7. Religious Land Use and Institutionalized Persons Act (RLUIPA)

Background

I. Introduction

The land use-related provisions of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) prohibit state and local governments from regulating land use in a manner that: discriminates *against* or *among* religious institutions, 42 U.S.C. § 2000cc(b); or imposes a substantial burden on religious exercise, unless the regulation is the least restrictive means of serving a compelling government interest. 42 U.S.C. § 2000cc(a)(1).

It goes without saying that District Commissions cannot discriminate against or among religious applicants or projects, so this chapter focuses on RLUIPA's substantial burden provision. RLUIPA substantial burden issues may arise in Act 250 proceedings, where a party claims that denial of a particular permit application or conditions on a particular permit place a substantial burden on religious exercise.

Commissions and staff should contact NRB legal staff in Montpelier if any RLUIPA issue comes up, or if they have any related questions.

II. RLUIPA's Substantial Burden Provision

A. The Statute

RLUIPA provides, in relevant part:

(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 demonstrated that imposition of the burden on that person, assembly, or institution –

> (A) is in furtherance of a governmental interest; and
> (B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc.

B. The Test

RLUIPA prohibits land use regulation that imposes a "substantial burden" on religious exercise, unless the regulation is the least restrictive means of protecting a compelling governmental interest. *In re Downing Act 250 Application*, No. 225-11-09 Vtec, Decision and Order on Cross-Motions for Partial Summary Judgment, at 10 (Nov. 29, 2010). To state a claim under RLUIPA, the plaintiff must show that the land use regulation:

(1) imposes a substantial burden
(2) on "religious exercise"
(3) of a person, institution or assembly.

Bikur Cholim, Inc. v. Village of Suffern, 664 F.Supp.2d 667 (SDNY 2009)(citing 42 U.S.C. § 2000cc(a)(1); *Westchester Day Sch. v. Vill. of Mamaroneck*, 379 F.Supp.2d 550, 555 (S.D.N.Y. 2005)(*Westchester II*); *Murphy v. Zoning Comm'n of the Town of Milford*, 148 F.Supp.2d 173, 187 (D.Conn. 2001)).

Once that showing is made, the burden shifts to the state to show that the land use regulation is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000cc(a)(1)(A-B).

1. Religious Exercise

RLUIPA defines religious exercise broadly to include "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 use, building, or conversion of real property for the purpose of religious exercise shall be considered . . . religious exercise." *Id*. § 2000cc-5(7)(A), (B). RLUIPA provides that religious exercise is construed broadly; "to the maximum extent permitted by the terms of this chapter and the Constitution." *Id.* § 2000cc-3(g).

Courts generally look to whether the proposed land use has a religious purpose, rather than whether the applicant is affiliated with a religion. *See, e.g., Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007)(*Westchester III*). "Religious exercise" as used in RLUIPA "covers most any activity that is tied to a religious group's mission." *Living Water Church of God v. Charter Twp. of Meridian,* 258 Fed.Appx. 729, 736 (6th Cir.2007).

The use or activity affected by the land use regulation must be a "sincere exercise of religion," even if it is not compelled by the religion. *Grace United Methodist Church v. City of Cheyenne,* 451 F.3d 643, 663 (10th Cir.2006). The Court will not look into whether a particular belief or practice is a key part of or central to the person's religion. *Bikur Cholim*, 664 F.Supp.2d at 288 (citing *Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005)). "An individual claiming violation of free exercise rights need only demonstrate that the beliefs professed are

sincerely held and in the individual's own scheme of things, religious." *Fifth Ave. Presbyterian Church v. City of New York,* 293 F.3d 570, 574 (2d Cir.2002)(quoted in *Bikur Cholim,* 664 F.Supp. 2d at 288-89). This is a fairly low threshold.

A church expansion to house religious activities or offices constitutes the reasonable extension of religious use of property. *Mintz v. Roman Catholic Bishop of Springfield*, 424 F. Supp. 2d 309 (D.Mass. 2006). Similarly, where a church expands or converts property to be used even in part for religious education and practice, this constitutes religious exercise. *Westchester III,* 504 F.3d 338; *see also, Academy of Our Lady of Peace v. City of San Diego*, 2010 WL 1329014 (S.D.Cal. 2010)(proposed construction of a classroom building for Catholic college-preparatory school constitutes religious exercise). However, a project does not constitute "religious exercise" simply because it is owned or built by a religious organization. *Westchester III*, 504 F.3d at 558 (citing 146 Cong. Rec. S7774-01, S7776 (July 27, 2000)).

2. Substantial Burden

The U.S. Supreme Court has not yet defined "substantial burden" under RLUIPA. However, many federal circuit courts of appeal have applied pre-RLUIPA constitutional case law on substantial burden. *See, e.g., Westchester III,* 504 F.3d at 348 (assuming that Congress intended to incorporate constitutional free exercise jurisprudence)(citing *Midrash Sephardi, Inc. v. Town of Surfside* , 366 F.3d 1214, 1226 (11th Cir. 2004, *cert. denied,* 543 U.S. 1146 (2005)); *Living Water Church of God*, 504 F.3d at 146 (6th Cir. 2007)(citing Cong. Rec. S7774-01, 7776 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy)); *but see, San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1035 (9th Cir. 2004)(substantial burden means a "significantly great" and "oppressive" restriction on any exercise of religion).

