From Dudley to DC: Religion, Land Use, Planning, and the Courts

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What is RLUIPA?

• Federal Zoning Statute
• Supremacy Clause
• Does Not Override Zoning
• Can Regulate Religious Uses
Four Main Provisions

• Substantial Burden
• Equal Terms
• Nondiscrimination
• Exclusions and Limitations
What is Religious Exercise?

• “The term ‘religious exercise’ includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”

• “The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.”

42 U.S.C. Section 2000cc-5(7)
Examples of Religious Uses

• Religious Assemblies or Institutions
  • House of Worship, Schools, Social Services (soup kitchens, food pantries, homeless shelters), Group Homes, Medical Services, Cemeteries

• Individuals
  • Home Worship, Home Bible Studies

• Mixed-Uses
  • Some, but not all, of property as religious use
What is Not Religious Exercise?

- Religious belief must be “sincerely held”
- Cannot be used to circumvent zoning
When Does RLUIPA Apply?

“[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.”

Zoning or Landmarking Law

• **Building Codes** – No

• **Safety Codes** – Probably Not
  – Affordable Recovery Housing v. City of Blue Island (7th Cir. 2017)

• **Environmental Review** – Possibly
  – Fortress Bible Church v. Feiner (2d Cir. 2012).

• **Eminent Domain** – Maybe, But Probably Not
  – St. John’s United Church of Christ v. City of Chicago (7th Cir. 2007); Congregation Adas Yerim v. City of New York (E.D.N.Y. 2009).
As-Applied Claims

– Complete or partial denial of application for zoning relief (special permit, rezone, site plan, etc.)

– Approval of application for zoning relief subject to conditions

– Order from local official (i.e., cease and desist order, notice of violation, etc.)
Facial Claims

• Challenge to text of zoning ordinance or law (i.e., zoning regulations subject religious uses to more onerous lot size requirements than other assembly uses in same zone)
Ripeness

• **As-Applied Challenge:** Final decision requirement (generally need to apply for a variance)

• **Facial Challenge:** Always ripe (no zoning application required)
Substantial Burden Provision

**Very Likely Yes**
- Nowhere to locate in the jurisdiction
- Unable to use property for religious purposes
- Imposing excessive and unjustified delay, uncertainty or expense
- Religious animus expressed by City Officials (residents’ comments matter too)

**Very Likely No**
- Timely denial that leaves other sites available
- Denial that has a minimum impact
- Denial where no reasonable expectation of an approval
- Personal preference, cost, inconvenience
Substantial Burden Provision

• If substantial burden is established – 2 questions:
  – Is the challenged action in furtherance of compelling interest?
  – Is the challenged action the least restrictive means possible to advance that interest?
The Equal Terms Tests

• **Dictionary Definition Test**: *Midrash Sephardi, Inc. v. Town of Surfside* (11th Cir. 2004)

• **Regulatory Purpose Test**: *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch* (3d Cir. 2007)

• **Accepted Zoning Criteria Test**: *River of Life Kingdom Ministries v. Vill. of Hazel Crest* (7th Cir. 2010)
Types of Assembly Uses

- Clubs
- Meeting halls
- Community centers
- Auditoriums and theatres
- Recreational facilities
- Schools

- Municipal uses
Nondiscrimination Provision

“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. Section 2000cc(b)(2)
Exclusions & Limits Provision

No government shall impose or implement a land use regulation that—

(A) totally excludes religious assemblies from a jurisdiction; or
(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

42 U.S.C. Section 2000cc(b)(3)
Safe Harbor Provision

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. Section 2000c-3(e)
Department of Justice

Statement of the Department of Justice on the Land-Use Provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA)

Enforcement

Publicity

Oversight
Typical Challenges for Municipalities

• Discovery: far-reaching and expensive
• Difficult to settle
  – Fact intensive
  – High emotions
  – “Political”
  – Publicized
Islamic Society of Greater Worcester v. Town of Dudley: A Case Study

John J. Davis, Esq.

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Dudley, MA

- Worcester County
- Population 11,390 (2010)
- Nichols College
- Five-Member Board of Selectmen
- Open Town Meeting
- Town Administrator
Islamic Society of Greater Worcester

- Religious non-profit organization (founded 1978)
- 350+ American Muslim families
- Mosque and 2 full-time Islamic schools
Cemetery Proposal

• 0 Corbin Road, Dudley (19 miles from Mosque)
• 55 acres
• Former farmland
• Zoned Residential District 87 (RD-87)
• Purchase price $287,500
Approval Process

• Building Commissioner – Special Permit requirement

• Zoning Board of Appeals
  (G.L. c. 40A, § 9)

• Board of Selectmen – right of first refusal (G.L. c. 61A, § 14)
Approval Process (continued)

