Regulation of Religious Land Uses

CHAPTER 27

Many religious activities and venues can be affected to some degree by land use regulations. Zoning districts define the uses that can be located on a particular site, and they may exclude houses of worship as well as other uses sponsored by religious bodies, such as schools, day care facilities, homeless shelters, and food banks. Dimensional requirements may establish setbacks or height limits that affect religious structures. Parking, landscaping, noise, and sign regulations also may limit options open to religious groups.

A number of state courts in the 1950s invalidated local government attempts to use zoning to limit religious uses in residential areas of the nation's burgeoning suburbs,[1] but the more recent trend has been to subject religious uses to the same generally applicable standards as comparable secular uses.[2]

In North Carolina many local governments have traditionally applied all of their land use regulations to religious uses. The courts have supported this.[3] For the most part, however, religious uses are treated sympathetically, and the restrictions applied have been modest.[4] Houses of worship are either favored or considered relatively benign from a land use impact perspective, so they usually are allowed in most zoning districts, though more stringent standards may be applied to facilities that serve large numbers of people.[5]

1. *See, e.g.*, State *ex rel.* Lake Shore Drive Baptist Church v. Vill. of Bayside Bd. of Trs., 12 Wis. 2d 585, 108 N.W.2d 288 (1961) (upholding exclusion of church from residential district as being arbitrary and capricious). For a collection of these cases, see 2 EDWARD H. ZIEGLER JR., RATHKOPF'S LAW OF PLANNING AND ZONING § 20.04 (4th ed. 1997); R. P. Davis, Annotation, *Zoning Regulations As Affecting Churches*, 74 A.L.R. 2d 377 (1960). Many of these state court decisions were based on substantive due process grounds, holding there was no rational basis for an exclusion or for treating religious uses differently from secular uses with comparable land use impacts. Laurie Reynolds, *Zoning the Church: The Police Power versus the First Amendment*, 64 B.U. L. REV. 767, 777–83 (1985) (contending that the Free Exercise Clause does not mandate an exemption for religious uses). Some states still hold that local governments do not have authority to regulate religious uses. *See, e.g.*, Vill. Lutheran Church v. City of Ladue, 935 S.W.2d 720 (Mo. Ct. App. 1996) (authority to regulate buildings and land used for "trade, industry, residence or other purposes" does not include the authority to regulate religious uses for other than public safety impacts). Other states have long held that land use restrictions need not make special provisions or exceptions for religious uses. *See, e.g.*, Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. City of Porterville, 90 Cal. App. 2d 656, 203 P.2d 823 (1949) (upholding exclusion of churches from single-family residential zone).

2. Most states have allowed the application of general zoning regulations—such as restrictions on off-street parking, wetlands, signs, size limits, setbacks, and special and/or conditional use permit procedures—to religious uses.

3. *See* Grace Baptist Church v. City of Oxford, 320 N.C. 439, 358 S.E.2d 3372 (1987) (application of paving requirement for off-street parking to church upheld, though the court expressly noted that the church had not raised First Amendment or state religious liberty clause issues in its complaint); Convent of Sisters of St. Joseph v. City of Winston-Salem, 243 N.C. 316, 90 S.E.2d 879 (1956) (application of zoning to parochial school upheld); Jirtle v. Bd. of Adjustment, 175 N.C. App. 178, 622 S.E.2d 713 (2005) (application of zoning to a church-related food pantry); Allen v. City of Burlington Bd. of Adjustment, 100 N.C. App. 615, 397 S.E.2d 657 (1990) (application of zoning to a community kitchen operated by a religious group upheld).

4. A 1997 review of zoning treatment of religious land uses in North Carolina municipalities indicated that places of worship are allowed as a permitted use in most zoning districts. The most common restrictions were limits on location of places of worship in specialized zoning districts (such as conservation overlay districts) and conditional use permit requirements for large-scale religious uses in residential areas. Building setbacks and off-street parking requirements were typically applied. Height limit exemptions for steeples or belfries were also common. Accessory uses (such as shelters, schools, or recreation facilities) were often subject to the same restrictions as comparable secular uses.

5. The Charlotte development regulations, for example, have differential standards for religious institutions in residential zoning districts. The ordinance distinguishes between small (up to 400 seats in largest assembly space), medium (401 to 750 seats), and large (751 to 1,200 seats) religious institutions. Large institutions must be located on larger streets and are limited to more intensive use zoning districts and have different floor area ratio requirements. CITY OF CHARLOTTE, N.C., ZONING ORDINANCE § 12.506 (2010).

Overview of First Amendment Issues

The First Amendment[6] both prohibits the establishment of a state religion and protects individuals in their free exercise of religion. The North Carolina Constitution also contains protection for freedom of religion.[7]

Several aspects of constitutional jurisprudence on religious freedom are clear. Government may not regulate religious beliefs.[8] Constitutional protection of the free exercise of religion also extends beyond beliefs to many physical acts based on those beliefs, such as assembling for worship and partaking of sacraments.[9] For example, a regulation designed specifically to prohibit animal sacrifice by followers of the Santería religion (as opposed to a uniformly applicable law on animal slaughter) was invalidated in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[10]

On the other hand, the U.S. Supreme Court has held that generally applicable regulations that are neutrally applied can restrict even religiously justified conduct. The difficulty is at the intersection of these two considerations: the freedom of individuals to believe (and so behave) as they wish on religious matters and the authority of states to regulate behavior uniformly for the public good.

The initial landmark case that addressed this conflict and established strong judicial protection of free exercise rights is *Sherbert v. Verner*.[11] Sherbert was a Seventh-Day Adventist who lost her job

6. The U.S. Constitution also forbids religious tests for federal offices. U.S. CONST. art. VI, cl. 3. *See* McDaniel v. Paty, 435 U.S. 618 (1978) (invaliding state prohibition on ministers running for public office).

7. One of North Carolina's earliest governance schemes, traditionally said to have been drafted by John Locke and adopted by the Lord Proprietors in 1669 before the area became a royal colony, guaranteed absolute freedom to all religious bodies. WILLIAM S. POWELL, THE CAROLINA CHARTER OF 1663 19 (1954). The current state constitution provides, "All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience." N.C. CONST. art. 1, § 13 (1996). The North Carolina Supreme Court has held that the state constitution both guarantees freedom of religious profession and worship and also firmly establishes a separation of religion and government. Heritage Vill. Church & Missionary Fellowship, Inc. v. State, 299 N.C. 399, 263 S.E.2d 726 (1980).

