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New Hampshire Local Government Center
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Don't Let RLUIPA Throw Your Land Use Planning for a Loop!

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Materials Prepared for this Session

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THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION
2. *One (1) Ounce of RLUIPA Prevention*
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3. *Practical Tips for Local Governments: Avoiding the RLUIPA Roundabout*
BY ATTORNEY DANIEL D. CREAN, CREAN LAW OFFICE, PEMBROKE, NH

Religious Services & Other Uses

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Individualized Assessment

Equal Terms

Practical Tips for Local Governments: Avoiding the RLUIPA Roundabout

BY ATTORNEY DANIEL D. CREAN, CREAN LAW OFFICE, PEMBROKE, NH

Religious Freedom and Land Use Regulation: Overview. The United States Constitution, in the First Amendment, limits governmental action as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The twin “prongs” of the First Amendment relating to religion proscribe Congressional action to (a) establish religion or (b) prohibit its free exercise. The Fourteenth Amendment to the Constitution applies the First Amendment (and other provisions in the Bill of Rights) to States and, by extension, to local governments. These limits on the local government are not absolute in that they do not prohibit any and all regulation that somehow might affect religion and religious institutions in some manner. General understanding and guidance on the manner in which the Constitutional protection for religious freedom affects local government land use regulatory powers is contained in the reprint of the International Municipal Lawyers Association *Municipal Lawyer* magazine article¹ included in the materials for this session.

Until the United States Supreme Court in 1990 ruled that religious “exercise” could be made subject to some governmental regulation that was a neutral law of general applicability,² the court generally applied a balancing test to determine if a law exceeded permissible bounds. Following that 1990 decision, those opposed to governmental action that they viewed as interference with religion succeeded in having Congress enact the Religious Freedom Restoration Act (RFRA) in 1993. That law sought to limit what were viewed by some as improper application of the *Smith* decision in a manner that infringed on religious freedom.

¹ *Religious Freedom and Land Use Regulation: It’s Not All About RLUIPA*, by Attorney Daniel D. Crean, reprinted with permission of the author and the International Municipal Lawyers Association.

² *Employment Div., Dep’t of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

In 1997, the U.S. Supreme Court invalidated portions of RFRA, concluding that the statute improperly tried to redefine constitutional rights, which was properly a role of the courts, and that RFRA improperly sought to enforce the law against states.³

The “ping-pong” religious freedom “game” continued with Congress, in 2000, serving up a revised version of RFRA in the form of the Religious Land Use and Institutionalized Persons Act, now commonly called “RLUIPA.” The law has two major areas of focus, as can be surmised by its title: religious rights of persons held in institutions and limits on religious exercise imposed by land use regulations. These two aspects of the law have generated an almost unceasing flow of court cases since RLUIPA’s enactment. Though the institutionalized persons focus of the law has been upheld directly, the constitutionality of the religious land use components, though vigorously contested in Circuit Courts, has not been decided by the U.S. Supreme Court. Therefore, RLUIPA remains as the law of the land, at least as of now, and this session of the 2011 Local Government Center Annual Conference seeks to provide an understanding of its terms along with practical guidance and suggestions for compliance.

As it relates to land use, RLUIPA states:

42 U.S.C. § 2000cc. Protection of land use as religious exercise

(a) Substantial burdens

(1) General rule. No government shall impose or implement 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.

(2) Scope of application. This subsection applies in any case in which—

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) Discrimination and exclusion

(1) Equal terms. No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) Nondiscrimination. 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.

(3) Exclusions and limits. 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.

One court has characterized what has come to be an almost “typical” RLUIPA argument as:

³ *City of Boerne, Texas v. Flores*, 521 U.S. 507 (1997).

Plaintiff argues that the Ordinance violates four provisions of RLUIPA: subsection (a), the substantial burden provision; subsection (b)(1), the equal terms provision; subsection (b)(2), the non-discrimination provision; and subsection (b)(3), the unreasonable limitations provision. As the Seventh Circuit notes, “[t]here is some obvious overlap in these statutory provisions . . . [b]ut each of RLUIPA’s land-use subsections captures a distinct kind of free-exercise harm and must be given its own force and effect.”

A nationally known land use attorney has provided guidance in coping with RLUIPA’s requirements in an article that also appeared in IMLA’s *Municipal Lawyer* (a reprint of which is included as a handout for this session⁴). A summary of several recent cases may assist in understanding both how RLUIPA affects land use planning and regulation and how to use planning to assist in avoiding the RLUIPA roundabout.

