



Substantial Burdens, Unreasonable Limitations and Unequal Terms: Local Government Regulation Under RLUIPA

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Sources of Law



- **First Amendment Challenge to Regulation of Religious Uses – Free Exercise Clause and Establishment Clause**
 - Enhanced judicial scrutiny
 - Not presumed constitutional
- **RLUIPA = Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc, *et seq.***

RLUIPA: Substantial Burden



- Governmental land use regulation may not impose a **substantial burden** on religious exercise, **unless** the government demonstrates that the burden is in furtherance of a **compelling governmental interest**; and is the **least restrictive means**.
- Applies where the substantial burden is imposed in the **implementation** of land use regulation with formal or informal procedures or practices that permit the government to make, **individualized assessments** of the proposed uses.

RLUIPA: Substantial Burden

- *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004): Substantial burden is more than an inconvenience to religious exercise. Significant pressure, which directly coerces the believer to conform his or her behavior accordingly. Requiring Orthodox Jews to walk a few extra blocks to zoning districts located close to downtown? No substantial burden.
- *Williams Island Synagogue, Inc. v. City of Aventura*, 358 F. Supp.2d 1207 (S.D. Fla. 2005): Denial of conditional use permit for synagogue was not a substantial burden. Distractions of current location, such as physical limitations, lack of foyer for late arriving worshippers, and need to turn to be able to face Jerusalem were not substantial burdens.



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RLUIPA: Substantial Burden



- *Christian Romany Church Ministries, Inc. v. Broward County*, 2008 WL 942565 (Fla. 4th DCA 2008) (under RLUIPA and Florida RFRA): If nothing unique or special about this particular church building, and nothing about the location that was unique or integral to the conduct of the religion, county can condemn and force the relocation of a church.
- *Hollywood Comm’y Synagogue, Inc. v. City of Hollywood*, 430 F. Supp.2d 1296 (S.D. Fla. 2006) (under RLUIPA and Florida RFRA): No substantial burden in city’s order to relocate synagogue from operating in a single family house.

RLUIPA: Substantial Burden

- *Konikov v. Orange County*, 410 F.3d 1317 (11th Cir. 2005): Requirement for a special exception to operate a religious organization in a rabbi's home was not a substantial burden.
- *Westgate Tabernacle, Inc. v. Palm Beach County*, 14 So. 3d 1027 (Fla. 4th DCA 2009): Requirement to obtain conditional use permit to operate a homeless shelter as part of a church was not a substantial burden under RLUIPA or Florida RFRA (church had failed to apply and thus failed to exhaust its administrative remedies, and could have obtained one with renovations).



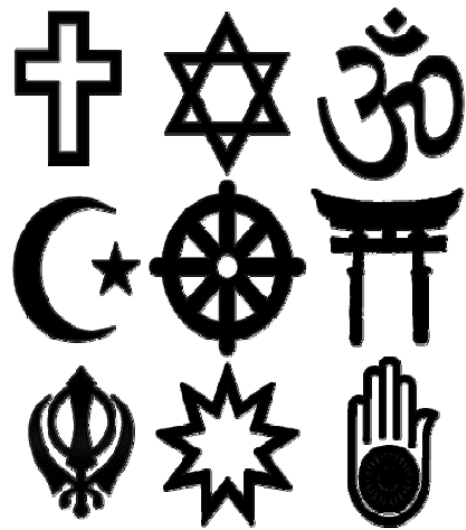


RLUIPA



- Land use regulation cannot **totally exclude** or **unreasonably limit** religious assemblies in a jurisdiction.
- Biggest practical danger: inadvertent discrimination, in code provisions enacted prior to 2000.

RLUIPA: Exclusion and Unreasonable Limitation



- Few cases address unreasonable limitation.
- Broad allowance in several zoning districts will help, but supplemental regulations can still result in effective limitation. Look at cumulative impact.
- Recent damages award, where a combination of minimum front footage and lot area requirements meant that a religious use would have to assemble several contiguous lots at high cost. *Chabad of Nova, Inc. v. City of Cooper City*, 575 F. Supp. 2d 1280 (S.D. Fla. 2008).