The state guarantee of religious freedom has never been absolute. The state constitution has always included a religious test for state office. The North Carolina Constitution of 1776 prohibited a "clergyman, or preacher of the gospel, of any denomination" from serving in the legislature or council of state. N.C. CONST. art. XXXI (1776). It further provided that "no person who shall deny the being of God, or the truth of the protestant religion, or the divine authority either of the old or new testament, or who shall hold religious principles incompatible with the freedom and safety of the state, shall be capable of holding any office or place of trust or profit in the civil departments within this state." N.C. CONST. art. XXXII (1776). John Culpepper of Anson County was expelled from the state House of Commons on December 19, 1801, because he was continuing to preach while in office. The religious test was, however, not broadly applied even in the early days of statehood. In 1809 the right to membership in the state House of Commons of a Jewish member, Jacob Henry of Carteret County, was challenged, and the House ruled that the constitutional prohibition did not apply to the legislature. William Gaston, a Catholic from New Bern, was one of the more prominent and well-respected early officeholders in North Carolina, serving in the state House of Commons from 1807–1809 (as speaker in 1808), the state Senate in 1812, and the U.S. Congress from 1812–1817. Gaston was elected by the legislature to the state supreme court, where he served with distinction from 1833 until his death in 1844. Gaston argued for deletion of the religious test at the 1835 constitutional convention, contending, "I trust we shall act up to the axiom proclaimed in your bill of rights, and permit no man to suffer inconvenience or to incur incapacity, because of religion, whether he is Jew or Gentile, Christian or Infidel, Heretic or Orthodox." WILLIAM GASTON, SPEECH OF THE HONORABLE JUDGE GASTON DELIVERED IN THE RECENT STATE CONVENTION OF NORTH CAROLINA ASSEMBLED FOR THE PURPOSE OF REVISING THE CONSTITUTION 36 (1835). While not abolished, the religious test was amended in 1835 to change the requirement for "protestant" belief to "Christian" belief and was further amended in 1868 to simply require a belief in God. It continues in that form in the current constitution, albeit unenforceably so. *See* Torcaso v. Watkins, 367 U.S. 488 (1961) (invalidating similar Maryland provision). *See generally* Kemp P. Battle, History of the Supreme Court, 103 N.C. 339, 371 (1883); Walter Clark, History of the Supreme Court of North Carolina, 177 N.C. 615, 623 (1919); R.D. W. CONNOR, WILLIAM GASTON, A SOUTHERN FEDERALIST OF THE OLD SCHOOL AND HIS YANKEE FRIENDS 43 (1934); JOHN V. ORTH, THE NORTH CAROLINA STATE CONSTITUTION: A REFERENCE GUIDE 137 (1993).

8. "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. . . . [G]overnment may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious beliefs, or lend its power to one or the other side in controversies over religious authority or dogma." Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 877 (1990) (citations omitted). In many respects this requirement that regulations not be directed toward the substance of religious beliefs is similar to the requirement that restrictions on constitutionally protected speech be content neutral. *See* Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981). "The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993). *See also* Locke v. Davey, 540 U.S. 712, 725 (2004) (upholding statute providing college scholarships but excepting those pursuing degrees in devotional theology as there was no showing of an animus toward religion).

9. "[T]he 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation." Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 877 (1990).

10. 508 U.S. 520 (1993). The Court unanimously concluded that the ordinance in question was specifically designed to stop a house of worship, school, cultural center, and museum planned by the plaintiff.

11. 374 U.S. 398 (1963). The test enumerated in *Sherbert*, known as the "substantial burden test" and discussed in the text below, was reaffirmed in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), where the Court invalidated a state law mandating school attendance for Amish children. For additional case law defining the substantial burden test, see Hernandez v. Comm'r, 490 U.S. 680 (1989) (disallowing charitable contribution tax deduction for "audit" sessions in Scientologist training classes not a substantial burden); Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450–51 (1988) (a substantial burden is one that coerces persons into acting contrary to their religious beliefs); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) (denial of unemployment benefits for Seventh-Day Adventist fired for not

in a South Carolina textile mill for refusing to work on Saturdays after the mill expanded from a five- to a six-day workweek. The Court announced a "strict scrutiny" test for government regulations that significantly burden religious practices: the regulation is invalid unless the government is both addressing a compelling state interest[12] and has chosen a narrowly tailored method of regulation. However, in *Employment Division, Department of Human Resources v. Smith*,[13] the Court in 1990 retreated from this strict judicial scrutiny. Two Oregon counselors, members of the Native American Church, were fired from a private drug rehabilitation firm because of their use of peyote. It was undisputed that the ingestion of hallucinogenic peyote was one of their religious sacraments. After the counselors were denied unemployment benefits on the ground that they had been dismissed for "misconduct"—peyote use was a criminal offense in Oregon at that time[14]—they challenged the determination. The Oregon Supreme Court applied the *Sherbert* test and ruled that the counselors were entitled to unemployment compensation because the governmental interest involved (preserving the financial integrity of the compensation fund) was not a sufficiently compelling governmental interest to justify substantially burdening the counselors' religious expression.[15] However, on appeal the U.S. Supreme Court ruled that if the regulation is a valid and neutral law of general applicability,[16] the Constitution does not mandate that the legislature provide a religion-based exemption. The Court concluded, "To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling' . . . contradicts both constitutional tradition and common sense."[17]

The North Carolina Supreme Court reached a similar result. A person convicted of peyote and marijuana use contended that his consumption was a sacramental part of his Neo-American Church. The court noted that the Free Exercise Clause "permits a citizen complete freedom of religion. He may belong to any church or to no church and may believe whatever he will, however fantastic, illogical, or unreasonable, but nowhere does it authorize him in the exercise of his religion to commit acts which constitute threats to the public safety, morals, peace and order."[18]

The *Smith* analysis was soon applied in the land use area.[19] One early case rejected a contention that *Smith* was limited to criminal statutes and held that a Salvation Army shelter was not exempt from state regulations on rooming houses and boardinghouses.[20] A second case, *St. Bartholomew's Church v. New York*,[21] upheld application of a historic preservation ordinance to a church. The court applied the *Smith* analysis and concluded that the New York Landmark Law was a neutral law of general application. Although the law substantially limited the church's options for using its real estate holdings

working on Saturdays a substantial burden); Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 718 (1981) (a substantial burden is more than an incidental effect that makes religious practice more difficult).

12. The Court noted that regulation of religiously based conduct upheld in the past addressed conduct that "invariably posed some substantial threat to public safety, peace or order." *Sherbert*, 374 U.S. at 403. Prohibition of religiously motivated but dangerous activity, such as handling poisonous snakes, has long been allowed. State v. Massey, 229 N.C. 734, 51 S.E.2d 179, *appeal dismissed*, 336 U.S. 942 (1949). *See also* Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983) (upholding revocation of tax-exempt status because compelling governmental interest in eradicating racial discrimination in education justified substantial burden on religious belief against interracial relationships).

13. 494 U.S. 872 (1990). *See also* United States v. Lee, 455 U.S. 252 (1982) (government may require payment of social security taxes by those with religious objection).

14. A number of states exempt peyote use in religious ceremonies from criminal sanction. Not long after the *Smith* decision, Oregon joined their ranks. OR. REV. STAT. ANN. § 475.992(5) (Supp. 1996). Section 2(b)(1) of the American Indian Religious Freedom Act Amendments of 1994, 42 U.S.C. § 1996a(b)(1), created a national exemption. The key issue from a free exercise standpoint, though, is not whether the government could make such an exemption but whether the Constitution requires it to do so.

