

Avoiding and Defending Against RLUIPA Claims

EVAN J. SEEMAN AND JOHN PELOSO F.X., JR., ROBINSON & COLE LLP,
WITH PRACTICAL LAW PUBLIC SECTOR

Search the [Resource ID numbers in blue](#) on Practical Law for more.

A Practice Note discussing how local governments can avoid liability under the Religious Land Use and Institutionalized Persons Act (RLUIPA). This Note discusses strategies for preventing and defending against substantial burden, unreasonable limits, and equal terms claims, using the safe harbor provision, addressing public statements, and educating government officials about the law.

The Religious Land Use and Institutionalized Persons Act (RLUIPA), enacted in 2000, is a federal law that prohibits municipalities from implementing zoning and other land use regulations that impose a substantial burden on a person's or group's religious exercise. In addition to injunctive relief, a prevailing plaintiff can recover its legal fees, which in addition to the municipality's own legal fees can reach the hundreds of thousands or millions of dollars.

This Note discusses how municipalities can avoid RLUIPA claims and, if unavoidable, how to defend against these claims, including placing municipalities in a better position to negotiate an acceptable settlement.

REGULATION OF RELIGIOUS LAND USES

The best way to avoid a RLUIPA claim is to plan for religious use. Regulation of religious uses and RLUIPA compliance are not mutually exclusive. Religious uses are not exempt from zoning. A religious group "has no constitutional right to be free from reasonable zoning regulations nor does [it] have a constitutional right to build its house of worship wherever it pleases" (*Alger Bible Baptist Church v. Township of Moffatt*, 2014 WL 462354, at *6 (E.D. Mich. Feb. 5, 2014)). Courts have consistently recognized "that land-use regulation is one of the historic powers of the [s]tates" (*City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 744 (1995)).

Prohibiting religious uses from certain zones is generally permissible as long as a municipality does not:

- Impose a substantial burden on the religious exercise of a person unless the action is the least restrictive means of advancing a compelling governmental interest (42 U.S.C. § 2000cc(a)(1)).
- Treat religious uses worse than analogous secular assembly uses (42 U.S.C. § 2000cc(b)(1)).
- Discriminate based on religion (42 U.S.C. § 2000cc(b)(2)).
- Totally exclude religious uses from locating anywhere in the municipality (42 U.S.C. § 2000cc(b)(3)(A)).
- Unreasonably limit the opportunity for religious groups to locate within its jurisdiction (42 U.S.C. § 2000cc(b)(3)(B)).

However, this does not mean that religious uses must be permitted in any zoning district or that their proposed use of property is allowed as of right. Rather, municipalities can allow religious uses as special permit uses (also known as conditional uses or special exception uses).

COMPREHENSIVE PLANNING AND REGULATING RELIGIOUS USE

Municipalities regulate land with zoning and other controls based on their comprehensive plans, which outline the municipality's long-term goals and policies that guide local land use decisions and operate as the blueprints for development. As with most other uses, municipalities typically allow religious and other assembly uses in certain zones and exclude them from others.

These types of restrictions, including those on religious use, further the municipalities' comprehensive plans. Courts have cited deference to local planning principles to reject unreasonable limits and substantial burdens claims.

For example, the US Court of Appeals for the Seventh Circuit deferred to local planning in a case involving a religious group that sought to operate a year-round Bible camp in an exclusively residential zone. The court noted that the proposed camp would be permitted in 36% of the county, with seasonal recreational camps permitted in 72% of the county. In rejecting the religious group's unreasonable limits claim, the Seventh Circuit found that

prohibiting the Bible camp use on the subject property advanced the comprehensive plan's goal to uphold the rural and rustic nature of the town, including the specific area surrounding a prominent lake in the residential zone. The group also had a reasonable opportunity to locate the camp on other suitable property in the county. (*Eagle Cove Camp & Conference Ctr., Inc. v. Town of Woodboro*, 734 F.3d 673 (7th Cir. 2013).)

AVOIDING AND DEFENDING SUBSTANTIAL BURDEN CLAIMS

The most common RLUIPA claim is where a religious group asserts that government action has substantially burdened its religious exercise. To claim a substantial burden, the applicant must first show one of the following:

- The substantial burden is imposed on a program or activity that receives federal financial assistance.
- The substantial burden affects interstate commerce.
- The government has made an individualized assessment on the proposed religious use by imposing or implementing a land use regulation, which is the most common.