RLUIPA: Equal Terms

- *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295 (11th Cir. 2006)
 - Elements of an “equal terms” claim:
 - A religious assembly or institution (use)
 - Subject to a land use regulation
 - Which treats religious uses on less than equal terms
 - With non-religious uses
 - Equal treatment, not special treatment



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RLUIPA: Equal Terms

- *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295 (11th Cir. 2006)



- Types of violations:
 - Facial differentiation between religious and nonreligious uses
 - “Gerrymandering” a regulation to place a burden solely on the religious use, even though regulation is neutral on its face
 - Selective enforcement of neutral regulation against religious uses
- If equal terms is violated, then strict scrutiny is applied to determine whether government is using a narrowly tailored means of accomplishing a compelling governmental interest.



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RLUIPA: Equal Terms

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- Requirement for nonagricultural, nonresidential uses, to be separated by at least 1,000 feet from agricultural and residential uses was not a “gerrymandering” equal terms violation.
- It applied to all uses equally, unless a variance or rezoning was obtained, and criteria for relief were neutral and were neutrally applied.
- Allegedly similar use – a preparatory school – was not similar for equal terms analysis, because it had sought and obtained rezoning while the church had sought and failed to receive a variance.

RLUIPA: Equal Terms

- *Konikov v. Orange County*, 410 F.3d 1317 (11th Cir. 2005): Requirement of permit to conduct religious services two to three times a week in rabbi's home, as implemented by code enforcement order, violated equal terms. Groups that met in homes with similar frequency, such as Cub Scouts, family gatherings, and other assemblies without a religious purpose, were not required to obtain a permit. However, the lack of permit requirement for model homes, day care centers, and home occupations was not a facial equal terms violation.



RLUIPA: Equal Terms



- *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004):
 - Zoning code allowed private social clubs to locate on first floor downtown, but required religion to locate above first floor. Violation of equal terms.
 - Town's interest in retail synergy underlying the regulation did not justify different treatment, because synagogue was no less pedestrian-friendly than private club. Private clubs and places of worship were similar uses required to be treated similarly. Compare *Chabad of Nova, Inc. v. City of Cooper City*, 575 F. Supp. 2d 1280 (S.D. Fla. 2008) (very broad concept of uses that are similar to religious assemblies).



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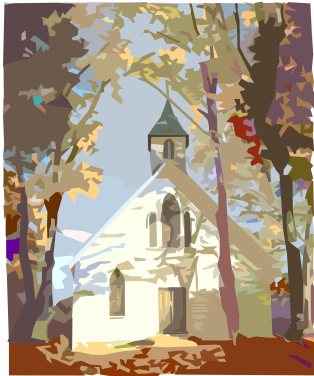
RLUIPA: Equal Terms



- *Hollywood Comm’y Synagogue, Inc. v. City of Hollywood*, 430 F. Supp.2d 1296 (S.D. Fla. 2006): Allegation that city allowed day care and education centers to operate out of single family homes in residentially zoned area, while not allowing religious assemblies to do so, stated an equal terms claim.
- *Williams Island Synagogue, Inc. v. City of Aventura*, 358 F. Supp.2d 1207 (S.D. Fla. 2005): Requirement that synagogue obtain a conditional use permit before moving into a residential zoning district, while the current use of the facility as a condo building’s accessory party room did not require such a permit, did not violate equal terms. City not required to treat religious uses identically with non-religious uses.



RLUIPA: Statutory Construction



- RLUIPA must be broadly construed to protect religion, and may not be used as a rationale for placing burdens on any religious belief, or to create a basis for claims to be filed against religious institutions or assemblies.
- It also allows government to avoid liability or preemption by changing, or retaining and creating exemptions from, the substantial burden on religious exercise, or by any other means that eliminates the substantial burden.



RLUIPA Standard of Review

○ Challenge to Regulation of Religious Uses

● Substantial Burden Claims (Free Exercise?)

- Initial Burden on Challenger re Showing of Substantial Burden
- Then City Must Show Regulation is Narrowly Tailored to Achieve Compelling Governmental Interest

● Equal Terms Claims (Equal Protection?)