15. *Smith*, 721 P.2d 445, 449–50 (Or. 1986).

16. Most courts have concluded that the potential for seeking a variance does not remove the typical land use regulation from the category of a "generally applicable" law. Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 276–77 (3d Cir. 2007); Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 651. (10th Cir. 2006).

17. *Smith*, 494 U.S. at 885 (citations omitted). A regulation that applies only to conduct motivated by religious beliefs is not "generally applicable" and so would have to be supported by a compelling governmental interest. "A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993). Particular care is important when individualized conditions are being imposed, such as a condition on a special use permit for a religiously sponsored homeless shelter. As the court concluded in *Lukumi*, "The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." *Id.* at 547. Also, the Court noted in *Smith* that a heightened scrutiny of even neutral laws of general application may be warranted when the law burdens both free exercise of religious views and other protected First Amendment rights. 494 U.S. at 881–82 (noting "hybrid" claims had received heightened scrutiny). Free expression claims are often closely related to free speech and freedom of association claims.

18. State v. Bullard, 267 N.C. 599, 603, 148 S.E.2d 565, 568 (1966).

19. Subsequent to the 2000 adoption of the Religious Land Use and Institutionalized Persons Act, much of the litigation in this area has involved both constitutional and statutory claims. Most of these contemporary cases are reviewed in the discussion of that statute below.

20. Salvation Army v. Dep't of Cmty. Affairs, 919 F.2d 183 (3d Cir. 1990) (holding that even though operation of shelters is a sacrament for the Salvation Army, *Smith* requires application of neutral, generally applicable regulations on boardinghouses).

21. 914 F.2d 348 (2d Cir. 1990). *See also* Daytona Rescue Mission, Inc. v. City of Daytona Beach, 885 F. Supp. 1554 (M.D. Fla. 1995). *But see* Mount St. Scholastica, Inc. v. City of Atchison, 482 F. Supp. 2d 1281 (D. Kan. 2007) (since state historic preservation statute allowed city council to overrule order denying demolition upon finding no feasible and prudent alternatives are available, law is not one of general application and strict scrutiny under the First Amendment applies).

to raise revenue,[22] the court found that it did not prevent the church from carrying out its religious and charitable missions in its current building. The court also held that because there was no showing of a discriminatory motive in the law's application, and no coercion related to the religious practice involved, the law did not violate the Free Exercise Clause.[23] State court decisions on the application of historic district and landmark restrictions on places of worship have been mixed.[24]

Statutory Protection of Religious Land Uses

Religious Freedom Restoration Act

In response to a perceived weakening of the protection of religious freedom resulting from the *Smith* decision,[25] Congress in 1993 enacted the Religious Freedom Restoration Act (RFRA),[26] the key provisions of which established a "strict scrutiny" test for any government regulations that significantly burden religious freedom. The law provided that "government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability."[27] Exceptions were allowed only if there was a "compelling governmental interest" and if the government had chosen the "least restrictive means" of furthering that interest.[28] The express intent of Congress in enacting the law was to overturn the *Smith* decision and return to the *Sherbert* strict scrutiny standard for reviewing substantial governmental infringement on religious liberty.[29]

In *City of Boerne v. Flores*,[30] the high Court ruled that Congress had exceeded its authority in adopting the RFRA and declared the act unconstitutional. The Court held that although Congress can enact legislation to remedy violations of constitutional protections, it cannot enact laws that change the scope of those rights.[31] In addition, the Court held that the historic preservation ordinance involved did not violate the *Smith* standard: "It is a reality of the modern regulatory state that numerous state laws, such as the zoning regulations at issue here, impose a substantial burden on a large class of individuals. When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow

22. The church proposed to replace its seven-story Community House, built in 1928, with a forty-seven-story commercial office tower.

23. *See also* Mount Elliott Cemetery Ass'n v. City of Troy, 171 F.3d 398, 405 (6th Cir. 1999) (upholding refusal to rezone single-family area for religious cemetery, noting locational restriction was a neutral law of general applicability).

24. The Washington state court, in several post-*Smith* decisions, has applied the *Sherbert* analysis to invalidate landmark protection ordinances. That court has found ordinances not to be neutral and has ruled that the economic burden inherent in historic district restrictions creates a substantial impediment to religious expression and, in addition, that landmark preservation is not a sufficiently compelling governmental interest to justify such a burden. First Covenant Church v. City of Seattle, 120 Wash. 2d 203, 840 P.2d 174 (1992). The Washington court has concluded also that such restrictions violate the state constitution's religious freedom provisions. In *Munns v. Martin*, 131 Wash. 2d 192, 930 P.2d 318 (1997), the court invalidated a potential fourteen-month delay imposed on church demolition of a school to construct a pastoral center. In *First United Methodist Church v. Hearing Examiner for Seattle Landmarks Preservation Board*, 129 Wash. 2d 238, 916 P.2d 374 (1996), the court held that landmark designation would reduce the resale value of the church, thus reducing the potential revenues available for its religious mission and substantially burdening the church without a compelling justification. The court noted that the designation was not unconstitutional per se but failed here on an "as applied" analysis. *Id.* at 252, 916 P.2d at 381.

The Massachusetts Supreme Judicial Court invalidated a Boston landmark regulation of the interior of church space as unduly infringing on the religious liberties guaranteed by the state constitution. Soc'y of Jesus of New Eng. v. Boston Landmarks Comm'n, 409 Mass. 38, 564 N.E.2d 571 (1990). The court had previously upheld landmark regulation of the exterior of religious buildings that are visible from a public way. Opinion of the Justices, 333 Mass. 783, 128 N.E.2d 563 (1955). *See also* Soc'y for Ethical Culture in the City of N.Y. v. Spatt, 51 N.Y.2d 449, 434 N.Y.S.2d 932, 415 N.E.2d 922 (1980) (upholding landmark designation).

25. Where there is a marked pattern of unconstitutional discrimination, as with the action of southern states prior to enactment of the Voting Rights Act of 1965, remedial action has been upheld. South Carolina v. Katzenbach, 383 U.S. 301 (1966). Whether there is in fact the requisite widespread pattern or practice of discrimination against religious land uses to justify remedial action is contested in the literature. *See* Mark Chaves & William Tsitsos, *Are Congregations Constrained by Government? Empirical Results from the National Congregations Study*, 42 J. CHURCH & ST. 335 (2000) (finding denial of approvals extraordinarily uncommon). For examples of those making the case that discrimination is widespread, see Von G. Keetch & Matthew K. Richards, *The Need for Legislation to Enshrine Free Exercise in the Land Use Context*, 32 U.C. DAVIS L. REV. 725 (1999); Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755 (1999); Roman P. Storzer & Anthony R. Picarello Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929 (2001). For those making the case that there is not widespread discrimination, see Caroline R. Adams, *The Constitutional Validity of the Religious Land Use and Institutionalized Persons Act of 2000: Will RLUIPA's Strict Scrutiny Survive the Supreme Court's Strict Scrutiny?* 70 FORDHAM L. REV. 2361 (2002); Stephen Clowney, Comment, *An Empirical Look at Churches in the Zoning Process*, 116 YALE L.J. 859 (2007); Ariel Graff, *Calibrating the Balance of Free Exercise, Religious Establishment, and Land Use Regulation: Is RLUIPA an Unconstitutional Response to an Overstated Problem?* 53 UCLA L. REV. 485 (2005); Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311 (2003). *See also* Daniel P. Lennington, *Thou Shalt Not Zone: The Overbroad Applications and Troubling Implications of RLUIPA's Land Use Provisions*, 29 SEATTLE U. L. REV. 805 (2006).