If the religious group can establish that government action substantially burdens its religious exercise, the government can only avoid liability if it can show that its action advanced a compelling governmental interest using the least restrictive means possible. (42 U.S.C. § 2000cc(a).)

Municipalities should understand the needs of the religious group. RLUIPA suits turn on whether an adverse zoning decision truly infringes religious exercise or is only a matter of preference or convenience for the religious group. Courts have repeatedly rejected claims of "financial cost and inconvenience, as well as the frustration of not getting what one wants" as constituting a burden on religion (*Castle Hills First Baptist Church v. City of Castle Hills*, 2004 WL 546792, at *11 (W.D. Tex. Mar. 17, 2004); see also *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) (rejecting the argument that having to walk a few blocks farther to a synagogue, even if some congregants were ill, or very young or old, constituted a substantial burden)).

In one case, members of a synagogue claimed that requiring that it locate in a specific zone substantially burdened its religious exercise because its congregants, including those who were ill, very young, or very old, would be required to "walk farther." The court was not persuaded: "While we certainly sympathize with those congregants who endure Floridian heat and humidity to walk to services, the burden of walking a few extra blocks, made greater by Mother Nature's occasional incorrigibility, is not 'substantial' within the meaning of RLUIPA." (*Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004).)

CREATE A SURPLUS OF LAND FOR RELIGIOUS USE

Conducting an annual inventory of all land available for religious use may help to plan for these uses and to avoid or defend against RLUIPA claims. The more land available for religious uses, the better a municipality's chances of defending against substantial burden and unreasonable limits claims. For both types of claims, some courts consider whether there are feasible alternative properties available

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

A surplus can also help municipalities defeat claims brought under RLUIPA's total exclusion provision, which provides that "[n]o government shall impose or implement a land use regulation that ... totally excludes religious assemblies from a jurisdiction" (42 U.S.C. § 2000cc(b)(3)(A)). Claims under this provision are defeated by making some land available for religious use.

The more alternatives there are, the more difficult it is for a religious group to show that an adverse decision has caused it to modify or forego its religious behavior. For example, the US Court of Appeals for the Second Circuit found a substantial burden where a village in New York denied an Orthodox Jewish group's special permit to expand its coeducational day school because of a lack of feasible alternatives. The court credited the testimony of the day school's experts, who testified that the planned location of the school expansion "was the only site that would accommodate the new building." (*Westchester Day Sch. v. Village of Mamaroneck*, 504 F.3d 338, 352-53 (2d Cir. 2007).)

Reevaluating Land Designated for Religious Use

To help avoid and defend against substantial burden and unreasonable limits claims, a municipality's annual inventory should determine how many lots are:

- Vacant.
- Available for sale.
- Zoned to allow religious use.

If few parcels are available for religious use, municipalities should consider whether amendments to the text of the zoning regulations or to the official zoning map would make more land available for religious use.

Real estate experts and planners can help municipalities better understand the realities of the marketplace and determine whether they should amend their zoning maps to make more land available for religious use. If a municipality chooses to vigorously defend a RLUIPA suit, real estate and planning experts may be able to convince a court that other sites are available for the religious group to use.

However, despite the provision's clarity, some religious groups attempt to use an alleged lack of other sites to attack an adverse zoning decision as substantially burdening their religious exercise when the groups simply prefer a specific site.

PLAN FOR A COMPELLING INTEREST

According to the US Supreme Court, compelling interests are interests of the "highest order" (*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993)). Although the legal standard for demonstrating a compelling interest is high, existing case law provides several examples, including:

- Protecting public health and safety objectives (*Wisconsin v. Yoder*, 406 U.S. 205 (1972)).
- Preserving the rural and rustic, single-family residential character of a residential zone (*Eagle Cove Camp & Conference Ctr., Inc. v. Town of Woodboro*, 734 F.3d 673 (7th Cir. 2013)).

