about the statute's interpretation and application, it is unreasonable to educate agency members on the fly.

For more information on RLUIPA training for government employees and officials, including potential exercises, see Practice Note, *Avoiding and Defending Against RLUIPA Claims: Preventing Claims by Educating and Counseling Government Officials* ([W-002-9215](#)).

Avoid Arbitrary and Capricious Decisions Through Training

One factor to determine whether a local government's action substantially burdens religious exercise is whether agency action was arbitrary and capricious. This is not unique to RLUIPA. To withstand judicial scrutiny, no zoning decision can be arbitrary or capricious. But the stakes are much higher when a federal statute, such as RLUIPA, is concerned. There is the risk that entire zoning schemes will be eviscerated with a RLUIPA loss, and a local government on the hook for hundreds of thousands of dollars or more in attorneys' fees.

A local government may find it difficult to show that its action was not arbitrary and capricious if a plaintiff proves that agency members were not familiar with RLUIPA's requirements when taking action on a religious land use application. For example, one court found a RLUIPA violation where planning board members "lacked legal training and possessed little to no knowledge of RLUIPA" and there was "no attempt by the City to educate the [planning board] regarding RLUIPA" (*Grace Church of N. Cty. v. City of San Diego*, 555 F. Supp. 2d 1126, 1137 (S.D. Cal. 2008)).

PREPARE FOR ATYPICAL ZONING CONSIDERATIONS

RLUIPA presents many considerations that are not otherwise present in zoning applications for secular uses. Agencies will not be aware of

these considerations absent training. Educating officials and agencies about the varying RLUIPA claims and unique set of factors applicable to each will help governments protect against allegations of religious discrimination. For example, whether there are ready and feasible alternatives for a secular use is generally irrelevant to zoning. However, a lack of alternative sites for religious use will weigh in favor of violations under the substantial burden and exclusions and limits provisions (see *Exclusions and Limits Claims and Substantial Burden Claims*).

A secular applicant's financial conditions have no bearing on obtaining zoning approval. However, under RLUIPA, a religious applicant's finances have been found to directly relate to whether another site is a feasible alternative. If the religious applicant cannot afford the site, it is likely not feasible. Contrary to the normal zoning process where stand-alone zoning approvals carry no precedential value, an as-applied equal terms challenge considers whether there are analogous secular assembly uses that have obtained the same zoning approval in the same zoning district as sought by the religious use.

Comments made by members of the public can be disastrous and in some cases fatal for governments defending RLUIPA claims (see *Winning or Losing RLUIPA Cases Occur at the Local Level and Avoid an Atmosphere of Hostility*). While public comments can support denials of garden-variety zoning applications, the stakes are much higher in RLUIPA litigation. Insensitive, distasteful, and discriminatory comments made by members of the public will be imputed to the agency itself, unless the agency expressly separates itself from and disavows those comments. Agencies must be cognizant of discriminatory and offensive comments, avoid an atmosphere of hostility, and control the process and the message.

EVALUATE HOW YOUR ZONING CODE REGULATES RELIGIOUS USES

Steps taken to evaluate and update local zoning codes will help prevent claims brought under each of RLUIPA's provisions, particularly when confronted with a facial challenge (see *RLUIPA Claims Overview*).

DETERMINE WHERE RELIGIOUS USES CAN LOCATE

RLUIPA prohibits a land use regulation that "totally excludes religious assemblies from a jurisdiction" or that "unreasonably limits religious assemblies, institutions, or structures within a jurisdiction" (42 U.S.C. §§ 2000cc(b)(3)(A), (B)). Governments may, however, reasonably limit land available to religious organizations. Reasonable limitations on zoning districts where religious uses may operate, whether religious uses are allowed as-of-right or by special permit, as well as minimum bulk, density, and dimensional requirements do not violate RLUIPA.

Reasonable Limitations on Religious Land Uses and Market Realities

When imposing reasonable restrictions on religious land uses, a local government must not lose sight of where religious uses may locate within a jurisdiction and ask if there is a sufficient supply of land readily available for religious use. This entails knowing not just land that is eligible for religious use, but land that is also on the market for sale or lease. Courts have held that religious uses, like other uses, are subject to the "harsh reality of the marketplace" (*Civil Liberties for*

Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003)). However, allegations that no parcels are unoccupied and available for purchase or lease in a zoning district can support violations under RLUIPA's substantial burden and unreasonable limitation prongs (see Substantial Burden Claims and Exclusions and Limits Claims, and see, for example, *United States v. Bensalem Township*, 220 F. Supp. 3d 615, 622 (E.D. Pa. 2016)).