The Religious Land Use and Institutionalized Persons Act of 2000, known as RLUIPA and referenced above in this note, is discussed in detail in the text below.

26. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994). Several states, including Florida, Illinois, and Rhode Island, have adopted comparable state-level legislation.

27. *See id.* § 2000bb-1(a). For a collection of cases applying the substantial burden test under this act, see *Hicks v. Garner*, 69 F.3d 22, 26 n.22 (5th Cir. 1995).

28. *See* 42 U.S.C. § 2000bb-1(b).

29. *See id.* § 2000bb(b)(1) (1994).

30. 521 U.S. 507 (1997).

31. The Court also invalidated aspects of the Americans with Disabilities Act on similar grounds of Congress exceeding the remedial authorization of the Fourteenth Amendment. Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).

that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs."[32]

Religious Land Use and Institutionalized Persons Act

Congress responded to the *Boerne* decision by adopting the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).[33] To overcome the constitutional infirmity identified in *Boerne*, the proponents of the law contend that it is a remedial action authorized by Section 5 of the Fourteenth Amendment and is further justified under the Commerce Clause.[34] Judicial challenges to the constitutionality of RLUIPA have thus far been unsuccessful.[35]

RLUIPA essentially codifies the *Sherbert* and *Church of the Lukumi Babalu Aye* rules.[36] It establishes a general rule that land use regulations[37] shall not impose a substantial burden on religious exercise (including religious assembly)[38] unless this is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. The law also mandates that land use regulations must not treat religious assemblies on "less than equal terms" with non-religious uses and must not discriminate on the basis of religion or religious denomination.[39] It also provides that a jurisdiction shall not totally exclude or unreasonably limit religious assemblies or structures.[40]

If a plaintiff produces prima facie evidence to support a violation of the general rule of RLUIPA, the government bears the burden of persuasion on any element of the claim (except that the plaintiff bears the burden on whether the restriction substantially burdens exercise of religion).[41] A prevailing party making a successful RLUIPA challenge is entitled to reasonable attorney fees.[42] The statute of limitations for bringing a RLUIPA claim begins to run when the challenged decision is formally made (such as on the date of signing of an order denying a permit).[43]

While most RLUIPA claims are brought by religious entities contending that there has been a violation of the law, claims are sometimes brought by landowners who contend that the land use regulation has prevented sale or lease to a religious entity. This raises the question of whether a landowner whose personal religious expression has not been affected has standing for a RLUIPA claim in this circumstance. In *Dixon v. Town of Coats*,[44] the plaintiff owned a building in a six-block downtown area that was placed in a mixed-use zoning district that did not allow places of religious assembly. When a lessee was denied permission to use the building for a church, the court held that the landowner had standing to bring a RLUIPA challenge.

Scope of RLUIPA Coverage

RLUIPA does not apply to all governmental decisions. It is applicable only for land use regulations and the treatment of institutionalized persons. While most of the challenged regulations involve traditional zoning requirements (such as rezonings, special and conditional use permits, and variances), courts have also found

32. *Boerne*, 521 U.S. at 535.

33. Pub. L. No. 106-274 (codified at 42 U.S.C. §§ 2000cc to 2000cc-5). The law was effective September 22, 2000. Also see the American Indian Religious Freedom Act, Pub. L. No. 95-341, codified in part at 42 U.S.C. § 1996 (2010).

34. 42 U.S.C. § 2000cc(a)(2)(B) (2010).

35. The section of RLUIPA addressing institutionalized persons was held not to be a facial violation of the Establishment Clause in *Cutter v. Wilkinson*, 544 U.S. 709 (2005). The Act was held facially valid under the U.S. Constitution in *Freedom Baptist Church v. Township of Middletown*, 204 F. Supp. 2d 857 (E.D. Pa. 2002) (denying motion to dismiss challenge to town regulations applicable to religious land uses). *See also* Mayweathers v. Newland, 314 F.3d 1062, 1066 (9th Cir. 2002) (holding RLUIPA constitutional exercise of congressional spending power in a case involving prison inmates).

36. World Outreach Conference Ctr. v. City of Chi., 591 F.3d 531, 534 (7th Cir. 2009); Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 897 (7th Cir. 2005); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1232 (11th Cir. 2004).

37. The law applies to a "zoning or landmarking law" that "limits or restricts a claimant's use or development of land." 43 U.S.C. § 2000cc-5(5) (2010). The law applies to governmental land use regulations if the "program or activity" receives federal financial assistance, affects interstate commerce, or is part of a system of individualized determinations of the proposed use of the property (such as requiring a special use permit for places of worship). 42 U.S.C. § 2000cc(a)(2) (2010). As typical land uses by a religious entity may well not in and of themselves constitute the "exercise of religion" in a Free Exercise context and RLUIPA covers any exercise regardless of it being compelled by or central to a system of religious beliefs, the statute is broader than a Free Exercise claim. Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 273–74 (3d Cir. 2007); Cambodian Buddhist Soc'y of Conn., Inc. v. Planning & Zoning Comm'n of Town of Newtown, 285 Conn. 381, 411, 941 A.2d 868, 888–89 (2008).

38. 42 U.S.C. § 2000cc(a)(1) (2010). The law specifically states that the "use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise." 42 U.S.C. § 2000cc-5(7)(B) (2010).

39. 42 U.S.C. § 2000cc(b)(1) (2010). See, for example, a RFRA and Free Exercise case, *Brown v. Borough of Mahaffey*, 35 F.3d 846 (3d Cir. 1994), which involved the town blocking access through a park to land being used for a tent revival. The court noted that if the action constituted intentional discrimination against the religious use, that could serve no legitimate governmental purpose.

40. 42 U.S.C. § 2000cc(b)(3) (2010).

41. 42 U.S.C. § 2000cc-2(b) (2010).

42. In *DiLaura v. Township of Ann Arbor*, 471 F.3d 666 (6th Cir. 2006), the court upheld an attorney fee award of $178,535.61 in a case involving a bed and breakfast providing complementary food and accommodations for guests staying for religious prayer and contemplation.