- Enforcing zoning regulations to ensure the safety of residential neighborhoods (*Murphy v. Zoning Comm'n of New Milford*, 289 F. Supp. 2d 87, 108 (D. Conn. 2003), vacated, 402 F.3d 342 (2d Cir. 2005)).
- Preventing crime (*Harbor Missionary Church Corp. v. City of San Buenaventura*, 642 F. App'x 726 (9th Cir. 2016)).

A compelling interest must be more than pro forma reliance on traditional zoning interests. It must be supported by a complete and comprehensive record of the municipality's interests, and local action must be tailored to meet those interests. Creating a complete and comprehensive record is especially important to defeat substantial burden claims, which are the perhaps the most fact-intensive type of RLUIPA claim.

If a religious institution shows that a government action has substantially burdened its religious exercise, a government can avoid liability only if its actions were taken to advance compelling interests using the least restrictive means possible. Municipalities therefore need to strongly consider the compelling interests they seek to promote when enacting a regulation or acting on an application. Municipal counsel should speak with the responsible planner and other officials to identify these interests in advance because courts do not look favorably on after-the-fact justifications for government action.

REGULATE RELIGIOUS USE BASED ON SIZE AND IMPACT

Municipalities can treat religious uses differently than other uses based on size and impact and still comply with RLUIPA. Limiting the focus to the size and impact of proposed uses, including the compelling interests the government seeks to advance, can have significant impact when defending against RLUIPA claims, for example:

- A Hindu group claimed that a local zoning code treated religious uses worse than secular uses. The court denied summary judgment because the zoning code did not discriminate against religious uses in favor of secular uses, but against large-scale uses in favor of small-scale uses. (*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).)
- A court denied summary judgment to a church, finding that the city's hostility toward the church arose not from religious discrimination but from concerns over its size and proposed growth, which "threatened to outstrip the character and size of the city" (*Castle Hills*, 2004 WL 546792, at *14).

ENCOURAGE REAPPLICATION AFTER A DENIAL

Encouraging modifications to a proposed religious use and suggesting that the applicant resubmit its proposal can increase a municipality's chances of defeating a substantial burden claim. However, disingenuously leaving open the possibility of modification and resubmission is not likely to insulate municipalities from substantial burden claims. To better defend against these claims, a municipality can express on the record a genuine willingness to entertain a modified application for a similar proposal. For example, one court found a town's stated willingness to consider a church's future application was not genuine. There was sufficient evidence that the town wanted to derail the church's project after the church

refused to make a payment in lieu of taxes, and the town had manipulated the statutory environmental review process to that end (under the State Environmental Quality Review Act or "SEQRA"). (*Fortress Bible Church v. Feiner*, 694 F.3d 208, 219 (2d Cir. 2012).)

An honest effort to develop alternatives may be the best approach for municipalities to avoid a RLUIPA violation and the potential for protracted and costly litigation. However, when engaging in dialogue over possible uses, it is important to impress on applicants that approval is not guaranteed, even though the agency may be more receptive to a modified proposal that incorporates the specific recommendations of the reviewing agency. Having the applicant and the municipality jointly engage a mediator may make sense in some cases. For those municipalities that do not want to encourage reapplication, identifying compelling interests advanced using the least restrictive means possible is key to defeating the claim.

AVOIDING EQUAL TERMS CLAIMS

Municipalities must be careful to avoid the perception of unequal treatment when excluding religious uses from certain zones. RLUIPA requires that religious uses be treated as well as any comparable secular assembly use (42 U.S.C. § 2000cc(b)(1)). Imposing a different, more onerous application process on a religious institution can support a violation of the equal terms provision.

Different courts have established different tests to determine unequal treatment (see *Elijah Grp., Inc. v. City of Leon Valley*, 643 F.3d 419, 422-23 (5th Cir. 2011)). Several courts have found violations where zoning codes prohibit religious uses but allow secular assembly uses, such as:

- Clubs.
- Meeting halls.
- Community centers.
- Auditoriums.
- Theatres.
- Recreational facilities.

(*Midrash Sephardi*, 366 F.3d at 1231-32.)

USE THE SAME PROCESS AND PROCEDURES

If religious uses are prohibited in a particular zone, be careful to similarly prohibit analogous secular assembly uses. Violations have been found where religious uses are allowed but subject to different, more stringent standards.