- Initial Burden on Challenger re Showing of Comparable Use Being Treated Differently
- Then City Must Show Not Actually Comparable, or Not Actually Treated Differently, or that Reason Independent of Religion Justifies the Difference in Treatment



Best Practices: Procedures



- Clear drafting is key. Ambiguity and vagueness can lead to notice challenges: what's illegal? what's ok?
- Non-discretionary standards as much as possible, to avoid the danger of selective enforcement – avoid conditional uses and special exceptions
- Tailor regulation to problem being addressed - avoid overbroad regulation
- Tight deadlines throughout process
- Clear path to judicial relief if sought
See, e.g., FW/PBS, Inc. v. City of Dallas, 110 S. Ct. 596 (1990).

Best Practices in Zoning Regulations



- No “one-size-fits-all” solution exists
 - Zoning strategies and desired outcome need to be tailored to the circumstances
 - The same language in a different zoning code can have vastly different meaning and effect
 - Many (most?) codes do not meet current law, so borrowing is a bad idea – be clear where you are vulnerable

Best Practices in Zoning Regulations



- Amortization of nonconformities with places of worship – unclear
- Unsettled whether conditional uses are allowed (they are not for adult uses). Recommend against them:
 - Inherent discretion in often vague standards, and potential for actual discrimination.
 - Conditional use locations may not count as available locations.

Best Practices in Ordinance Drafting



- The governmental purpose is paramount in determining whether the regulation will be upheld.
 - Controlling impacts of the use, presenting important and substantial governmental interests, in a neutral manner? Yes.
 - Suppressing exercise of religion or regulating religion differently from comparable uses? No.
- Governing law is very fact-sensitive, evolving over time, and can be unpredictable. Never adopt without first checking for updates in the law and identifying potential issues.

Best Practices in Ordinance Drafting

- Administrative Relief Procedures



- Provides avenue for relief to persons, religious assemblies and institutions in advance of filing a claim.
- Consistent with legislative history of RLUIPA, which encourages local governments to offer accommodations to possible claimants.
- Consistent with evolving caselaw requiring plaintiffs to exhaust available administrative remedies prior to filing suit.
- Provides the city with an opportunity to resolve claims, and thereby avoid costly and extended litigation.



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Best Practices in Ordinance Drafting



- Consider innovative ways of defining the problem you are trying to regulate
- If you can solve the problem with uniform regulation, you may avoid the RLUIPA issues:
 - Regulation of location, bulk and lot coverage of *places of worship* in single family neighborhoods
 - Regulation of location, bulk and lot coverage of *non-residential uses* in single family neighborhoods

Best Practices in Ordinance Drafting



- When it is not targeted to the religious conduct, regulation is more likely to receive benefit of the doubt.
- Avoid underinclusiveness – is it really true that only that conduct presents the issues of concern?
- Avoid overbreadth – is there a way to accomplish the regulatory objective while still allowing more flexibility for the religious use?



Resources



Lucero, Lora A., “The Eleventh Commandment: Thou Shalt Not Burden Religious Land Use Applicants,” *Zoning & Planning Report* (April 2010)

Gaiimo, Michael S. and Lora A. Lucero, editors, *RLUIPA Reader: Religious Land Uses, Zoning, and the Courts* (American Bar Ass’n and APA Planners Press 2009)

Dalton, Daniel P., “Religious Land Uses, Zoning, and the Courts in 2008,” *Planning and Environmental Law* (July 2009)

Trevarthen, Susan L., “Best Practices in First Amendment Land Use Regulations,” *Planning and Environmental Law* (June 2009)

Weinstein, Alan C., “How to Avoid a Holy War: Dealing with Potential RLUIPA Claims,” *Planning and Environmental Law* (March 2008)





Conclusion

- **When in doubt:**
 - Be as clear, unambiguous and non-discretionary as possible
 - Act promptly
 - Deal with the protected use in the most even-handed way possible – avoid overbreadth and underinclusiveness
 - Be alert to the potential for inadvertent discrimination
 - Always focus on the land use impact or other neutral justification for regulation, and not the content of the religious expression or activity
 - What works today may be invalid next year – check for latest developments in the law
 - Get expert assistance