43. United States v. Maui Cnty., 298 F. Supp. 2d 1010 (D. Haw. 2003).

44. No. 5:08-CV-489-BR, 2010 WL 2347506 (E.D.N.C. June 9, 2010). *See also* Berry v. Jefferson Parish, 326 F. App'x 748 (5th Cir. 2009) (dismissing claim by owners who wished to sell the land to "Christian-affiliated developer"); Dilauria v. Ann Arbor Charter Twp., 30 F. App'x 501 (6th Cir. 2002) (owner proposing to donate land to religious entity for religious use had standing); Moxley v. Town of Waldersville, 601 F. Supp. 2d 648 (D. Md. 2009) (owner losing contract to sell to religious entity has standing).

closely related regulations (such as off-street parking requirements) to be covered.[45]

Nonregulatory decisions do not come within the purview of potential protection under this statute. Given this fact, a variety of nonregulatory governmental actions that have a land use impact have been held not to be subject to this law, including involuntary annexation,[46] use of eminent domain,[47] and road-closing decisions.[48]

For the most part, only those activities of a religious entity that can be characterized as "exercises of religion" qualify for statutory or constitutional protection. This clearly includes use of land and buildings for worship and the necessary accessory uses[49] for that worship, such as regulations on parking lots and signs.[50] Ancillary and accessory uses that are part of a religious entity's ministry are also generally covered.[51] These uses include church-sponsored monasteries, rectories, schools, day cares,[52] family life centers,[53] student centers,[54] counseling centers, homeless shelters,[55] soup kitchens, food pantries,[56] and the like. Protection does not extend to land uses and activities that may be owned by a religious entity but which are put to non-religious uses, such as meeting spaces for other groups,[57] investment property leased for commercial purposes, campgrounds,[58] housing for the disabled and elderly,[59] or even sometimes church office space.[60]

Defining a "Substantial Burden"

In many respects the critical question in assessing a RLUIPA or First Amendment claim is the threshold inquiry of whether or not the challenged regulation substantially burdens the free exercise of religion.[61] If the burden imposed is not substantial, there is no potential constitutional or statutory violation.[62] Under RLUIPA, the "substantial burden" test is applicable in three situations: where federal funding is being used for a program, where interstate commerce is affected, or when individualized land use determinations are being made.[63]

45. *See, e.g.*, Lighthouse Cmty. Church of God v. City of Southfield, 2007 WL 30280 (E.D. Mich. 2007). *See* Shelley R. Saxer, *Assessing RLUIPA's Application to Building Codes and Aesthetic Land Use Regulation*, 2 ALBANY GOV'T L. REV. 623 (2009) (arguing for broad application of law). A plaintiff must exhaust any local land use appeals in order to have a ripe RLUIPA claim. Miles Christi Religious Order v. Twp. of Northville, 629 F.3d 533 (6th Cir. 2010). The plaintiffs owned a residence zoned for single-family use. In addition to housing brothers of the religious order, the residence was also used for religious services. Neighbors complained about parking in the front lawn in violation of town ordinances. The town cited the plaintiff and required that a site plan be submitted to show adequate off-street parking. The court held that failure to submit the site plan or request a variance rendered a RLUIPA claim not ripe.

46. Vision Church v. Vill. of Long Grove, 468 F.3d 975, 997–98 (7th Cir. 2006) (RLUIPA is not applicable to involuntary annexation decision).

47. Faith Temple Church v. Town of Brighton, 405 F. Supp. 2d 250, 254 (W.D.N.Y. 2005) (use of eminent domain to acquire a site for parkland that was desired by the adjacent church for expansion purposes not subject to RLUIPA); St. John's United Church of Christ v. City of Chi., 401 F. Supp. 2d 887, 899–901 (N.D. Ill. 2005).

48. Prater v. City of Burnside, 289 F.3d 417, 434 (6th Cir. 2002) (RLUIPA not applicable to decision on opening or closing a roadway).

49. Accessory uses are generally those that are incidental to and customarily a part of the principal use. Most zoning regulations allow accessory uses to be located with their principal permitted use.

50. Trinity Assembly of God of Balt. City, Inc. v. People's Counsel for Balt. Cnty., 407 Md. 53, 962 A.2d 404 (2008) (regulating size of on-site signs).

51. *See generally*, Sara C. Galvan, *Beyond Worship: The Religious Land Use and Institutionalized Persons Act of 2000 and religious Institutions' Auxiliary Uses*, 24 YALE L. & POL'Y REV. 207 (2006); Shelley R. Saxer, *Faith in Action: Religious Accessory Uses and Land Use Regulation*, UTAH L. REV. No. 2 (Oct. 15, 2008).

52. City of Richmond Heights v. Richmond Heights Presbyterian Church, 764 S.W.2d 647 (Mo. 1989). *But see* Ridley Park United Methodist Church v. Zoning Hearing Bd., 920 A.2d 953 (Pa. Commw. Ct. 2007) (refusal to allow church to operate day care center on site had a de minimus impact on religious exercise).

53. Mintz v. Roman Catholic Bishop of Springfield, 424 F. Supp. 2d 309 (D. Mass. 2006) (parish center with social hall, kitchen, and offices).

54. Episcopal Student Found. v. City of Ann Arbor, 341 F. Supp. 2d 691 (E.D. Mich. 2004).

55. Stuart Circle Parish v. Bd. of Zoning Appeals, 946 F. Supp. 1225 (E.D. Va. 1996); Jesus Ctr. v. Farmington Hills Zoning Bd. of Appeals, 215 Mich. App. 54, 544 N.W.2d 698 (1996).

56. Jirtle v Bd. of Adjustment, 175 N.C. App. 178, 622 S.E.2d 713 (2005).

57. Glenside Ctr., Inc. v. Abington Twp. Zoning Hearing Bd., 973 A.2d 10 (Pa. Commw. Ct. 2009) (use of space for meetings of Alcoholics Anonymous not a use for religious purposes).

58. City of Hope v. Sadsbury Twp. Zoning Hearing Bd., 890 A.2d 1137 (Pa. Commw. Ct. 2006) (campground for use by non-denominational ministry).

59. Greater Bible Way Temple of Jackson v. City of Jackson, 478 Mich. 373, 733 N.W.2d 734 (2007) (apartments across street from church to be used by elderly and disabled).

60. Cathedral Church of the Intercessor v. Vill. of Malverne, 353 F. Supp. 2d 375, 390–91 (E.D.N.Y. 2005) (expansion for administrative office use by church); N. Pac. Union Conference Ass'n of the Seventh-Day Adventists v. Clark Cnty., 7118 Wash. App. 22, 4 P.3d 140 (2003) (denial of permit for church office building in an agricultural district not a substantial burden).

61. For general case law defining the substantial burden test in a First Amendment context, see *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450–51 (1988) (a substantial burden is one that coerces persons into acting contrary to their religious beliefs), and *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 718 (1981) (a substantial burden is more than an incidental effect that makes religious practice more difficult). *See generally* Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989).

