RLUIPA Defense: Avoiding and Defending RLUIPA Claims

Land Use & Sustainable Development Law Institute
Bagels with the Boards CLEs
Thanks for having us

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* RLUIPA Group Members at Robinson+Cole
Sherbert v. Verner, 374 U.S. 398 (1963)
Religious Freedom Restoration Act of 1993
City of Boerne v. Flores, 521 U.S. 507 (1997)
Congress enacts RLUIPA in 2000
Religious Land Use and Institutionalized Persons Act (RLUIPA)

The Basics:

- Substantial Burden
  - 42 USC §2000cc(a)
- Equal Terms
  - 42 USC §2000cc(b)(1)
- Nondiscrimination
  - 42 USC §2000cc(b)(2)
- Exclusions and Limitations
  - 42 USC §2000cc(b)(3)
No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on religious exercise, unless the government demonstrates a compelling governmental interest that is the least restrictive means of furthering that interest.
Definitions are available.... But, are they helpful?

- **Land Use Regulation:** The term “land use regulation” means 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.

- **Religious Exercise** “(A) In general: The term ‘religious exercise’ includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief. (B) Rule: 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.”
Who Needs Definitions Anyway?

- Substantial burden
- Compelling governmental interest
Neutral and generally applicable laws may impose a substantial burden

Recent Cert. Petition: “RLUIPA is an attempt, so far successful in the Second Circuit, to substitute a legislative mandate which follows Sherbert v. Verner, rather than the judicial standard set by this Court in Smith.”
Substantial Burden In Other Circuits
Substantial Burden In Other Circuits

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- effectively
- coercion
- oppressive
- delay, uncertainty
- impracticable
- substantial pressure
- & expense
What constitutes a “substantial burden” on religious exercise?

**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.

**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.
Compelling Interests

- MERE SPECULATION, not compelling; need specific evidence that religious use at issue jeopardizes the municipality’s stated interests

- Compelling interests are interests of the highest order (public health and safety)
Examples of Compelling Interests

- Preservation of a municipality’s rural and rustic single family residential character of a residential zone. *Eagle Cove Camp Conf. Ctr. v. Town of Woodboro* (7th Cir. 2013)
- Not compelling? Property values, revenue generation.
Least Restrictive Means

* We do not doubt that cost may be an important factor in the least restrictive means analysis . . . Government may need to expend additional funds to accommodate a citizens religious beliefs.” *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014)

* Under strict scrutiny, if a less restrictive alternative is available, the government “**must** use that alternative.” *U.S. v. Playboy*, 529 U.S. 803, 813 (2000)
Denial of zoning application without consideration of any conditions or alternatives fails this test. *Westchester Day Sch.* (2d Cir. 2007)

“But nothing in the Court’s opinion suggests that prison officials must refute every conceivable option to satisfy RLUIPA’s least restrictive means requirement.” *Holt v. Hobbs* (2015) (Sotomayor, J., concurring) (emphasis added)

Must strike “delicate balance” between religious practice and governmental interest. *Jova v. Smith* (2d Cir. 2009)
Equal Terms (2nd Cir.)

* Chabad
* Third Church of Christ v. New York, 626 F.3d 667 (2d Cir. 2010)
Equal Terms: More Circuit Variability

secular assemblies that are similarly situated as to the regulatory purpose. (3rd Cir. Lighthouse)

secular comparator, similarly situated with respect to an accepted zoning criteria (7th Cir., River of Life Kingdom)

a church and school were insufficiently comparable, given that the properties sought different forms of zoning relief from different land use authorities applying "sharply different" criteria. (11th Cir., Primera Iglesia)

(1) the regulatory purpose or zoning criterion behind the regulation, as stated explicitly in the text of the ordinance or regulation; and (2) whether the religious assembly or institution is treated as well as every other nonreligious assembly or institution that is "similarly situated" with respect to the stated purpose or criterion. (5th Cir., Opulent Life Church)
Nondiscrimination Claims

* 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.A. § 2000 cc(b)(2)

* Few cases have considered this provision
  * Chabad Lubavitch (2d Cir.) (Need evidence of discriminatory intent)
  * Church of Scientology of Georgia, Inc. v. City of Sandy Springs (N.D. GA 2012)
Exclusions and Limitations

* 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.A. § 2000 cc(b)(3)
Unreasonable Limitations

* Does not examine restrictions placed on individual religious land owners but on religious uses in general

* “What is reasonable must be determined in light of all the facts, including the actual availability of land and the economics of religious organizations.” Vision Church v. Vill. of Long Grove (7th Cir. 2006)

* Generally, if religious uses are allowed in some, but not all zones, this claim may be defeated

  * But see Chabad of Nova, Inc. v. Cooper City (S.D. FL 2008)
To prevail on this claim, plaintiff must show “the complete and total exclusion of activity or expression protected by the First Amendment.” Eagle Cove Camp Conf. Ctr. v. Town of Woodboro (7th Cir. 2013)

Even if religious uses allowed only by special permit in jurisdiction, this claim fails. Vision Church (7th Cir. 2006)

In Sossamon v. Texas, the Supreme Court held that sovereign immunity forecloses the availability of money damages as a remedy against states and state actors in their official capacities under RLUIPA. 131 S. Ct. 1651, 1663 (2011)(A Prisoner Case).

Does this holding extend to land uses cases?

A resounding yes from the Sixth Circuit
Mitigating the Risk of Facing a RLUIPA Claim

* When an application under your zoning code is filed by a religious organization, perform a RLUIPA analysis
  * Determine from the applicant 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
Mitigating the Risk of Facing a RLUIPA Claim (continued)

* Invite the applicant to propose a less intensive use (can municipal goals be met in a less restrictive manner?)
* Plan for religious use
* Educate local officials
* RLUIPA’s Safe Harbor provision
* Insure that RLUIPA claims are covered under your governmental liability policy
Invariably Expensive

- Time and Money – lawyers, coincident SEQRA proceedings, experts (land use, damages, environmental)

Probably document intensive

- Equal terms, free exercise, facial, and as-applied challenges usually involve extensive documentation
- Plaintiff documentation usually extensive

Cases are fact intensive
Defending a RLUIPA Claim (continued)

- Once brought, rarely settled
  - Legal fees
  - Cases become matters of faith to plaintiffs
- Difficult to defend at trial
  - Most are claimed to a jury
  - God vs. Government bias potential
  - Cross-examination of church officials requires tact not ferocity
  - Jury instructions invariably confusing
  - Federal judiciary rarely has RLUIPA or land use experience
www.RLUIP-Defense.com: A New Look!

RLUIPA Defense
Religious Land Uses, Zoning, and the Courts

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.
RLUIPA

Our land use lawyers represent clients in matters involving the Religious Land Use and Institutionalized Persons Act (RLUIPA), a federal law requiring local governments when implementing and enforcing their land use regulations to do so without burdening the religious exercise of religious institutions and to treat them the same as non-religious institutions. Oftentimes, when a local government denies a
Resources


* A Guide To Federal Religious Land Use Protections, Dep’t. of Justice.


* Karla Chaffee and Dwight Merriam, Six Fact Patterns of Substantial Burden in RLUIPA: Lessons for Potential Litigants, 2 ALBANY GOV’T L. REV. 437 (2009)
Questions, Comments & War Stories?

THANK YOU!!!

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