Quantitative Approach

It is not uncommon for courts to take a more quantitative approach and assess the percentage of land, based on zoning district, where religious uses are allowed to locate, similar to the way that the courts examine freedom of speech restrictions in the context of adult business use regulation (see *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 53 (1986)). Calculating the percentage of land with zoning that allows religious uses and having at least a general sense of the market conditions (how many parcels on that land per year are available for sale) can help a local government evaluate in advance of any religious application whether there are reasonable opportunities for religious uses in the marketplace.

If analysis shows that limited land is available for religious use, it is likely time to consider zoning code or zoning map amendments to increase the land available for those uses. Create an inventory of religious uses currently operating within the jurisdiction to be updated annually. For information on creating a surplus of land for religious use, see Practice Note, *Avoiding and Defending Against RLUIPA Claims: Create a Surplus of Land for Religious Use* ([W-002-9215](#)).

In jurisdictions that are close to being built to capacity, evidence that numerous religious uses are already operating can provide a powerful defense to total exclusion and unreasonable limits claims, although the outcome of that defense may depend on a factual evaluation of what is reasonable after years of litigation.

Knowing that a religious organization has a federally-backed right to claim that it is unreasonably limited or excluded from a jurisdiction, governments should work with religious land uses and direct them to all lands where:

- Religious uses are allowed by right.
- Those uses are allowed by special permit.
- Those uses are prohibited.

KNOW YOUR FACIAL COMPARATORS

Perhaps the most common of all facial challenges are brought under the statute's equal terms prong (see Equal Terms Claims). An equal terms violation may exist if a zoning code prohibits religious uses in a zone while permitting analogous secular assembly uses without justification. There may also be an equal terms violation if religious land uses are allowed in a zone but are subject to more stringent zoning review than similar secular assembly uses (for example, if a religious use must obtain certain permits not required of secular assembly uses), or if religious uses have to comply with more stringent area, bulk, setback, or parking requirements than secular assembly uses in the same zone.

Government attorneys should review local zoning codes with several important questions in mind:

- What restrictions apply to religious uses?
- Are those restrictions the same or more stringent than those applicable to non-religious assemblies or institutions?
- Are comparable secular uses somehow treated more favorably than religious uses?
- What uses are comparable? This is the most important question in equal terms litigation.

Litigating Comparable Use

Different federal circuit courts have developed slightly different tests to identify comparators and assess equal terms violations. Some courts look to the dictionary definition of the term "assembly" and have generally found that any use falling into that definition is a valid comparator for the purpose of RLUIPA.

Other circuit courts have examined the regulatory criteria (or purposes) of a given zoning district and questioned whether all assembly-type uses within a district further the criteria or purposes. For example:

- If religious uses are excluded from a redevelopment district with the purpose of increasing employment and attracting more retail services, would religious uses inhibit this purpose?
- If some secular assemblies are allowed, does their inclusion further the regulatory purpose?

If the answer is "yes" to both questions, there may not be an equal terms violation. If, however, the answer is "no," there may be an equal terms violation.

Some circuit courts have adopted a more objective approach compared to the regulatory criteria test. These courts evaluate "accepted zoning criteria" based on the text of the zoning code (as opposed to external sources, such as legislative histories, meeting minutes, laws not contained in zoning code themselves, and other secondary sources). Therefore, it is a best practice to include policy statements within a zoning code explaining why certain uses are allowed and other uses are excluded, such as "this district is designed to provide ample and convenient shopping for residents by setting aside some land for commercial purposes only".