62. Given the similarity of the tests involved on this issue in First Amendment, RFRA, and RLUIPA cases, there is a fair amount of case law on this issue. Courts have applied the pre-*Smith* case law defining a "substantial burden" regarding the application of RLUIPA and RFRA. Marria v. Broaddus, 200 F. Supp. 2d 280, 298 (S.D.N.Y. 2002). For a collection of cases applying the substantial burden test under RFRA, see *Hicks v. Garner*, 69 F.3d 22, 26 n.22 (5th Cir. 1995). There are, however, modest but potentially important differences in the two statutory and the constitutional provisions. RFRA defines "exercise of religion" with reference to the constitutional law while RLUIPA focuses on land uses for religious exercise and expressly does not require that it be compelled by or be central to a system of religious belief. *See* Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024, 1033 (9th Cir. 2007), *aff'd* 535 F.3d 1058 (9th Cir. 2008).

63. 42 U.S.C. § 2000cc(a)(2). For a discussion of the individualized determination trigger, see *Cambodian Buddhist Society of Connecticut, Inc. v. Planning & Zoning Commission of Town of Newtown*, 285 Conn. 381, 415–20, 941 A.2d 868, 890–93 (2008). RLUIPA also prohibits a land use regulation that "unreasonably limits" religious assemblies, institutions, or structures within

The initial question is how burdensome a restriction must be in order to be "substantial." Clearly neither the First Amendment nor RLUIPA purport to exempt religious activity from land use regulations. Religious entities are only protected when the burden becomes substantial.[64]

Several formulations of a test for defining how substantial the burden must be to trigger some legal protection have been used. In *Midrash Sephardi, Inc. v. Town of Surfside*,[65] the court held that the burden must be more than an "inconvenience" on religious exercise. To be impermissible, the burden must be "akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly" or to "force adherents to forego religious precepts . . . ."[66] In *Civil Liberties for Urban Believers (CLUB) v. City of Chicago*,[67] the court held that to constitute a substantial burden, the restriction must "bear[] direct, primary, and fundamental responsibility for rendering religious exercise -- including the use of real property for the purpose thereof within the regulated jurisdiction generally -- effectively impractical."[68] In *Guru Nanak Sikh Society of Yuba City v. County of Sutter*,[69] the court held the regulation must be "oppressive," imposing a significant restriction on religious exercise.

By contrast, courts have held that a facially neutral land use regulation adopted for legitimate purposes unrelated to religion is considered to be an incidental rather than a substantial burden.[70]

Application of "Substantial Burden" and "Unreasonable Limitation" Tests

The application of these tests has for the most part resulted in typical land use regulations being found not to impose a substantial burden. Many courts have held that typical zoning restrictions on the location of particular religious uses do not impose a substantial burden and are not an unreasonable limitation, particularly if reasonable alternative locations in the jurisdiction are permissible.[71]

A typical restriction is to limit the location of places of worship in residential areas. The court in *Midrash Sephardi, Inc. v. Town of Surfside*[72] held that "reasonable 'run of the mill' zoning considerations" (such as locating places of assembly outside of residential areas and addressing the size, congruity with existing nearby uses, and parking availability for a proposed land use) are not a substantial burden. The court in *Grace United Methodist Church v. City of Cheyenne*[73] similarly upheld the city's refusal to grant a variance for the

a jurisdiction. 42 U.S.C. § 2000cc(b)(3)(B). This limitation is often addressed concurrently with the "substantial burden" limitation.

64. "[T]he adjective 'substantial' must be taken seriously lest RLUIPA be interpreted to grant churches a blanket immunity from land-use regulations." World Outreach Conference Ctr. v. City of Chi., 591 F.3d 531, 539 (7th Cir. 2009).

65. 366 F.3d 1214, 1227 (11th Cir. 2004).

66. *Id. See also* Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643 (10th Cir. 2006) (not a substantial burden if regulation makes it more difficult to exercise religion but has no tendency to coerce action contrary to religious belief); San Jose Christian Coll. v City of Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004). In *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303 (6th Cir. 1983), the court applied the following two-step inquiry to determine whether there was a substantial burden: (1) What is the nature of the religious observance at stake (with "fundamental tenets" and "cardinal principles" receiving greater protection)? and (2) What is the nature of the burden (with indirect economic impacts being permissible)?

67. 342 F.3d 752, 759–62 (7th Cir. 2003). In *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464 (8th Cir. 1991), the challenged regulation excluded churches as incompatible with revitalization of a central business district. The court remanded the case for additional findings under a traditional content-neutral time, place, and manner regulation of speech analytic framework (e.g., adequacy of studies relative to adverse secondary impacts of church location in the commercial district). *See also* Love Church v. City of Evanston, 896 F.2d 1082 (7th Cir. 1990); Int'l Church of the Foursquare Gospel v. City of Chi. Heights, 955 F. Supp. 878 (N.D. Ill. 1996) (denial of special use permit to locate a church in a vacant commercial building did not constitute a substantial burden because churches were a permitted use in more than 60 percent of the city); Stuart Circle Parish v. Bd. of Zoning Appeals, 946 F. Supp. 1225 (E.D. Va. 1996).

68. *CLUB*, 342 F.3d at 761. *See also* San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1033–36 (9th Cir. 2004).

69. 456 F.3d 978, 988 (9th Cir. 2006). *See also* Int'l Church of the Foursquare Gospel v. City of San Leandro, 634 F.3d 1037 (9th Cir. 2011) (exclusion of church from industrial district, where there is testimony that no ready alternatives are available, is substantial burden).

70. Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 275–76 (3d Cir. 2007).

71. In *Chabad of Nova, Inc. v. City of Cooper City*, the parties used an analysis of the availability of reasonable alternative avenues for expression similar to that used in adult business siting cases. 575 F. Supp. 2d 1280, 1289 (S.D. Fla. 2008).

72. 366 F.3d 1214, 1227 (11th Cir. 2004). *See also* Hollywood Cmty. Synagogue, Inc. v. City of Hollywood, 430 F. Supp. 2d 1296, 1317–19 (S.D. Fla. 2006) (prohibition on holding services in residentially zoned areas where there are other areas suitably zoned is not a substantial burden under RLUIPA, but showing of substantial burden not required if unequal treatment is established); Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of W. Linn, 338 Or. 453, 111 P.3d 1123 (2005) (requirement that conditional use permit application be revised to provide larger buffers between proposed meeting house and adjacent single-family residential area not a substantial burden under RLUIPA). In *Hollywood Community Synagogue, Inc. v. City of Hollywood*, 436 F. Supp. 2d 1325 (S.D. Fla. 2006), the plaintiff did secure relief on constitutional grounds. *See also* First Vagabonds Church of God v. City of Orlando, 610 F.3d 1274 (11th Cir. 2010) (upholding ordinance regulating large-scale feeding operations in public park under state RLUIPA-like law); Tran v. Gwinn, 262 Va. 572, 580, 554 S.E.2d 63, 67 (Va. 2001) (requirement of special use permit for places of worship in a residential conservation zone is only a minimal and incidental burden of free exercise of religion); Open Door Baptist Church v. Clark Cnty., 140 Wash. 2d 143, 995 P.2d 33 (2000) (requiring a church in a rural estate zoning district to obtain a conditional use permit is a permissible incidental burden on free exercise of religion).

