RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT OF 2000

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I. Introduction

To the list of items given special consideration in land use law (such as vernal pools and affordable housing), Congress recently added churches, temples and mosques. The federal Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc et seq. ("RLUIPA"), took effect in September 2000. Designed to protect religious exercise, the RLUIPA very broadly gives religiously-affiliated land use applicants a unique advantage when dealing with local land use regulation.

II. Background to RLUIPA: Congress vs. The Supreme Court

Prior to 1990, the U.S. Supreme Court had held that the free exercise of religion clause in the First Amendment required exceptions to "generally applicable" laws and policies for religious adherents. A generally applicable law is one that makes no distinctions among people and applies to everyone equally. In Sherbert v. Verner, 374 U.S. 398 (1963), a Seventh Day Adventist was refused unemployment compensation because she would not accept a job that required her to work on Saturdays, her day of worship. She challenged the South Carolina law on First Amendment grounds. The U.S. Supreme Court held that a state cannot impose a substantial burden on a person's exercise of religion without a narrowly tailored compelling government interest, more commonly known as the "strict scrutiny" test.

In 1990, however, the legal landscape shifted. The Supreme Court that year decided Employment Division v. Smith, 494 U.S. 872 (1990), which involved a Native American who

used peyote, a controlled substance, as part of his religious exercise. Smith was denied unemployment benefits when he tested positive for drugs. Abandoning the analysis of Sherbert, the Court held that if a law of general applicability imposes a burden on religious exercise, it is not a violation of the First Amendment.

In response to this change, Congress enacted the Religious Freedom Restoration Act ("RFRA") in 1993. The findings of Congress noted that RFRA was adopted specifically to override Smith and to re-establish the strict scrutiny review of Sherbert. RFRA mandated that the government could only burden a person's exercise of religion if it had a "compelling governmental interest." Additionally, the burden had to be the "least restrictive means" that the government could use to meet that goal. In the same year, Connecticut's legislature passed a similar act, but with a few key differences. Like RFRA, Connecticut General Statutes § 52-571b prohibits governmental burden on religious exercise unless it furthers a compelling governmental interest by the least restrictive means. The Connecticut act, however, applies to all governmental action, not just land use regulation. The Connecticut courts have not yet interpreted the term "burden" under this statute.

The Supreme Court struck down RFRA as unconstitutional in City of Boerne v. Flores, 521 U.S. 507 (1997). This case involved a Catholic church located in Boerne's historic district that sought to expand, but was denied the necessary permits by the historic preservation commission. The Court held that RFRA was an unconstitutional exercise of Congressional power when applied to the states, since Congress had not demonstrated that it was "remedying" constitutional violations rather than creating new rights. Congress, again not willing to be bested by the Supreme Court, passed RLUIPA in July 2000 and President Clinton signed it into law in September 2000.

III. **Key Statutory Language**

A. Basic Prohibitions

Most significantly, RLUIPA prohibits any government agency from imposing or implementing:

> a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly or institution (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc(a)(1). RLUIPA thus resurrects RFRA's "compelling governmental interest" and "least restrictive means" standards. RLUIPA also prohibits the government from treating a religious assembly or institution on "less than equal terms" than a non-religious assembly; discriminating against any assembly or institution on the basis of religion; completely excluding religious assemblies in a jurisdiction; or placing unreasonable limits on the religious assemblies, institutions or structures within a jurisdiction.

B. Key Terms

Congress in RLUIPA provided definitions for some of the key terms but left others to the courts. "Religious exercise" is defined by RLUIPA as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." Religious exercise also includes "the use, building or conversion of real property for the purpose of religious exercise." "Land use regulation" is defined 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."