Evaluating Your Zoning Code for Comparable Uses

With an understanding of how courts will evaluate comparable uses in the applicable jurisdiction, local government counsel should closely evaluate its zoning code and ask:

- **Are there any zoning districts where similar secular uses are allowed but religious uses are not?** If so, is there a strong policy justification for excluding religious uses, such as creating a vibrant commercial core or preserving land for industrial use? Is that policy written into the code itself?
- **Do all of the use restrictions in a given zone further a stated policy?** For instance, a community that excludes religious assemblies from a downtown business district to create a vibrant commercial core may run into an equal terms issue if uses, such as private clubs (for example, the Elks and American Legion), which could also run afoul of the purpose of the zoning district, are allowed.
- **Where assembly uses are allowed, are there differing bulk, area, dimensional, or parking standards applicable to religious**

uses versus secular uses? If so, there must be a strong and convincing justification for the difference in treatment.

- **What type of zoning relief is required of religious versus other assembly uses?** If religious uses are subject to more onerous approval requirements, the regulation is likely subject to challenge.
- **Are unnecessary distinctions made between a long list of assembly-type uses?** Many zoning codes take a laundry list approach by categorizing every possible type of assembly use. Instead of distinguishing in a use table between religious uses and private clubs and other assemblies, consider one category, for example, assembly uses up to X square feet. This could help transform allegations of religious discrimination into legitimate regulation of uses based on size and community impact. (See *Adhi Parasakthi Charitable, Med., Educ., & Cultural Soc’y of N. Am. v. Township of West Pikeland*, 721 F. Supp. 2d 361, 378 (E.D. Pa. 2010).)
- **Does the zoning code use strictly Christian nomenclature that is not applicable to all religions?** Replace references to “churches” with broad references inclusive of all religion, such as “houses of worship.” Replace height exceptions for “steeple” but not “minarets” with broad, more general religious nomenclature.
- **Are there other zoning code provisions, such as definitions, that limit the applicability of zoning provisions to certain types of religions?** Requiring that a religious use is “duly incorporated” or that it meets “regularly” can be exclusive of religions that do not fit within those limitations and could present equal terms problems if similar secular uses are not subject to like requirements.

EVALUATING A RELIGIOUS USE APPLICATION

LEARN ABOUT THE APPLICANT

When reviewing religious use applications, land use agencies should take the time to learn what the applicant seeks to do with its land and how the proposed use relates to the applicant’s religious practice. By developing a full understanding of the applicant’s religious needs, an agency can better equip itself to assess whether its proposed decision will impose a substantial burden on the applicant’s proposed religious use, and, if so, whether there may be alternatives available that address the agency’s compelling interests but are less intrusive on the applicant’s religious use. Understanding the centrality of a particular use to the applicant’s system of religious beliefs can help the agency understand the burden imposed by denying or limiting that use. If there are certain aspects of a proposed religious use that are less central than other aspects but which are cause for concern, there may be an opportunity for local governments to negotiate with the religious applicant to allow some, but not all, of the desired activities.

WHAT IS A “RELIGIOUS USE”?

As a general rule, land use agencies may be well advised to assume a use is religious if an applicant says it is. As analyzed under the First Amendment, courts have long held that they are not in the business of deciding what is and what is not religious exercise (*United States v. Ballard*, 322 U.S. 78, 86-87 (1944)). Under RLUIPA, broad discretion is likewise afforded to an applicant’s claimed religious use and often uses that seem secular or charitable in nature qualify under RLUIPA. RLUIPA protections are also not limited to assemblies and institutions (for example, church or congregation). An individual’s use of his or her land for religious purposes is also protected.

Local Definitions of Religious Use Are Not Determinative

Land use agencies should be aware that a use need not be deemed religious under local zoning codes to receive statutory protection. For example, the DOJ has noted the wide array of uses that may qualify for religious protection, including:

- Operation of homeless shelters, soup kitchens, and other social services.
- Accessory uses, such as fellowship halls, parish halls, and similar buildings or rooms used for meetings, religious education, and similar functions.
- Operation of a religious retreat center in a house.
- Religious gatherings in homes.
- Construction or expansion of schools, even where the facilities would be used for both secular and religious educational activities.

Mixed-Use Applications

Land use agencies may also question whether mixed-use applications, which encompass both religious and secular uses, are subject to RLUIPA protection. In these circumstances, a court might segment its analysis, to separately address each room or facility in a multi-use building, so that when a room is used for:

- Both secular and religious purposes, RLUIPA protections apply.
- A secular purpose only, RLUIPA protections do not apply.