73. 451 F.3d 643 (10th Cir. 2006). The proposed day care center would have operated eighteen hours per day, seven days per week, and would have been open to the public regardless of religious affiliation. The zoning ordinance limited day care facilities in this zone to those serving twelve or fewer children. *See also* Redwood Christian Schs. v. Cnty. of Alameda, 2007 WL 781794 (N.D. Cal. 2007) (denial of conditional use permit for a 650-student school held to not be an unreasonable limitation under RLUIPA where denial based solely on impacts on the land and neighborhood, without consideration of religious orientation of school and other sites, existed within jurisdiction for school siting).

church's proposed 100-child day care center in a low-density residential neighborhood. In a pre-RLUIPA case, *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*,[74] the court upheld an ordinance that prohibited the construction of churches in most of the city's residential zoning districts. Churches were allowed only in some multifamily residential and business districts, which comprised some 10 percent of the city land area. The court held that there was not a substantial burden on religious practices because the ordinance did not prohibit construction but only restricted the particular sites available to the congregation.[75] In *Grosz v. City of Miami Beach*,[76] a leading pre-*Smith* case, the court applied a similar analysis and reached a like result. The court upheld a zoning enforcement action taken to prohibit an elderly rabbi from conducting religious services in a converted garage adjacent to his house. The property was in a single-family zoning district. Churches were prohibited in that district but allowed as permitted uses in all other zoning districts. The court found that the interest in protecting residential neighborhoods from the impacts of institutional uses was important and that the burden on the petitioner to move his religious services to an appropriate zoning district was not substantial, since half the city (including an area only four blocks away from the plaintiff's house) freely allowed religious institutions.

In other instances the land use regulations limit non-commercial uses, including religious uses, in commercial or industrial areas in order to promote economic development. The court in *CLUB*[77] held that Chicago's land use restrictions for places of worship did not violate RLUIPA or the constitution. The challenged zoning ordinance allowed places of worship by right in all residential districts (which included the majority of land available for development) but required a special use permit in commercial districts and a rezoning in manufacturing districts.[78] The court in *San Jose Christian College v. City of Morgan Hill*[79] held that restriction of places of worship to particular zoning districts and refusals to rezone property for religious uses did not impose an impermissible substantial burden on religious exercise. In *Petra Presbyterian Church v. Village of Northbrook*,[80] the court upheld a prohibition that kept churches and secular membership organizations from locating in an industrial zoning district.

Other nondiscriminatory land use regulations on religious uses are typically upheld. Examples include the following routine land

74. 699 F.2d 303 (6th Cir. 1983). The court applied a two-step inquiry to determine whether there was a substantial burden: (1) What is the nature of the religious observance at stake (with "fundamental tenets" and "cardinal principles" receiving greater protection)? and (2) What is the nature of the burden (with indirect economic impacts being permissible)?

75. *Id. See also* Johnson v. Caudill, 475 F.3d 645 (10th Cir. 2006) (noting wide range of other zoning districts within which church could operate day care facility).

76. 721 F.2d 729 (11th Cir. 1983). *See also* Christian Gospel Church, Inc. v. City & County of S.F., 896 F.2d 1221 (9th Cir. 1990); Messiah Baptist Church v. Cnty. of Jefferson, 859 F.2d 820 (10th Cir. 1988) (upholding denial of approval to build a church in an agricultural zone); United States v. Airmont, 839 F. Supp. 1054 (S.D.N.Y. 1993) (proposed church may be compelled to comply with zoning). A zoning provision that closed a homeless shelter being operated as an accessory use by a church was upheld on the basis that the burden on the church to move the shelter to an appropriate zoning district was less than the burden on the county if it were forced to allow the shelter to operate in violation of the ordinance. First Assembly of God of Naples, Fla., Inc. v. Collier Cnty., 27 F.3d 526 (11th Cir. 1994). For other cases applying a similar balancing analysis, *see, e.g.*, Daytona Rescue Mission, Inc. v. City of Daytona Beach, 885 F. Supp. 1554 (M.D. Fla. 1995); Church of Jesus Christ of Latter-Day Saints v. Jefferson Cnty., 741 F. Supp. 1522 (N.D. Ala. 1990).

77. 342 F.3d 752, 759–62 (7th Cir. 2003). *See also* Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 615 F. Supp. 2d 980 (D. Ariz. 2009) (denial of conditional use permit for church not a substantial burden when other sites outside three-block commercial redevelopment area available); Williams Island Synagogue, Inc. v. City of Aventura, 358 F. Supp. 2d 1207 (S.D. Fla. 2005) (upholding denial of conditional use permit for alternative location for synagogue, holding inconveniences and distractions to worshippers that can be addressed in current location do not constitute a substantial burden); Episcopal Student Found. v. City of Ann Arbor, 341 F. Supp. 2d 691 (E.D. Mich. 2004) (denial of permit to demolish historic building in order to construct a larger building held not to be a substantial burden); Vineyard Christian Fellowship v. City of Evanston, 250 F. Supp. 2d 961, 991–93 (N.D. Ill. 2003) (limitations on religious uses in zoning district not a substantial burden, but regulation held to violate Equal Protection Clause); Dixon v. Town of Coats, No. 5:08-CV-489-BR, 2010 WL 2347506 (E.D.N.C. June 9, 2010) (no substantial burden when churches excluded from six-block central business district but allowed in rest of town).

There are similar pre-RLUIPA holdings. *See, e.g.,* Cornerstone Bible Church v. City of Hastings, 948 F.2d 464 (8th Cir. 1991). The challenged regulation excluded churches as incompatible with revitalization of a central business district. The court remanded the case for additional findings under a traditional content-neutral time, place, and manner regulation of speech analytic framework (e.g., adequacy of studies relative to adverse secondary impacts of church location in the commercial district). *See also* Love Church v. City of Evanston, 896 F.2d 1082 (7th Cir. 1990) (special use permit requirement constitutional); Int'l Church of the Foursquare Gospel v. City of Chi. Heights, 955 F. Supp. 878 (N.D. Ill. 1996) (denial of special use permit to locate a church in a vacant commercial building did not constitute a substantial burden because churches were a permitted use in more than 60 percent of the city); Stuart Circle Parish v. Bd. of Zoning Appeals, 946 F. Supp. 1225 (E.D. Va. 1996); City of Colo. Springs v. Blanche, 761 P.2d 212 (Colo. 1988) (requirement that church obtain a conditional use permit constitutionally permissible).