I. Standing and Ripeness. Two basic aspects of filing a court action involving land use law (whether it involves an appeal of an administrative decision, a variance, a taking claim, or RLUIPA) relate to the concepts of standing and ripeness. Standing essentially means that the person filing the action has something at stake that justifies the action. In New Hampshire, we are accustomed to the requirement that a land use party must be “aggrieved” in some manner. Standing requirements clearly do apply to RLUIPA claims.

In addition, courts generally refrain from handling land use matters unless they are reasonably assured that the local decision-making process has run its course, so that recourse to the judiciary is appropriate at the time of filing. This doctrine, called ripeness, may be more difficult to assess in a RLUIPA case. For example, a federal district court in California held that there is no ripeness requirement in RLUIPA. In that case⁵, the U.S. government sued the city of Walnut based on the denial of a conditional use permit seeking to construct a house of worship. The city asked the court to dismiss the action because the applicant had not “exhausted its administrative remedies” prior to the suit being filed. Contrasting the “exhaustion of remedies” language of the institutionalized persons aspects or RLUIPA with the lack of such language in the land use portion, the Court allowed the suit to proceed.

In contrast, the federal district court in Massachusetts declined to resolve the validity of a Springfield city ordinance imposing architectural restrictions on a church that had been closed by a local bishop.⁶ The court’s refusal to decide the matter was premised upon its view that compliance imposed only minimal concerns for the church, and it could not address the matter correctly because the church had not even submitted a site plan, much less obtained a decision that would better define both statutory and constitutional issues.

Another recent decision upheld the lower court’s dismissal because the effect of an ordinance was “unknown” because the plaintiff did not appeal denial of its site plan to the zoning board of appeals which would have answered important questions concerning intensification of use, whether the building was a church, and the requirement to secure a variance.⁷

⁴ *One (1) Ounce of RLUIPA Prevention*, by Attorney Dwight H. Merriam, reprinted with permission of the author and the International Municipal Lawyers Association.

⁵ *U.S. v. City of Walnut*, No. CV-10-06774-GW (C.D. Cal. Jan. 13, 2011).

⁶ *Roman Catholic Bishop of Springfield v. City of Springfield*, 760 F. Supp. 2d 172 (D. Mass 2011). Many RLUIPA and First Amendment Free Exercise clause cases have involved the manner in which governments may regulate architectural and/or use changes for churches that face difficulty in maintaining the building due to factors such as declining enrollment or other financial problems.

⁷ *Miles Christi Religious Order v. Township of Northville*, 629 F. 3d 533 (6th Cir. 2010).

Local governments may take an “ounce” of prevention by reviewing local ordinances and regulations – and practices – to ensure that the local appeals process is clear, not confusing, and capable of producing a decision in timely manner. Such procedures may not ensure that a correct decision is reached in every case. However, they can avoid a court having to “guess” at whether the procedures have created a substantial burden or improperly discriminated against a religious use.

II. Substantial Burden. Many RLUIPA cases involve a determination on the key issue of whether an ordinance, or the application of it, imposes a substantial burden on religious exercise when approval is premised upon “individualized action.” Such a claim occurred when a church proposed to build on land in an industrial zone that did not permit religious uses (which were allowed via a conditional use permit in residential districts). Entertainment and commercial recreation uses were allowed as conditional uses in the industrial zone. City planning staff met with church officials for over a year to discuss zoning amendments. Eventually, the church exercised its option to purchase the land based on what it believed was an indication from planning staff that there was a “strong likelihood” that the religious use would be granted. The approval was not forthcoming, as the city did adopt an overlay ordinance that identified 196 properties where religious assembly could occur, but plaintiff’s property was not among them. The church sued after applying for a conditional use permit that was denied. The lower court dismissed the case finding that the zoning amendment was a neutral law of general applicability (see comments on *Smith*, above) and imposed only an incidental burden on the church. The Ninth Circuit Federal Court of Appeals⁸ reversed, finding the burden to be substantial and noting that the city’s reason for its action (preserving industrial property to enhance its tax base) was not a compelling government interest.⁹ One might have questioned the court’s ruling that the action amounted to an exclusion of religious uses from the community, but the U.S. Supreme Court declined to review the 9th Circuit’s ruling.