Municipalities should develop comparable regulations for broad classes of similar uses. Classify assembly uses together and, if possible, permit them all in the same zones under the same standards and prohibit all of them from the same zones. Regulating for broad classes may also help municipalities to:

- Establish the neutrality and general applicability of their respective codes.
- Demonstrate that they do not impermissibly target religious use.

Carefully scrutinize the zoning code to determine which uses could potentially be considered assembly uses, because assembly uses may not be obvious. For example, codes that identify municipal uses may not appear to qualify as secular assembly uses, but they

can include public schools, libraries, and museums (see Cautionary Example of Unequal Treatment).

If it is unclear whether a particular use could be considered an assembly use, err on the side of caution, and regulate it in the same manner as the rest of the grouped assembly uses.

Cautionary Example of Unequal Treatment

Important lessons can be taken from the case, *Corp. of Catholic Archbishop of Seattle v. City of Seattle*, where a federal district court ruled that municipal uses were assembly uses (28 F. Supp. 3d 1163 (W.D. Wash. 2014)). The court found that the city violated RLUIPA's equal terms provision by requiring a Catholic high school to apply for a variance to put up 70-foot-high light poles for its athletic field in a residential single-family zone, while allowing public schools to do the same by special exception. The city argued that the differential treatment would promote the provision of public facilities by government agencies (*Catholic Archbishop of Seattle*, 28 F. Supp. 3d at 1168). Making it easier for these light poles to be placed at public athletic fields may encourage members of the public to use the public fields over private fields without the same lights.

The court rejected this argument because the city's justification for the unequal treatment did not relate to "accepted zoning criteria" (one type of equal terms tests). The court noted that objective zoning criteria contained in the city's land use code for a single-family zone included "light, tree coverage, density, structure height, traffic, parking, aesthetic considerations and occupancy" but did not include the municipality's justification. The city's justification, instead, appeared in external sources, such as the State of Washington's Growth Management Act (Wash. Rev. Code Ann. Ch. 36.70A). (*Catholic Archbishop of Seattle*, 28 F. Supp. 3d at 1169.) Therefore, municipalities should include any justifications for different treatment in their respective zoning codes.

AVOIDING EQUAL TERMS CLAIMS: ARTICULATE JUSTIFICATIONS FOR USING DIFFERENT STANDARDS

There may be justifiable reasons why a municipality does not want to regulate broadly, and reasons may be acceptable if they are carefully articulated. The municipality should be mindful of the court's decision in *Catholic Archbishop of Seattle*, which held that municipalities must articulate any justifications for unequal treatment in the applicable sections of the zoning code itself to avoid the claims of subjectivity (see Cautionary Example of Unequal Treatment).

Justifications that have defeated, or courts have held could potentially defeat, equal terms claims include:

- Creating parking space.
- Controlling traffic.
- Generating municipal revenue.
- Limiting a commercial zone to commercial use.

(See *River of Life Kingdom Ministries v. Village of Hazel Crest*, 611 F.3d 367, 373 (7th Cir. 2010).)

CONSIDER THE IMPACTS OF ALL USES IN COMMERCIAL ZONES

Municipalities should be cautious when creating a pure commercial district in name, and then allowing non-commercial secular

uses while rejecting religious uses. When identifying potential justifications for different treatment, carefully consider what other uses are allowed, and whether these uses could cause the same impacts the municipality seeks to alleviate by using different standards for religious uses. If allowed uses cause the same or similar impacts as religious uses excluded from the zone, the municipality may be subject to a colorable equal terms claim.

This problem arose in a reverse urban blight case in the US Court of Appeals for the Ninth Circuit, where a city sought to create an entertainment district (*Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1165 (9th Cir. 2011)). The city required churches, but not other secular uses, to obtain a conditional use permit because a state statute prohibited the issuance of new liquor licenses to businesses operating within 300 feet of churches. The Ninth Circuit rejected the city's stated justification for the unequal treatment promoting the development of the entertainment district because "many of the uses permitted as of right would have the same practical effect as a church of blighting a potential block of bars and nightclubs" (*City of Yuma*, 651 F.3d at 1174-75).

PUBLIC STATEMENTS AS EVIDENCE OF DISCRIMINATION

Discriminatory comments made by government officials or consultants reviewing a religious group's land use proposal, especially when made in the public record, can be particularly damaging to municipalities defending against these claims. Even if a comment was made in jest, it is important to remember that words may appear very different on paper than they sound when spoken.