RLUIPA, however, does not define the key terms "substantial burden," "compelling

government interest" or "least restrictive means." The legislative history indicates that all three terms were intended to be consistent with existing case law. Thus for a burden to be deemed "substantial," it must be more than an inconvenience or minimal intrusion. This would include being forced to violate a central tenet of the religion, facing substantial pressure to modify behavior, being prevented from engaging in religious conduct, or having to choose between religion and some form of governmental benefits. Courts have found "compelling government interests" to include integrity of the zoning scheme, protection of residential neighborhoods, regulation of homeless shelters, regulation of building aesthetics, traffic control, and public safety. RLUIPA proponents contend that government interests in the "character of the community" and historic preservation are not compelling, but traffic, parking and environmental impacts could be compelling if they are severe. Finally, "least restrictive means" has traditionally been a very fact-specific inquiry. Therefore, the less onerous the restrictions are, the more likely they will pass muster under RLUIPA. See Church of Lukumi Babalu Aye v. Hialeah, 508 U.S. 520 (1993) (discussing what constitutes the least restrictive means in a religious context).

C. Applicability

RLUIPA sets forth three situations in which it applies. The first is where the program or activity at issue receives federal funding.[1] The second situation is where the "substantial burden" affects interstate commerce. This includes the "aggregate effects" of many religious organizations across the country spending money to construct or renovate the buildings for which they seek a permit.

[1] Since the statute is limited to a program or activity that receives federal assistance, presumably a town's receipt of federal money for other purposes such as highway construction would be an insufficient nexus.

The third situation is the "individualized assessment" or permitting situation. This occurs when a government agency imposes the substantial burden in the implementation of a land use regulation under which the agency makes an "individualized assessment of the proposed uses for the property involved." On a practical level, this is where RLUIPA will apply in most land use cases.

IV. **Recent Cases**

Litigation under RLUIPA began almost immediately across the country. Although there does not appear to be a flood of lawsuits, there have been a number of interesting decisions which have included a wide variety of religions and types of religious exercise. Significantly, no federal courts at the appellate level have yet ruled on the constitutionality of RLUIPA.

One local example arose in New Milford, Connecticut. After recovering from a serious illness, Robert Murphy began holding prayer group meetings in his home on Sunday afternoons, attended by 25 to 40 people. About six years later, the New Milford ZEO began to receive complaints about parking and traffic, specifically about access for emergency vehicles and safety of children. The ZEO issued a cease and desist order after a determination by the PZC that the prayer meetings were not a permitted use. The Murphys did not appeal the order to the ZBA or apply for a special permit. Instead, they sued the town in federal court, seeking a temporary injunction under RLUIPA prohibiting the ZEO from enforcing the order.

Magistrate Judge Holly Fitzsimmons issued the temporary injunction, finding that the Murphys were likely to prevail on their RLUIPA claim. Murphy v. Zoning Commission of New Milford, 148 F. Supp.2d 173 (D. Conn. 2001). The court found that the Murphys demonstrated that their religious exercise was substantially burdened (as fewer people were attending the

meetings) and the town had not used the least restrictive means to protect its stated interests. The town then moved to dismiss the case, arguing that the court lacked subject matter jurisdiction over it. In August 2002, Judge Fitzsimmons denied the motion, finding that the Murphys sufficiently alleged a claim under 42 U.S.C. § 1983, that they did not need to exhaust administrative remedies (i.e., appeal the cease and desist order to the ZBA) before they could bring their claims, their claims were ripe, and that the town did not enjoy immunity from suit in federal court under the Eleventh Amendment. Murphy v. Zoning Commission of New Milford, 223 F. Supp.2d 377 (D. Conn. 2002).