Other factors that may implicate RLUIPA’s substantial burden provisions include lengthy, but vague, criteria that must be met in order to obtain a conditional use permit and repeated requirements to participate in hearings. This requirement recognizes the notion that delay in many cases may amount, in practical terms, to an effective denial. Still other concerns may arise when a community’s planning and administrative staff reviews proposals (and either indicates approval or at least no objection) and the application is then denied or is accompanied by imposition of exactions or conditions.¹⁰ In that same case, the town’s review of the application not only asked for donation of a fire truck or payments in lieu of taxes, but also found that the proposal created environmental concerns sufficient to invoke N.Y. state requirements to prepare a costly environmental impact statement. This latter requirement was found by the court to constitute punitive action for the church’s refusal to agree to the “requests” for a fire truck or PILOT agreement. In a side note, the town was found to have violated the Equal Protection clause of the Constitution based on a finding that it treated this church differently from the easier access given to other churches with similar uses.

It is not only zoning and site plan requirements that can trigger substantial burden issues. A Seventh Day Adventist congregation seeking to build a church and related facilities bought land where churches were a permitted use. But its application for changes in sewer and water classifications for a part of the property were denied, thus barring their use. The record showed that many other properties obtained reclassification, and a jury verdict for the church was upheld as violating RLUIPA’s prohibition against substantial burdens.¹¹

⁸ *Int’l. Church of the Foursquare Gospel v. San Leandro*, No. 09-15163 (9th Cir. Apr. 22, 2011).

⁹ Remember that RLUIPA, like the First Amendment, does not prohibit all action that may impose a substantial burden or impact free exercise if the government can demonstrate a compelling interest supporting the action.

¹⁰ *Fortress Bible Church v. Feiner*, 734 F. Supp. 2d 409 (S.D.N.Y. 2010).

¹¹ *Reaching Heights Int’l., Inc. v. Prince George’s County*, 368 F. App’x 370 (4th Cir. 2010).

Not all cases result in decisions against local government. For example, a landowner who leased property to a number of businesses and churches contested the city's rezoning of an area that included his property so that churches were not an allowed use.¹² One of the plaintiff's religious tenants was permitted to operate, but a second church was denied. The RLUIPA substantial burden claim was denied as the zoning change applied only to a small six-block area of the city. It may be important to note, though, that the plaintiff here was the landlord, not a religious organization, though the primary result would likely not have changed.

III. Discrimination and Exclusion. Though it may sometimes be difficult to ascertain a difference between substantial burden and "equal treatment" RLUIPA claims, they do involve different aspects of the law. The latter, premised upon part (b) of the law, examine more closely contrasting treatment in how an ordinance or an application is handled with respect to both religious and non-religious uses and between uses by different religions.

As mentioned above, issues can relate to a church seeking to use its property for activities other than religious services or schools, particularly when it is faced with difficulties in meeting its budget. One such case¹³ involved an attempt by a church in New York City to use its facilities for catering and private functions. The city sought to stop the "business" but its efforts were enjoined by the district court. That injunction was upheld by the circuit court which found an equal terms/discrimination violation in that secular institutions (hotels and other facilities) conducted very similar activities with similar effects without objection from either neighbors or the city.

One of the factors that can make RLUIPA cases interesting at this point in time is trying to ascertain the tests that will be used by courts to apply the law. The New York City decision just mentioned, for example, looks at the usual three prevailing tests, but rested its ruling on the finding that the district court did not abuse its discretion. As noted in the circuit court ruling, the three tests are worded differently but usually arrive at the same result. The three tests may be summarized as:

1. A secular comparator looks at the evidence considered by the governmental body imposing the restriction to ascertain the criteria it used in making its determination and then identifying a secular organization meeting those same criteria, thus comparing impacts of the land use.
2. Another approach focuses on the impact of the allowed and forbidden uses in light of the purpose of the regulation.
3. A third approach refines the second to shift the focus slightly from the government's subjective purpose in enacting the zoning law to the law's stated regulatory criteria, which may be deemed more objective.

IV. Other RLUIPA Considerations. Though not all RLUIPA claims involve "non-mainstream" religious organizations, it is certainly fair to note that many of the cases do involve organizations that either are not viewed as being consistent with "typical" religious views or that worship in a different manner from the norm. One manner in which local governments may invite trouble is to question the sincerity of religious belief merely because it is "different."