Plaintiffs' lawyers can and do construe any relevant comment as an example of overt discrimination. One court found a town's "open hostility" to religious use, in support of finding a violation of RLUIPA's substantial burden provision, was evinced in part by:

- Agency members' comments that they opposed the application because it was "another church."
- The agency's instruction to the town planner to "stop" and "kill" the project.

(*Fortress Bible*, 694 F.3d at 214, 219-20.)

Some courts consider whether an agency's decision was arbitrary and capricious when evaluating RLUIPA claims (*Westchester Day Sch.*, 504 F.3d at 351). Discriminatory comments made by public officials could support a finding that an agency's decision was arbitrary and capricious.

Even comments from municipal lawyers that are not carefully considered are subject to being misconstrued. For example, for a local historic district commission, apparently wanting to emphasize that the religious use should be treated like any secular use, said that the Jewish Orthodox group's plans should be "reviewed as if it were a strip joint." The point the attorney was attempting to make could have succeeded by using the example of a private club, such as ones operated by the Veterans of Foreign Wars or the American Legion, instead of a strip club. The comment followed both the attorney and client throughout the case. (Third Amended Complaint ¶ 57, *Chabad Lubavitch v. Borough of Litchfield*, No. 3:09 CV 1419 (JCH) (D. Conn. Apr. 26, 2010).)

CURE DAMAGE FROM AGENCY MEMBER STATEMENTS

There are steps that can be taken to cure the damage caused by comments that are alleged to be evidence of discrimination. Agency members should immediately and publicly renounce on the record any comments that could be construed as discriminatory and should be clear that the applicant's religious beliefs play no part in their review of the application.

If a discriminatory comment is made, the agency's chair should consider requesting that the offending member recuse herself from further review of the application, noting on the record that the reason for recusal is due to the discriminatory comments of the agency member and again affirm that religion plays no part in its review.

Even if the meaning of a statement is unclear but could be construed in an unfavorable light, the record should be clarified. It may also be helpful to ask how the applicant would like to proceed. If the applicant makes a suggestion and the agency acts on the suggestion, such as an official resolution condemning the statement, the applicant may have waived any opportunity to challenge the comments. While it is difficult to predict whether this would be enough to cleanse the record, as each case is highly fact-specific, it would demonstrate good faith efforts on the part of the municipality.

AVOID AN ATMOSPHERE OF HOSTILITY AT PUBLIC HEARINGS

Just as public officials need to watch what they say to avoid having their comments construed as discriminatory, they also need to be cognizant of discriminatory comments made by members of the public or risk agency members being found complicit in or, more consequentially, persuaded by, these comments. This is what happened in *City of Cleburne v. Cleburne Living Center*, where the city denied a special permit for a group home for persons with developmental disabilities due to residents' prejudices against those individuals (473 U.S. 432 (1985)). The city's deference to the negative attitudes and unsupported fears of these opponents supported a finding of discrimination under the Equal Protection Clause. Although not a religious land use case, the same principle applies. As the court in *Cleburne* noted, "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." (*Cleburne Living Ctr.*, 473 U.S. at 448.)

There are several ways that public officials can prevent the public from making discriminatory comments, including:

- Preparing a statement to be read at the opening of the public hearing to let the public know that the religious applicant may submit evidence about its religion, particularly regarding what its beliefs require and the space needed to accommodate its exercise of religion.
- Informing members of the public that they should not challenge the applicant's religious beliefs, even if they disagree about whether the proposed use is religious, and asking them to limit their comments to zoning issues, not religion.
- If discriminatory comments are made, immediately:
 - instructing the speaker to limit her comments to zoning issues;
 - renouncing these comments; and
 - stating again on the record that religion plays no part in their review.

DENOUNCE DISCRIMINATORY PUBLIC STATEMENTS

Different problems arise when members of the public make incendiary and discriminatory comments outside of the hearing itself. Although these comments are not part of the record, local officials who are aware of them should denounce them in a public forum to help avoid an atmosphere of hostility. For example, in response to a proposal by a Muslim group to construct a 27,000-square-foot mosque and multipurpose hall on a 1.5-acre parcel of land located in a residential neighborhood, members of the public voiced their opposition on blogs and in the comments sections of local online media, such as:

- "Mosques are weapons bunkers, terrorist training centers, and places of incitement."
- "Yay, just what the USA needs, another house where they teach to kill those that disagree with their ideology."
- "Why don't the locals just defile the ground with pork products."