• Board of Health (G.L. c. 114, § 34)
• Conservation Commission (G.L. c. 131, § 40)
• Planning Board – Site Plan Review
• Town Meeting “permission” (G.L. c. 114, § 34)
ZBA Public Hearing

• Public Hearing – 4 nights

• Presentation

  ➢ “Dover” protected
  ➢ No structures
  ➢ 6-acre cemetery
  ➢ 9-15 burials/year
  ➢ Capacity for 16,000 graves
Public Hearing (continued)

• Public concerns – *e.g.*, groundwater, traffic, public safety, wildlife, property values, vandalism

• Public comments
  - “Crazy music”
  - “Let’s slow this down!”
  - Soldiers killed in Afghanistan
  - “Put it in your backyard, not mine”
Fallout in Press

• “Muslim Cemeteries Not OK in Their Backyards”
• “Muslims Face Backlash Over Proposed Cemetery”
• “Fearing Exclusion, Even Among the Dead”
Fallout in Press (continued)

• ISGW Attorney:
  ➢ Town showed “prejudice” and “blatant bias” against Islamic faith
  ➢ “It seems okay to bash Muslims” in election year
  ➢ Public’s reaction is rooted in “distrust, fear and bigotry”
Lawsuit – Land Court

• Sued ZBA, ZBA Members, Town & seller
• Claims – declaratory judgment, intentional interference with contractual relations, admin. appeal
• “ZBA did nothing to quell the multitude of racist and biased comments” made by public
• Entitled to Special Permit under RLUIPA
ACLU

• Announces intent to file Federal civil rights action
• Against Town, ZBA Members, Selectmen & Town Counsel
• RLUIPA
• First Amendment – Free Exercise of Religion
• Equal Protection
U.S. Attorney/DOJ

- Institutes investigation of Town’s zoning and land use practices pursuant to RLUIPA
- Issues press release: “U.S. Attorney Ortiz to Probe Islamic Cemetery Proposal in Dudley”
- Requests town documents & records
- Schedules interviews of Town personnel
Mass. Attorney General

• Issues letter of warning to Selectmen
  ➢ Application of Cemetery Statute to religious use could be challenged on basis of conflict with Dover Amendment
  ➢ Requirement of Town Meeting vote on proposed cemetery could arguably violate RLUIPA
Settlement Negotiations

• Joint request for remand to ZBA
• Obtain ZBA approval
  ➢ 6 acres only
  ➢ One-night hearing
  ➢ Determination of proposed use as “Dover” protected
  ➢ Issue Special Permit based on “mutually-agreeable” conditions (10-year moratorium)
Settlement Negotiations (continued)

• Obtain Board of Health approval
• Obtain Conservation Commission approval (if necessary)
• Site Plan Review by Planning Board not required (no parking lot proposed)
• Selectmen will not place proposed cemetery on future Town Meeting warrant
Settlement Negotiations (continued)

• Release of all claims (including civil rights and RLUIPA)

• Stipulation of Dismissal with prejudice (upon completion of process)

• No payment of damages or attorneys’ fees
Outcome

• ZBA issues Special Permit
• No Federal civil rights/RLUIPA suit filed
• U.S. Attorney/DOJ investigation dropped
• ISGW withdraws application
• Town unsuccessfully seeks repayment of attorneys’ fees
Avoiding a RLUIPA Claim

• Education and awareness
• Control the process and message
• Assess your zoning code
  – How are all assembly uses treated?
  – Do distinct standards apply to places of worship?
  – Total exclusion?
Avoiding a RLUIPA Claim

• When an application under your zoning code is filed by a religious organization, perform a RLUIPA analysis
  – Determine the reasons for the application (i.e. what burdens on religion now exist)
  – Attempt to identify and measure the burden that might be imposed if the application is denied in whole or in part
  – Compare the nature and extent of the application to that of other applicants that could be regarded as comparators
  – Attempt to determine the risk of an equal terms claim if application is denied in whole or in part
Avoiding a RLUIPA Claim

• Invite the applicant to propose a less intensive use (can municipal goals be met in a less restrictive manner?)
• Negotiate a new location
• Plan for religious use (inventory of all sites where religious use permitted)
• Insure that RLUIPA claims are covered under your governmental liability policy
Test Your Knowledge

RLUIPA

Hypotheticals

ANIMAL SACRIFICE
Check Out Our New Look! RLUIPA Defense’s Re-Grand Opening!

BY KARLA CHAFFEE, EVAN SEEMAN AND DWIGHT MERRIAM ON FEBRUARY 24, 2015
POSTED IN UNCATEGORIZED

RLUIPA Defense has had a makeover! The authors of RLUIPA Defense will continue to bring you breaking news and analysis of cases and controversies influencing the confluence of religion and land use—but now with a more refined, easy to use format. No need to worry, because our archive of resources, library of cases, and older posts are still easily accessible.

Check out our new digs & thanks for reading.
THANK YOU!

Q & A