The first published decision analyzing the constitutionality of RLUIPA was issued last year by the federal district court in Philadelphia. Freedom Baptist Church of Delaware County v. Township of Middletown, 204 F. Supp.2d 857 (E.D. Pa. 2002). In that case, the church was holding regular services in an office building that it leased. The township's zoning enforcement officer ordered the worship services to cease because they were being held in a strictly commercial zone that did not allow houses of worship. Following the denial of its application for a variance, the church appealed in state court and simultaneously sued in federal district court, alleging a violation of RLUIPA. In a detailed analysis, the court upheld the constitutionality of RLUIPA, finding that it did not suffer from the same flaws and "sweeping coverage" that caused the Supreme Court to strike down the RFRA. The court found that Congress acted within its powers under the Commerce Clause, and that RLUIPA simply codifies the right to freedom of religion as interpreted by the high court and provides a remedy for violations of that right. The case was reported settled in the Fall of 2002, with the township agreeing to amend its zoning ordinance and pay the church's attorneys' fees.

In another recent example, a Presbyterian church in New York City with a policy of allowing homeless people to sleep on its steps brought RLUIPA, First Amendment and other claims challenging the City's decision to remove the people found sleeping there. The federal district court preliminarily enjoined the City from removing people from the church-owned steps, finding the plaintiffs were likely to succeed on their claim that their provision of outdoor sleeping space for the homeless constitutes religious activity protected by the Free Exercise Clause of the First Amendment. The City appealed, and the Second Circuit Court of Appeals affirmed.[2] Fifth Avenue Presbyterian Church v. City of New York, 293 F.3d 570 (2nd Cir. 2002).

In a California case, the Cottonwood Christian Center sought to construct a church and associated buildings on an 18 acre property within the City of Cypress. Shortly after the city rejected the Center's first application, the city established a development moratorium in that area of the city in connection with its redevelopment area. After the moratorium was lifted and negotiations were completed for a Costco store, the Center filed suit under RLUIPA. The city then sought to obtain the Center's property through eminent domain. The Center moved for a preliminary injunction, which was granted by the court in August 2002. Cottonwood Christian Center v. City of Cypress, 218 F. Supp. 2d 1203 (C.D. Cal. 2002). A settlement of this case was announced in early 2003, under which the redevelopment agency will purchase the property in dispute from the Center; the Center will purchase an existing golf course of 29 acres; and the city will issue all necessary permits for construction of the church and the related facilities.

There have been some other interesting cases of late:

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[2] Because the plaintiffs argued for the first time on appeal that RLUIPA subjects the City's application of its zoning regulations to strict scrutiny, the court declined to decide the RLUIPA issue and confined its ruling to the First Amendment.

- An association of churches known as C.L.U.B. (Civil Liberties for Urban Believers) filed a RLUIPA claim against the City of Chicago claiming a substantial burden on churches occupying land in the city due to current zoning. Shortly after RLUIPA's enactment, Chicago amended its zoning regulations to require special permits not only for churches in a particular zone, but for clubs, lodges, recreation and community centers, and meeting halls as well. The federal district court found that this resulted in churches receiving the same treatment as other organizations. C.L.U.B. et al v. City of Chicago, 157 F.Supp.2d 903 (N.D. Ill. 2001). Following the court's refusal to amend its decision, 2002 U.S. Dist. LEXIS 5913 (N.D. Ill. Mar. 29, 2002), C.L.U.B. appealed to the Seventh Circuit; oral argument was heard in early January 2003.

- A college purchased a former hospital building and sought to convert it to its new facility. The City Council of Morgan Hill rejected the zone change needed to permit an educational use and the college brought a RLUIPA suit in federal court. The district court granted summary judgment for the City, San Jose Christian College v. City of Morgan Hill, 2002 U.S. Dist. LEXIS 4517 (N.D. Calif. Mar. 8, 2002). The college has appealed to the Ninth Circuit, claiming that the district court improperly used a rational basis standard rather than a higher level of scrutiny.

- A minister and a property owner who sought to hold wedding ceremonies at her beachfront home in Maui applied for a conditional use permit. Following the denial of the permit, plaintiffs sued under RLUIPA, naming the commission members in their individual capacities. The federal district court denied a motion to dismiss the action against the members individually on the grounds of legislative immunity; the members appealed. The Ninth Circuit affirmed and found that the commissioners were not entitled to legislative immunity because the conditional use permit was actually an administrative, rather than legislative, decision. Kaahumanu v. County of Maui, 315 F.3d 1215 (9th Cir. 2003).