(Second Amended Complaint at 57, *Al Madany Islamic Ctr. of Norwalk, Inc. v. City of Norwalk*, No. 3:12-cv-00949-MPS (D. Conn. May 6, 2013).) While these public comments outside a hearing are not directly relevant to governmental liability, they can taint the public debate and color an eventual denial of use.

One federal court has recently ruled that public comments is one factor to be considered under a RLUIPA nondiscrimination provision claim (*Chabad Lubavitch*, 768 F.3d at 195). The nondiscrimination provision states, "No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination" (42 U.S.C. § 2000cc(b)(2)). Although few courts have interpreted or applied this provision, the court in *Chabad Lubavitch* found that the provision looked to many of the same factors under the Equal Protection Clause, including statements made by community members. Plaintiffs can also support nondiscrimination claims by pointing to other religious groups that have been treated more favorably. However, religious animus (express or implied) is required to prove any nondiscrimination claim.

CORRECTING IMPERMISSIBLE REGULATION UNDER RLUIPA'S SAFE HARBOR PROVISION

The availability of land for religious uses alone may not be enough to defeat an unreasonable limits or substantial burden claim. The US Department of Justice (DOJ), which investigates allegations of discrimination across the country and sometimes sues to enforce RLUIPA, cautions that courts have found violations of the unreasonable limits provision "where regulations effectively left few sites for construction of houses of worship, such as through excessive frontage or spacing requirements, or have imposed steep and questionable expenses on applications" (DOJ, Civil Rights Division: Statement of the Department of Justice on the Land-Use Provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA), at Question 15 (Dec. 15, 2010)).

There may be no opportunity to make more land available for religious use. In these situations, municipalities may want to incorporate specific mechanisms into their zoning codes that allow exceptions for religious uses having difficulty finding land.

RLUIPA contains a safe harbor provision that authorizes municipalities to exempt religious land uses from certain policies or practices that might otherwise violate the statute (42 U.S.C. § 2000cc-3(e)). Although this provision does not detail what municipalities must do to avoid liability, it gives them broad authority to act. Municipalities should add this provision verbatim to local codes.

The safe harbor provision may be used to address several issues. Where a religious group claims that a zoning denial, coupled with the realities of the real estate market, have imposed a substantial burden on religious exercise, the safe harbor provision appears to allow municipalities to reconsider the denial (see *Riverside Church v. City of St. Michael*, 2016 WL 4545310 (D. Minn. Aug. 31, 2016)). A municipality could use the provision to reverse the denial and approve it subject to reasonable conditions. In this regard, municipalities should work with religious applicants to determine which conditions would be acceptable for all involved. If this is impossible, be sure that all conditions of approval are reasonable in scope and further compelling interests (public health and safety) in the least restrictive means possible.

If a RLUIPA suit is filed after a denial, or even an approval with conditions, the municipality may consider using the provision to reopen the hearing, inform the applicant of an acceptable development design, or review the application again if the former hearing was full of religious animus. The provision has been used with some success relating to possible facial violations of RLUIPA's equal terms provision. In these situations, municipalities have amended zoning codes to ensure that religious uses are treated the same as secular uses.

PREVENTING CLAIMS BY EDUCATING AND COUNSELING GOVERNMENT OFFICIALS

RLUIPA is not easy to understand, and even courts interpret the statute differently. Proper training of local officials before they begin to review a religious use application is essential to avoiding and defending against RLUIPA claims. Educating local officials during the review process itself is not ideal because it may lead officials to focus too much on the statute instead of the proposed use.

One factor courts consider is whether a land use agency's decision was arbitrary and capricious or supported by substantial evidence in the record. This is particularly relevant to substantial burden claims. A finding that a decision was arbitrary and capricious weighs in favor of finding a RLUIPA violation. One court found a violation of the substantial burden provision in part because of the arbitrariness of the municipality's decision-making process, noting that:

- The planning board members "lacked legal training and possessed little to no knowledge of RLUIPA."
- There was "no attempt by the City to educate the [planning board] regarding RLUIPA."
- "To the extent members of the RBPB were even aware of RLUIPA's existence, the evidence indicates that their understanding of the law was flawed."