A related question under RLUIPA asks "what is a religious use?" Many cases, even before RLUIPA's enactment, counseled a broad view of the uses encompassed within the notion of religious use.¹⁴ Yet, not every use will meet even a broad concept of religious use – a court upheld denial of a permit to operate a fitness center inside a church and high school that had been approved pursuant to a

¹² *Dixon v. Town of Coats*, No. 5:08-CV-489-BR (E.D.N.C. June 9, 2010).

¹³ *Third Church of Christ Scientist v. City of New York*, 626 F.3d 667 (2nd Cir. 2010).

¹⁴ *City of Concord v. New Testament Baptist Church*, 118 N.H. 56 (1978) finding that a five-day-a-week school run by a fundamentalist church was a use "usually connected with a church" under Concord's zoning ordinance.

variance.¹⁵ Other cases have involved determinations as to whether changing a religious use from a permitted use to a special exception constituted a land use regulation for RLUIPA analysis.

Another over-arching concern is to avoid situations where some branches of local government “sing a different tune” when it comes to approvals for religious uses. As might be expected, RLUIPA cases really are not different from other land use cases which view a local government as a single entity that should not speak with conflicting voices. While it is true that advisory recommendations, suggestions, or opinions may not necessarily bind a local government, officials and employees who act in such an advisory capacity should be alert to the status afforded to religious use under RLUIPA.

Finally, it is appropriate to look at the remedies that are afforded when a RLUIPA violation is found. The law, itself, is not an exemplar of clarity, as it simply states at section 4:

A person may assert a violation of this Act as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

Certainly, as noted in this review of recent cases, appropriate relief may include declaratory relief in the form of ruling on the validity of regulations and regulatory actions. Relief may also take the form of temporary or permanent injunctions. However, while some circuit courts have held that monetary damages may be awarded, there has been no definitive decision from the U.S. Supreme Court as of now, as to whether relief may include monetary damages. A recent decision from that court¹⁶ analyzes RLUIPA damages but solely in the context of its provisions governing institutionalized persons. The court affirmed lower court decisions holding that sovereign immunity protected the state and state officials in their official capacity, and that a state would not be deemed to have waived sovereign immunity solely by virtue of having received federal funds. The court left to another day a decision on monetary liability in the land use context.

V. A Recap of Preventive Medication

A. “Know what you’ve got!”

- Identify existing religious uses;
- Identify areas where religious uses may locate without undue problems;
- Assess the adequacy of such areas now and for the foreseeable future.

B. “Know what you make ‘em do!”

- Review zoning, site plan review, building codes, historic preservation regulations and other land use regulations, not only for substance as to how they might improperly limit or exclude religious uses, but also for how their procedures and substance might discriminate against religious uses by treating them differently from the manner in which similar non-religious uses are treated.

C. “Know who speaks for you!”

- Establish a point of contact within the community who has some training in understanding how RLUIPA affects the manner in which religious uses should be treated by providing training and creating a nice “pew-side” manner.
- If and when discretionary decisions will be involved, provide written and oral guidance to assist in navigating the route to a decision.

¹⁵ *New Life Worship Center v. Town of Smithfield Zoning Board of Review*, No. 09-0924r (R.I. Super. Ct., July 7, 2010), noting that the fitness center was open to the general public.

¹⁶ *Sossaman v. Texas*, 131 S. Ct. 1651 (2011).

D. *“Know who’s saying what to whom!”*

- Emails are discoverable and emails that indicate a bias against religious uses can undo the best-laid planning.
- Meetings or communications about a case may not only violate the right-to-know law, but may sink the ship of state in a RLUIPA contest.

E. *“Act promptly, but not rashly!”*

- Reaching a prompt decision is important in any land use matter, particularly so in one where RLUIPA applies.
- But, the need to act promptly must not undercut the need to be considerate and thoughtful – in this case, meaning to consider carefully and think about the case.
- Document, Document, Document, Document, Document! Create a record – during the proceedings, not as an afterthought.

F. *“Know when to fold ‘em!”*

- If you’ve followed steps A-E, you may not have to yield to litigation if filed; but understand that RLUIPA has changed the rules of the game, at least in terms of putting some of the burden on you!

G. *“If you lose one hand, stay in the game!”*

- Losing one motion in a case, or even losing a single case, may not be cause for alarm. Even before you get a decision, consider “going back to the drawing board” to review the substance and procedures required in your land use scheme of regulation.
- Better yet, as part of your annual planning process (You do have an annual planning process, don’t you?), include a religious land use review and update as needed.