



MEMORANDUM

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Zoning & Religious Land Use

In general, Churches and religious organizations are regulated by the same Zoning laws as other organizations. Unfortunately, Cities and local governments often enact zoning ordinances that are specifically designed to prevent churches and other tax-exempt organizations from building in certain areas in order to increase tax-revenue. While this is often the primary motivation for the ordinances, cities rarely admit it, justifying the regulations on other grounds such as the prevention of fraud or ensuring that all contribute equally to carrying their legally mandated share of the tax burden. In some instances, however, cities have specifically claimed increasing the tax-revenue as their primary justification for denying a church's application for a building permit.

The Religious Land Use and Institutionalized Persons Act (RLUIPA) was passed by Congress in 2000 to protect Churches and religious organizations from zoning ordinances that target churches for different treatment, or that place a "substantial burden" on a person or organization's ability to worship. The Supreme Court upheld the constitutionality of RLUIPA in the 2005 case of *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

Equal Protection

RLUIPA forbids disparate treatment of religious organizations, and requires that a "religious assembly or institution" be treated on "equal terms with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(b)(1) (2006). This means that if assemblies of persons are allowed in a particular zone, but churches that would constitute a similar assembly are excluded, the regulation probably violates RLUIPA.

For example, in *Petra Presbyterian Church v. Village of Northbrook*, 489 F.3d 846 (7th Cir. 2007), the United States Court of Appeals for the Seventh Circuit held that a municipality could not allow non-religious membership organizations and community centers to locate within an industrial zone while simultaneously excluding churches. The court noted that a violation of

RLUIPA's equal terms provision must be remedied by either permitting religious organizations in the zone or forbidding analogous non-religious uses in the zone. *Id.* at 849.

Substantial Burden

If the Church is able to show that an ordinance imposes a substantial burden on it, then the zoning authority may only apply that ordinance to the Church if it shows that it has a compelling interest to do so and that it used "the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1 *et seq* (2006).

There is no bright-line rule as to what constitutes a "substantial burden;" rather, a "case-by-case, fact-specific inquiry [is necessary] to determine whether the government action or regulation in question imposes a substantial burden on an adherent's religious exercise" *Adkins v. Kaspar*, 393 F.3d 559, 571 (5th Cir. 2004).

Courts have found that denying a permit to build a Parish Center would be a substantial burden when the Parish Center "would serve as a meeting place for the parish counsel, would include an office for religious education, could facilitate gatherings related to church services and would, in the process, alleviate crowding in the rectory," *Mintz v. Roman Catholic Bishop*, 424 F. Supp. 2d 309, 321 (D. Mass. 2006), even though the church could have made "certain accommodations within its existing structures to meet its ongoing religious needs." *Id.*

Similarly, in *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007), the court found that a substantial burden was imposed on a Jewish School when the Zoning board denied the school's application to expand their facilities to meet a growing student body's needs. Since these facilities would be used for religious instruction, the court found that the permit denial placed a substantial burden the school's religious exercise. The court noted that denying a permit to build a "gymnasium to be used exclusively for sporting activities," or to build "office space" would not impose a substantial burden on the school's religious exercise. *Id.* at 347–48. Thus, under this court's holding, "[t]here 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." *Id.* at 349. Some courts use the availability of equally acceptable alternative venues as a significant factor in determining if a burden is substantial, or merely an inconvenience. *Albanian Associated Fund v. Twp. of Wayne*, 2007 U.S. Dist. LEXIS 73176, *2, *28 (D.N.J. 2007).

Compelling Governmental Interest and Least Restrictive Means

"Under RLUIPA, once a religious institution has demonstrated that its religious exercise has been substantially burdened, the burden of proof shifts to the municipality to prove it acted in furtherance of a compelling governmental interest and that its action is the least restrictive means of furthering that interest." *Westchester Day Sch.* 504 F.3d at 353. While there is ample Supreme Court precedent describing the compelling interest standard as a high hurdle to leap, it is a nebulous concept that is difficult to define. In *Church of Lukumi Babalu Aye v. City of Hialeah*, (1993) the Court described "compelling interest" as an "interest[] of the highest order." *Id.* at 546.

In *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002), the court held that the generation of tax revenue was *not* a “compelling” interest sufficient to justify a substantial burden upon the free exercise of religion. The court explained:

If revenue generation were a compelling state interest, municipalities could exclude all religious institutions from their cities. “So universal is the belief that religious and educational institutions should be exempt from taxation that it would be odd indeed if we were to disapprove an action of the zoning authorities consistent with such belief and label it adverse to the general welfare.” *Id.* at 1228 (internal citation omitted). The court also noted that substantially burdening religious practice is rarely the least restrictive means of furthering the government’s interest in revenue generation: “[m]unicipalities have numerous ways of generating revenue without preventing tax-free religious land uses.” *Id.* at 1229.

Additionally, in *Elsinore Christian Center v. City of Lake Elsinore*, 291 F. Supp. 2d 1083 (C.D. Cal. 2003)¹ the court held that the City’s denial of a church’s request to use property in an economically depressed downtown commercial area for religious services violated RLUIPA. After finding that a substantial burden was imposed on the church’s religious exercise, the court held that the city’s stated interests—maintaining needed services provided by the previous occupant (a grocery store and recycling center), preventing the loss of tax revenue, and eliminating blight—were not “compelling” for RLUIPA purposes. *Id.* at 1093. The court explained that:

[t]he maintenance of property tax revenue is a potentially pretextual basis for decision-making that appears to have been a specific target of RLUIPA. The Act’s drafters were concerned that where, as here, a church is required to seek a permit, “the zoning board [does] not have to give a specific reason [for denying the permit]. They can say it is not in the general welfare, or they can say you are taking property off the tax rolls.” Indeed, if a city’s interest in maintaining property tax levels constituted a compelling governmental interest, the most significant provision of RLUIPA would be largely moot, as a decision to deny a religious assembly use of land would almost always be justifiable on that basis.

Id. (citations omitted).

Under RLUIPA, religious assemblies or institutions may not be prohibited in the drafting or application of regulations while non-religious assemblies are allowed to be carried out in the same area. In addition, even if a religious organization is not treated differently but the regulation imposes a substantial burden on the organization’s religious exercise, the city must show that that regulation is the least restrictive means possible to meet a compelling government interest.

¹ *rev’d on other grounds* by 2006 U.S. App. LEXIS 21571 (9th Cir. 2006) (unpublished).