(*Grace Church of N. Cty. v. City of San Diego*, 555 F. Supp. 2d 1126, 1137 (S.D. Cal. 2008).)

Educating local officials about RLUIPA compliance before application review can be part of a compliance effort that avoids RLUIPA violations. Even if this training is not necessary or feasible, municipal counsel should offer refresher training tailored to the issue relevant to the specific proposal either:

- When a municipality learns that it will be receiving an application for a proposed religious land use.
- After it receives the application but before it opens the related public hearing.

If municipal counsel is involved in the review of the application to assist the agency members, it may be most effective for training to come from an outside source. Outside training can also help maintain the confidentiality of the attorney-client relationship. Non-privileged actions and statements from municipal counsel, likely the municipality's agent, will be part of the record if a RLUIPA claim is ever litigated. However, there are preventative measures that municipal counsel can offer, such as:

- Providing annual courses to update members on new developments in the law.
- Updating zoning handbooks.
- For municipalities without handbooks, making copies of the DOJ's RLUIPA reports, which are freely available to decision makers (for the most recent report, see DOJ: Update on the Justice Department's Enforcement of the Religious Land Use and Institutionalized Persons Act: 2010-2016).
- Administering mandatory trainings and pop quizzes for municipal officials based on their review of the handbook or other materials.

MOCK APPLICATION EXERCISES

Municipalities can create an exercise to find the weak spots in their regulations by enlisting public officials to take on roles as potential applicants and make hypothetical applications. Script the applications and build in as many teaching points as possible. Assign roles to some participants but not others. The municipality might develop a scenario regarding an application for a house of worship with a private, religious school in a residential neighborhood. Add more complexities to the example, such as:

- The religious group seeking the mixed use uses hallucinogenic tea as part of its faith.
- Part of the school is used for only religious classes and the other part for only secular classes.
- Within the past few years, the agency has approved both secular and religious high schools in the same zone of varying sizes.
- Agency members:
 - have a conflict of interest; or
 - have made questionable comments.
- There are angry neighbors.

After the exercise is complete, bring in the experts, identify the issues, and critique the agency's decision and its handling of the public hearing.

REAL-TIME ADVICE

City or special counsel should be present at all meetings or hearings where religious land use proposals are considered. Some of the

factors under RLUIPA may conflict with certain aspects of the normal discretionary review process. For example, while financial hardship generally cannot form the basis for variance relief, a religious applicant's financial situation is relevant to substantial burden claims (see *Westchester Day Sch.*, 504 F.3d at 352-53). Consideration of the applicant's ability to find ready alternatives may not be relevant to most other types of applications but are relevant to religious and other uses that have First Amendment protection, such as adult entertainment. The municipality should consider whether:

- There are other sites where the religious group could locate without unreasonable delay or uncertainty.
- The group has explored other alternative sites.

If an agency member makes a comment that is clearly inconsistent with RLUIPA, for example, that the agency cannot consider the availability of alternative sites when deciding a special permit application, it may be necessary for counsel to step in and provide real-time advice to avoid a decision that may later be found to have been arbitrary and capricious.

IS THE PROPOSED USE RELIGIOUS EXERCISE? RELIGIOUS EXERCISE

RLUIPA defines "religious exercise" as "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)). The statute 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)).

The statute's reach is broad. RLUIPA applies to just about any type of use alleged by an applicant as a form of religious exercise, even if nontraditional, as long as the beliefs are sincerely held. Courts 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).)

While municipalities are free to challenge the sincerity of religious beliefs, they should not opine on what they view and do not view as religious exercise. Challenging whether an applicant's proposed use is a form of religious exercise could also raise a red flag of discrimination.

One court recently considered when mixed use is religious exercise. The court applied the segmented approach, under which, for each room or facility in a multi-use building, the court:

- Applied the substantial burden analysis to those rooms that were used for both secular and religious purposes.
- Did not apply the substantial burden analysis to rooms or facilities used only for a secular purpose.