(*Chabad Lubavitch of Litchfield County, Inc. v. Borough of Litchfield*, 213 F. Supp. 3d 329 (D. Conn. 2016).)

CENTRALITY OF RELIGIOUS BELIEFS

While RLUIPA’s definition of religious exercise notes that the use need not be central to the applicant’s system of religious beliefs for RLUIPA to apply, it may be more difficult to defend a RLUIPA claim against what appears to be a central religious belief (for example, construction and use a house of worship) than a less central one. Understanding the centrality of a particular use to the applicant’s system of religious beliefs can help the agency understand the burden imposed by denying that use.

By way of contrast, consider a congregation of 100 people either applying to expand its existing:

- 20-space parking lot as it seeks permission to add an expansion to accommodate its growing population. If the application is denied, the applicant’s ability to exercise its religious beliefs is severely hindered. The use requested in this application may be considered central to the applicant’s system of religious beliefs.
- 100-space parking lot, to accommodate the occasional special event hosted on site. If this application is denied, the applicant’s ability to exercise its religious beliefs may not be severely hindered. The use requested in this application is less central to the applicant’s system of religious beliefs and may be easier for local governments to defend.

CHALLENGING SINCERITY OF RELIGIOUS BELIEFS

Only when it appears that a religious belief is not sincerely held should land use agencies consider a use to be secular. RLUIPA may not apply if a religious group claims its use is religious simply to circumvent zoning code requirements.

Caution must be exercised in challenging the sincerity of religious beliefs, as doing so could be used to support a RLUIPA violation. This might make the agency and its members look unreasonable or hostile and misinformed about RLUIPA and its application. Failing to recognize a use as religious, or failing to make efforts to understand the applicant's religious needs, may also support a determination that the agency's decision was arbitrary and capricious. (See *Chabad Lubavitch of Litchfield County, Inc. v. Borough of Litchfield* (D. Conn. 2017).)

Consider the following examples of uses that were not protected by RLUIPA:

- A proposed daycare center, which was to be operated by a church, open to the public, and staffed by caregivers and instructors who were not members of the church (*Grace United Methodist Church v. City of Cheyenne*, 427 F.3d 775 (10th Cir. 2005), opinion vacated on reh'g, 451 F.3d 643 (10th Cir. 2006)).
- Fortune telling by a psychic, who professed a strong belief in the words and teachings of Jesus, as incorporated into tarot cards, and the New Age movement, which she described as "a decentralized Western Spiritual movement that seeks Universal Truth and the attainment of the highest individual potential," was found to be engaged in a way of life, rather than religious exercise (*Moore-King v. County of Chesterfield*, 708 F.3d 560 (4th Cir. 2013)).
- The sale of property, although it was previously used for religious exercise and the proceeds were to be used to fund the group's religious mission (*California-Nevada Annual Conference of the Methodist Church v. San Francisco*, 74 F. Supp. 3d 1144 (N.D. Cal. 2014)).

LEARN ABOUT SECULAR ASSEMBLY USES OPERATING IN EACH ZONE

Land Use Agencies must treat religious uses and any comparable secular assembly uses with the same rigor and procedures. Understanding how analogous secular assembly and religious uses in the same zoning district are treated is central to:

- Affording the religious use applicant equal treatment.
- Avoiding as-applied claims under the equal terms and nondiscrimination provisions.

(See Equal Terms Claims and Nondiscrimination Claims.)

An as-applied equal terms challenge may arise when a religious use applicant is prevented, in whole or in part, the ability to use its property in accordance with its religious beliefs, while secular assembly uses have obtained zoning approval to operate in the same zone. This usually takes the form of a religious land use applicant being denied certain zoning relief that was granted to a secular assembly applicant (see *Anatomy of a Religious Land Use Controversy*).

What is a Valid Comparator?

As with facial equal terms claims, the challenge for land use agencies lies in determining whether a given use is a valid comparator. Courts differ in their approaches. Some courts require that comparators be similarly situated to the religious use while others do not. Courts often make this determination by assessing whether the two uses have similar community effects (see *Third Church of Christ, Scientist, of N.Y.C. v. City of New York*, 626 F.3d 667, 671 (2d Cir. 2010) and *Litigating Comparable Uses*).