As Judge Posner has said, "Any land-use regulation that a church would like not to have to comply with imposes a 'burden' on it, and so the adjective 'substantial' must be taken seriously lest RLUIPA be interpreted to grant churches a blanket immunity from land-use regulation." *World Outreach Conference Center v. City of Chicago and Trinity Evangelical Lutheran Church v. City of Peoria,* 591 F.3d 531, 539 (7th Cir. 2009).

Forcing a person to choose between following or abandoning one of the precepts of his or her religion is a substantial burden. *Westchester III*, 504 F.3d at 348 (citing *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Lovelace v. Lee,* 472 F.3d 174, 187 (4th Cir. 2006)(substantial burden is one that "puts substantial pressure on an adherent to modify his behavior"). This type of substantial burden was first recognized in First Amendment jurisprudence, but not in the land use context. It is less likely to be at issue in a land use case.

In the land use context, the more common type of substantial burden is coercion – not direct force. Any regulation that "necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise – including use of real property for the purpose thereof within the regulated jurisdiction generally – effectively impracticable" generally constitutes a substantial burden. *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 997 (7th Cir. 2006); *see also, Westchester III*, 504 F.3d at 349 (any direct coercion of a religious institution to change its behavior constitutes a substantial burden); *Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214, 1227 (11th Cir.2004) ("[A] 'substantial burden' must place more than an inconvenience on religious exercise; a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly."); *San Jose Christian College v. City of Morgan Hill,* 360 F.3d 1024, 1034 (9th Cir.2004) ("[F]or a land use regulation to impose a 'substantial burden,' it must be oppressive to a significantly great extent.")(cited in *Bikur Cholim*, 664 F.Supp.2d at 290). The substantial burden determination is a relative one. "[W]hether a given burden is substantial depends on its magnitude in relation to the needs and resources of the religious organization in question." *World Outreach,* 591 F.3d at 539.

However, "where the denial of an institution's application to build will have minimal impact on the institution's religious exercise, it does not constitute a substantial burden, even when the denial is definitive. There must exist a close nexus between the coerced or impeded conduct and the institution's religious exercise for such conduct to be a substantial burden on that religious exercise." *Westchester III,* 508 F.3d 338. As noted in a 2010 Environmental Division decision: "[A] generally applicable burden imposed by a neutral regulation, or a permit decision that has a minimal impact on the particular religious exercise, is not a substantial burden." *Downing*, Decision and Order at 12.

Substantial burden is a fact-based inquiry. *World Outreach,* 591 F.3d at 539 (cited in *Academy of Our Lady of Peace v. City of San Diego,* 2010 WL 1329014, slip op. at 11 (S.D. Cal. 2010). Whether a substantial burden exists depends on the specific facts of each case.

Nothing in RLUIPA bars jurisdiction over religious applicants or projects. It only bars Act 250 from imposing a substantial burden, unless the burden is the least restrictive means of serving a compelling state interest. Unfortunately, Commissions and staff are not often going to be in a position to have the information needed to determine whether a particular permit condition or denial will have a substantial burden on an applicant's religious exercise.

3. Compelling Interest

If an applicant demonstrates that a permit denial or condition imposes a substantial burden on his or her religious exercise, the burden shifts to the state to prove that the regulation is the least restrictive means of furthering a

compelling state interest. The bar for showing that a regulatory burden on religious exercise is the least restrictive means for showing a compelling government interest is very high.

III. Conclusion

As religious applicants and applications continue to come through Act 250, Commissions and staff should be aware of RLUIPA and its implications, and should contact Montpelier legal staff with any issues or questions that come up. Substantial burden determinations are very fact-specific and many of the relevant facts will not be available to Act 250 because they are related to religious exercise. It is always crucial to support permit conditions and denials with findings of fact; perhaps even more so in the RLUIPA context.

Additional RLUIPA resources:

U.S. Department of Justice RLUIPA webpage: http://www.justice.gov/crt/housing/rluipaexplain.php.

RLUIPA Guide, U.S. Department of Justice, http://www.justice.gov/crt/religdisc/rluipa_guide.pdf.

RLUIPA Update, Alan C. Weinstein, Professor, Cleveland-Marshall College of Law, http://www.wulaw.wustl.edu/landuselaw/RLUIPA.htm (Feb. 21, 2003).

Law of the Land: A Blog on Land Use and Zoning, Patricia Salkin, Associate Dean and Assistant Professor, Albany Law School, http://lawoftheland.wordpress.com/category/rluipa/.

Bram Alden, *Reconsidering RLUIPA: Do Religious Land Use Protections Really Benefit Religious Land Users?*, 57 UCLA L. Rev. 1779, http://uclalawreview.org/?p=1047.

Note, Religious Land Use in the Federal Courts under RLUIPA, 120 Harv. L. Rev. 2178 (2007), http://www.harvardlawreview.org/issues/120/june07/notes/religious_land_use.pdf .

Prepared on August 19, 2010, by Melanie Kehne, Associate General Counsel.