(*Chabad Lubavitch v. Borough of Litchfield*, 2016 WL 370696, at *6-7 (D. Conn. Jan. 27, 2016).)

CORPORATE RLUIPA CLAIMS AFTER HOBBY LOBBY

In the wake of the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*, it is unclear whether privately held corporations can now bring RLUIPA claims (134 S. Ct. 2751 (2014)). In *Hobby Lobby*, the Court found that corporations were "persons" and could sue under RLUIPA's predecessor, the Religious Freedom Restoration Act (RFRA) (42 U.S.C. §§ 2000bb to 2000bb-4). While this decision has had its critics, including Justice Ginsburg in her dissent, and

the case law ruling on claims from corporations is not yet mature, municipalities should cautiously analyze corporate claims and suits under RLUIPA and RFRA. Out of an abundance of caution, municipalities should proceed as though the statute does apply.

ADDITIONAL PROCEDURES AND PREPARING FOR A RIPENESS DEFENSE

RLUIPA claims must be ripe to be adjudicated by a court. The Supreme Court set out the most common test to determine ripeness in *Williamson County Regional Planning Commission v. Hamilton Bank*, which requires that an applicant obtain a final, definitive position about how it can use its property, including exhaustion of the variance process (473 U.S. 172 (1985)). Under this test, courts have dismissed RLUIPA suits for lack of ripeness where the religious entity or individual did not seek variance relief.

RELAXED RIPENESS

Another test to determine ripeness, which must be considered before the *Williamson County* test, is the relaxed ripeness test. Under the relaxed test, a court adjudicates RLUIPA claims, even if the religious entity or individual did not seek a variance, if both:

- The religious entity suffered immediate injury from the government's actions.
- Additional administrative remedies would not further define the alleged injuries.

(*Dougherty v. N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 90 (2d Cir. 2002).)

For example, one court concluded that a property owner's failure to appeal a cease and desist order to a local zoning board of appeals left the owner's asserted immediate injuries ill-defined (*Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 352 (2d Cir. 2005)).

When weighing additional procedures and to preserve the ripeness defense, municipalities should therefore consider establishing either:

- An administrative procedure to allow an aggrieved religious land use applicant to appeal an adverse zoning decision to the zoning board of appeals or another agency.
- A formal process of reconsideration for land use decisions, especially one that is required before a further administrative appeal.

Generally applied, additional procedures could place municipalities in a position to:

- Show that an alleged immediate injury is ill-defined absent an appeal of an adverse decision.
- Prompt an adjudicating court to dismiss a lawsuit, especially where the religious group did not seek a variance or other relief.

A religious group may sue after both an initial denial of its desired use and after the reconsideration or appeal, raising the possibility of two lawsuits. However, having an additional round of review has some advantages for municipalities. Municipalities using these types of additional procedures can:

- See the claims in the first challenge, allowing them to know what they may be up against in later lawsuits.

- Carefully tailor their decisions to specifically address the claims raised by the religious group in its complaint. For example, if a group alleges that its application should be approved because the municipality approved similar secular assembly uses, the municipality can study those other approved uses and distinguish them from the proposed religious use.
- Have another chance to identify compelling interests and apply the regulations in the least restrictive means possible.

ABOUT PRACTICAL LAW

Practical Law provides legal know-how that gives lawyers a better starting point. Our expert team of attorney editors creates and maintains thousands of up-to-date, practical resources across all major practice areas. We go beyond primary law and traditional legal research to give you the resources needed to practice more efficiently, improve client service and add more value.

If you are not currently a subscriber, we invite you to take a trial of our online services at legalsolutions.com/practical-law. For more information or to schedule training, call **1-800-733-2889** or e-mail referenceattorneys@tr.com.

01-17

© 2017 Thomson Reuters. All rights reserved. Use of Practical Law websites and services is subject to the Terms of Use (<http://static.legalsolutions.thomsonreuters.com/static/agreement/westlaw-additional-terms.pdf>) and Privacy Policy (<https://a.next.westlaw.com/Privacy>).

Reprinted with permission from Practical Law, December 22, 2017. Further reproduction without permission of the publisher is prohibited. For additional information about this publication, please visit www.legalsolutions.thomsonreuters.com.