Determining whether there is a valid comparator can, when taking into consideration the size of the property and the character of the surrounding neighborhood, involve evaluating:

- How the two uses compare in terms of:
 - traffic;
 - frequency of use (hours of operation); and
 - density (number of people coming to site).
- Whether the community effect of the religious use will be similar to that of the secular use.

A secular assembly building of similar size to a religious assembly building may be a valid comparator, but if there is a significant difference in size there may be no valid comparator (see *Grace Church of Roaring Fork Valley v. Bd. of Cty. Comm'rs*, 742 F.Supp.2d 1156, 1164 (D. Colo. 2010)). The same applies for lot sizes, as lots of varying sizes could lead to varying community impacts (*Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1313 (11th Cir. 2006)).

There are several other factors that zoning agencies and officials should consider when evaluating whether a use is or is not a comparator:

- The zoning relief sought by the religious use applicant is the same as that granted to the secular assembly use applicant.
- The religious use and the secular assembly use are in the same zone.
- The zoning regulations were the same when the secular assembly use was approved, or whether they have since been amended.
- The secular assembly use was recently permitted, or permitted many years ago.
- Histories and characteristics of the buildings or uses on the property.

If any of these statements are not true, the secular use is probably not an adequate comparator and the RLUIPA claim would fail.

WINNING OR LOSING RLUIPA CASES OCCURS AT THE LOCAL LEVEL

RLUIPA cases are won and lost at the local level, even before getting to court. The actions of government officials, land use and zoning agencies, and even members of the public, as well as the record developed at the local level are the driving forces in resultant litigation.

AVOID AN ATMOSPHERE OF HOSTILITY

Local government counsel must make lawmakers and other officials understand that, in the context of a RLUIPA claim, their comments will be dissected to the greatest degree possible to create an inference of discriminatory intent or religious animus. Public officials' comments will be scrutinized, regardless of whether made:

- In the process of public or private meetings regarding the ratification of new laws, which can be used as evidence for potential facial challenges.
- At public or private meetings to discuss pending applications, which can be used as evidence for potential as-applied challenges.

A comment may seem innocent and innocuous at the time it was made. However, in litigation, those comments may be twisted and convoluted to portray an official as biased and having an agenda other than passing a valid, necessary law or fairly and impartially addressing a land use application.

Public Comments Imputed to Local Government

Courts have held that comments made by members of the public can be imputed to government officials if it can be shown that the officials both:

- Were aware of the public comments.
- Took action based on the public comments.

In sum, this means officials should hear and receive comments by the public but always (on and off the record) remain neutral when responding to those comments. Local officials should not provide opinion, sympathize, argue, or disagree with public comments. Local officials should simply acknowledge the speaker's right to voice his or her opinion and state that the only considerations relevant to the board are those specified by law.

If there is a grossly inappropriate comment, the chair of the board should:

- Ask that all future comments focus on the land use aspects of a proposed law or application, not the religious aspects.
- State that only comments related to the land use aspects are relevant to the board's decision.

To the extent it is necessary to discuss religion, such as discussion of applications by other religious organizations, the focus must remain on land use. Each religious applicant will often present unique issues. However, every applicant should be treated in the same way. Fair and uniform treatment is paramount.

For information on how plaintiffs use comments during RLUIPA litigation, see Practice Note, *Avoiding and Defending Against RLUIPA Claims: Public Statements as Evidence of Discrimination* ([W-002-9215](#)).

BEST PRACTICES TO CREATE LITIGATION-FRIENDLY LOCAL RECORDS

Evaluate Reasonable Accommodations

In the application process, a local government should fully evaluate what is being requested and determine if the request is reasonable. If the requests being made are unreasonable, the local government should invest the time and effort, be creative, and see if there are any reasonable requests that can be accommodated. A candid discussion with the applicant, providing a well-reasoned explanation about why an application cannot be granted, can go a long way to show that a local government and its officials acted properly.

Considerations and points of discussion with an applicant for a reasonable accommodation include:

- Will the request really have an adverse impact?
- How great will any impact be?
- Is there precedent for the use and accommodation?
- Can the applicant and local government reach a middle ground that results in a win-win outcome?

- If it is determined that what the applicant seeks to develop just cannot be accomplished, is there an alternative that can accommodate the proposed use?
- Have any alternatives been discussed with the applicant?