V. **Issues in Local Application**

It is important for Connecticut attorneys, planners and land use commissioners to bear in mind that the statute covers much more than houses of worship. RLUIPA's broad definition of "religious exercise" creates a scenario in which not only a religious school but also a day care facility, gym or senior citizen center falls within the scope of the Act. Virtually any land use application by a religious organization could trigger RLUIPA's protection. It is also important for town officials to realize that RLUIPA expressly prohibits the exclusion of -- or placement of unreasonable limitations on -- religious assemblies.

The critical provision of RLUIPA is its prohibition on imposing a "substantial burden" and treating a religious organization on less than equal terms. The normal test of local land use regulation, i.e. that it furthers health, safety and welfare, will be supplanted if local land use regulation substantially burdens religious exercise. Put another way, it seems clear that arguing that a local land use agency is merely subjecting a religious organization to a neutral and generally applicable zoning regulation will not validate local action. RLUIPA's requirements therefore may turn out to be similar to the "reasonable accommodation" requirement in federal fair housing and disability laws (such as the Americans with Disabilities Act) that protects certain groups when they seek housing.

There remains an open question on the extent to which local historic district or historic properties commissions established under Conn. Gen. Stat. § 7-147a, et seq. will be thwarted by RLUIPA. If such a commission were to deny a certificate of appropriateness for a religious use in a historic district, its action would likely be vulnerable to a RLUIPA challenge. In fact, religious congregations whose building plans ran up against historic district restrictions have filed RLUIPA lawsuits against their municipalities in federal district courts in Virginia and Alabama.

What also remains to be determined by the state courts is the relationship of Connecticut's 1993 statute, Conn. Gen. Stat. § 52-571b, to RLUIPA. State law may not provide less protection of religious exercise than federal law, but it may provide more. In fact, RLUIPA specifically provides that it does not preempt more protective state laws. Connecticut's statute seems to offer even greater protection than RLUIPA, but the Connecticut courts have not yet defined what constitutes a "burden" on religious exercise. Moreover, it is unclear whether the state analog to RFRA survives the U.S. Supreme Court's 1997 decision striking down RFRA.

The only case to reach the courts under Connecticut's law did not involve any exercise of religion. With religious organizations being more attuned to their rights after RLUIPA, they may now begin to explore state law remedies that were previously ignored.

VI. **Tracking RLUIPA Developments**

A. Websites

The following sites provide a helpful starting point for information on RLUIPA and the status of pending cases:

www.rluipa.com - Maintained by the Becket Fund for Religious Liberty

www.nlc.org - National League of Cities

www.imla.org - International Municipal Lawyers Association

B. Law Review Articles

Anthony Picarello, Jr. and Roman Storzer, The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Zoning Practices, 9 George Mason L. Rev. 929 (2001) (available at www.rluipa.com)

Gregory S. Walston, Federalism and Federal Spending: Why the Religious Land Use and Institutionalized Persons Act of 2000 is Unconstitutional, 23 Hawaii L. Rev. 479 (2001) (discussion focuses on institutionalized persons section of act, but provides substantial analysis of constitutionality arguments)

Kenneth J. Brown, Establishing a Buffer Zone: The Proper Balance Between the First Amendment Religion Clauses in the Context of Neutral Zoning Regulations, 149 U. Penn. L. Rev. 1507 (2001) (general overview and analysis of religious land uses)

C. Miscellaneous Articles

Marci Hamilton, Struggling with Churches as Neighbors, in FindLaw's Legal Commentary, Jan. 17, 2002

John G. Rappa, Office of Legislative Research, Regulating Religious Land Uses (No. 2000-R-0926), Nov. 6, 2000 (available at www.cga.ct.gov/2000/rpt/olr/htm/2000-r-0926.htm)