What Are The Government's Compelling Interests?

In approving, denying, or approving an application with conditions, local governments must fully evaluate the governmental interests impacted or potentially impacted by the application. Determining whether a governmental interest is legitimate or compelling involves, among other things, whether:

- The government has voiced the interests when evaluating prior applications for applications involving both religious and secular assembly uses.
- The interests or concerns are in writing in, for example, the comprehensive plan, charter, ordinances, or other laws.

If the governmental interests or concerns have neither been voiced in prior applications or committed to an official writing, they should be. At trial the governing body may be accused of manufacturing interests to justify its actions. If a local government, in denying or modifying an application, can point to a written compelling interest that has been the basis of the denial of past applications, then the government is on much more solid footing.

For information on planning for a compelling interest in the religious land use context, see Practice Note, *Avoiding and Defending Against RLUIPA Claims: Plan for a Compelling Interest* ([W-002-9215](#)).

Encourage the Applicant to Re-Apply

If an application is denied, it is in a government's interest to encourage the applicant to reapply. This serves two purposes:

- It creates (or continues) a rapport with applicant.
- It demonstrates that, although the original application could not be accommodated, the government values the applicant and wants to do what it can for the applicant.

For more information on reapplication, see Practice Note, *Avoiding and Defending Against RLUIPA Claims: Encourage Reapplication After a Denial* ([W-002-9215](#)).

Maintain A Professional Environment

This Note focuses on actions by officials in the formal aspects of the lawmaking and application processes. In the context of RLUIPA litigation, equally if not more important are actions taken, specifically communications by municipal officials outside of the formal municipal processes. RLUIPA plaintiffs, in the discovery stages of litigation, will scour all communications by municipal officials: emails, texts, written correspondence, and conversations with residents. Plaintiffs hope to find evidence of discrimination or animus.

These issues can be addressed by simply leaving work at the office. Counsel and officials should not discuss laws or applications on Twitter, Facebook, or while using personal email addresses. Even for social media users, business matters should not be discussed on these platforms. If you do voice opinions as to matters, be aware that an opinion on a subject that has absolutely no relation to government business can and will be seized on by a plaintiff if it has even the slightest suggestion of an improper agenda or viewpoint.

SAFE HARBOR PROVISION

If a local government has not undertaken a RLUIPA analysis (for all the reasons that can stall or prevent local government action) of its code and is subject to a legal challenge under the statute, RLUIPA contains an escape valve provision. It allows a local government to address any code provision or practice that violates RLUIPA. The statute's safe harbor provision is an important tool that local governments should immediately look to when faced with a RLUIPA claim.

The provision broadly states:

"A government may avoid the preemptive force of any provision of this chapter by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden."

(42 U.S.C. § 2000c-3(e).)

RLUIPA cases are, in almost every circumstance, expensive to defend and settle. Use of the safe harbor provision allows a local government to creatively address a religious applicant's complaints and leverage a favorable resolution.

There are few reported decisions involving the safe harbor provision, although one decision from the District Court for the District of Minnesota provides an example of how the safe harbor provision can be used as a RLUIPA defense. In 2015, Riverside Church sued Big Lake, Minnesota because a municipal zoning district allowed multi-plex theaters but not religious assemblies. After the suit was filed, Big Lake used RLUIPA's safe harbor provision to amend its zoning code to remove "multi-plex theater" and add "assembly, religious institution, house of worship" as conditional uses. The Court ruled that the City's use of the safe harbor provision relieved the City from liability under RLUIPA. (See *Riverside Church v. City of St. Michael*, 205 F. Supp. 3d 1014 (D. Minn. 2016).)

While the reason for the relative lack of use of the safe harbor provision is not clear, it may be that it is most often applied at the local level to resolve disputes before they devolve into litigation. It may also be, however, that positions have so hardened that governments are unwilling to give even an inch, viewing any concession as a sign of weakness. Given that RLUIPA litigation is highly charged with emotion, it may also be that governments would rather have a court require them to allow a given religious use than voluntarily do so on their own, especially in a highly politicized environment.

The safe harbor provision can be used to amend zoning ordinances that are vulnerable to a facial challenge. It can also be used to grant a permit or revise objectionable permit conditions after the fact. Its protective force may be leveraged to encourage a plaintiff that is initially reluctant to enter settlement negotiations to come to the table and enter honest negotiations where the parties work to find a compromise that protects municipal interest and protects the desired religious exercise.

Governments may also want to consider adding language that captures the spirit of the safe harbor provision into their own land

use regulations. Language stating that the code is not intended to impose a substantial burden on religious exercise or contradict any other statutory requirement, along with granting government officials the discretion to accommodate religious uses may help prevent a RLUIPA claim well before it escalates. Again, however, the US Supremacy Clause provides that federal law controls in the event of a conflict with local law. Therefore, to the extent there may be a RLUIPA violation, or potential RLUIPA violation, local governments can invoke the safe harbor provision even if the text of the provision is not contained in their respective zoning codes.

For more information about, and tips for the use of, RLUIPA's safe harbor provision, see Practice Note, *Avoiding and Defending Against RLUIPA Claims: Correcting Impermissible Regulation Under RLUIPA's Safe Harbor Provision* ([W-002-9215](#)).

RLUIPA'S LEGISLATIVE HISTORY

RLUIPA was enacted at a time when Congress and President Clinton were attempting to reestablish US Supreme Court Free Exercise protections that many viewed as undone by *Employment Division v. Smith* (494 U.S. 872 (1990)). Before *Smith*, the Supreme Court had issued decisions finding that laws that were neutral and generally applicable (laws that do not target religion and apply equally across the board) could nevertheless violate the First Amendment if their application unduly burdened religion. *Smith*, in a majority opinion authored by Justice Scalia, was said to turn this well-established precedent on its head. *Smith* ruled that laws that were neutral and generally applicable could never, as a matter of law, violate the First Amendment.

In the land use and zoning context, this meant that so long as a zoning ordinance did not single-out religion and applied generally to all uses, there could never be a violation of the Free Exercise Clause no matter the burden on religion (including a complete zoning denial prohibiting religious use altogether). Under the *Smith* framework, local governments would be largely insulated from claims of religious discrimination. Governments would not always prevail against claims of religious discrimination (see *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)). However, they were certainly in a much stronger position to avoid liability.

CONGRESSIONAL REACTION TO SMITH: THE RELIGIOUS FREEDOM RESTORATION ACT (RFRA)

Following *Smith*, religious advocacy groups lobbied Congress to restore protection that they claimed had existed before *Smith*. Congress responded by enacting the Religious Freedom Restoration Act (RFRA) in 1993 (42 U.S.C. § 2000bb). Under RFRA, any state or federal law, even laws that were neutral and generally applicable, that substantially burdened religious exercise violated the statute unless the law advanced a compelling governmental interest and was narrowly tailored to further that interest. RFRA's application to state law was temporary. The Supreme Court ruled that it was unconstitutional as-applied to the states (*City of Boerne v. Flores*, 521 U.S. 507 (1997)).

CONGRESSIONAL REACTION TO CITY OF BOERNE V. FLORES: RLUIPA

While RFRA still applies to federal law, local zoning codes are beyond its reach. In an effort to enact a federal law more limited in scope than RFRA, Congress studied where religious protection was most needed and identified two areas:

- The land use and zoning context.
- The institutionalized persons setting (prisons).

In contrast to RFRA, which applied to any state law, RLUIPA applies only to these two areas.

The legislative history explains the need for RLUIPA:

“Churches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation. Zoning codes frequently exclude churches in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes. Or the codes permit

churches only with individualized permission from the zoning board, and zoning boards use that authority in discriminatory ways.

Sometimes, zoning board members or neighborhood residents explicitly offer race or religion as the reason to exclude a proposed church, especially in cases of black churches and Jewish shuls and synagogues. More often, discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or ‘not consistent with the city’s land use plan.’ Churches have been excluded from residential zones because they generate too much traffic, and from commercial zones because they don’t generate enough traffic. Churches have been denied the right to meet in rented storefronts, in abandoned schools, in converted funeral homes, theaters, and skating rinks - in all sorts of buildings that were permitted when they generated traffic for secular purposes.”

(146 Cong. Rec. S7774-01 (daily ed. July 27, 2000) (statement of Sen. Hatch).)

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