78. *See also* Berry v. Jefferson Parish, 326 F. App'x 748 (5th Cir. 2009) (dismissing claim by owners who wished to sell the land to "Christian-affiliated developer"); Dilauria v. Ann Arbor Charter Twp., 30 F. App'x 501 (6th Cir. 2002) (owner proposing to donate land to religious entity for religious use had standing); Moxley v. Town of Waldersville, 601 F. Supp. 2d 648 (D. Md. 2009) (owner losing contract to sell to religious entity has standing).

79. 360 F.3d 1024, 1033–36 (9th Cir. 2004) (denial of rezoning for religious education use not a substantial burden where alternative sites within city were available). *But cf.* Int'l Church of the Foursquare Gospel v. City of San Leandro, 634 F.3d 1037 (9th Cir. 2011) (exclusion of places of worship from industrial zones creates triable issue of fact regarding substantial burden).

80. 489 F.3d 846 (7th Cir. 2007). The court noted that "[w]hen there is plenty of land on which religious organizations can build churches (or, as is common nowadays, convert to churches buildings previously intended for some other use) in a community, the fact that they are not permitted to build everywhere does not create a substantial burden." *Id.* at 851. The court held that to establish a substantial burden the religious entity would have to establish that exclusion from the industrial zone left such a paucity of other potential sites that a substantial burden was created.

use restrictions: limitations on the size and height of buildings used for religious uses;[81] limits on the height and size of signs;[82] a requirement confining religiously-sponsored multifamily housing to a zoning district that allows multifamily housing;[83] a requirement that within a rural-agricultural zoning district all nonagricultural, nonresidential uses be separated by at least 1,000 feet from existing agricultural and residential uses;[84] routine historic preservation standards, especially where the regulations do not totally frustrate religious exercise;[85] and a requirement that places of worship be harmonious with the general character of a rural area in order to secure a special use permit.[86]

The costs and procedural difficulties inherent in securing special use permits and other regulatory approvals have been held not to impose a substantial burden.[87] In *CLUB* the court noted that the additional costs of securing special use permits or rezonings did not make location of places of worship in the city impractical, and thus there was not a substantial burden on religious exercise under the act. However, imposition of a requirement to obtain permits that were not in fact required, especially when imposed on a small religious organization with limited resources, can be a substantial burden.[88]

Some cases have, however, found land use regulations to impose a substantial burden or to be an unreasonable limitation on free exercise, particularly when there have been multiple denials of land use approvals for a particular applicant or the grounds for denial seem arbitrary. In *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*,[89] the court found that the city's refusal to

81. *See, e.g.*, Living Water Church of God v. Charter Twp. of Meridian, 258 F. App'x 729 (6th Cir. 2007) (25,000-square-foot limit on buildings in residential district not a substantial burden as applied to special use permit for school adjacent to church); Vision Church v. Vill. of Long Grove, 468 F.3d 975, 999–1000 (7th Cir. 2006) (55,000-square-foot size limit on church not a substantial burden); Cathedral Church of the Intercessor v. Vill. of Malverne, 353 F. Supp. 2d 375, 390 (E.D.N.Y. 2005) (limits on size of expansion and off-street parking requirements not a substantial burden); Korean Buddhist Dae Won Sa Temple of Haw. v. Sullivan, 87 Haw. 217, 953 P.2d 1315 (1998) (height limit on temple not a substantial burden). *See also* Love Church v. City of Evanston, 896 F.2d 1082, 1086 (7th Cir. 1990).

82. Trinity Assembly of God of Balt. City, Inc. v. People's Counsel for Balt. Cnty., 407 Md. 53, 96–97, 962 A.2d 404, 429–31 (2008) (upholding sign size limit of 25 square feet and six-foot height as applied to proposed church sign of 250 square ft. and 25-foot height with changeable copy). In *Osborne v. Power*, 318 Ark. 858, 890 S.W.2d 570 (1994), the court held a large light and sound Christmas display at a residence could be enjoined as a nuisance.

83. Greater Bible Way Temple of Jackson v. City of Jackson, 478 Mich. 373, 733 N.W.2d 734 (2007) (construction of apartment complex not religious exercise, but even if it were, requirement to build in appropriate zoning district is not a substantial burden).

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

85. World Outreach Conference Ctr. v. City of Chi., 591 F.3d 531, 538–39 (7th Cir. 2009) (holding that refusal to allow demolition of landmarked building in order to build a church family life center is not a substantial burden when church has sufficient vacant land on site to construct the center). Also see the discussion of application of historic preservation standards in *St. Bartholomew's Church*, *supra* at n.21.

86. Cambodian Buddhist Soc'y of Conn., Inc. v. Planning & Zoning Comm'n of Town of Newtown, 285 Conn. 381, 941 A.2d 868 (2008).

87. Vision Church v. Vill. of Long Grove, 468 F.3d 975, 990–91 (7th Cir. 2006) (requirement that church secure a special use permit does not in and of itself unreasonably limit religious assembly); Konikov v. Orange Cnty., 410 F.3d 1317, 1323–24 (11th Cir. 2005) (requirement to obtain a special use permit before operating a "religious organization" in a residential zoning district is not a substantial burden). *See also* Christian Methodist Episcopal Church v. Montgomery, No. 4:04-CV-22322, 2007 WL 172496 (D.S.C. 2007) (requirement to seek rezoning or conditional use permit not a substantial burden under RLUIPA); Men of Destiny Ministries, Inc. v. Osceola Cnty., No. 6:06-cv-624, 2006 WL 3219321 (M.D. Fla. 2006) (requirement that religiously-based drug treatment home secure conditional use permit not a substantial burden under RLUIPA); Sisters of St. Francis Health Servs., Inc. v. Morgan Cnty., 397 F.Supp. 2d 1032, 1050–51 (S.D. Ind. 2005) (requirement that proposed hospital expansion submit permit applications not a substantial burden under RLUIPA); Hale O Kaula Church v. Maui Planning Comm'n, 229 F. Supp. 2d 1056 (D. Haw. 2002) (requiring religious uses to obtain a special use permit is not a facial violation of RLUIPA); Cnty. of L.A. v. Sahag-Mesrob Armeina Christian Sch., 188 Cal. App. 4th 851, 116 Cal. Rptr. 3d 61 (2010) (requirement to secure conditional use permit prior to opening 800-student school not a substantial burden); Ridley Park United Methodist Church v. Zoning Hearing Bd., 920 A.2d 953 (Pa. Commw. Ct. 2007) (refusal to allow church to operate day care center on site had a de minimus impact on religious exercise); Tran v. Gwinn, 262 Va. 572, 554 S.E.2d 63 (2001) (upholding ordinance requiring special use permit for places of worship in residential zoning district).

88. World Outreach Conference Ctr. v. City of Chi., 591 F.3d 531, 537–38 (7th Cir. 2009). The court noted that the resources of the religious institution must be considered as "the burden is relative to the weakness of the burdened." *Id.* In this case the religious institution was seeking to continue use of a former YMCA building and rent its rooms to victims of Hurricane Katrina (while the city alderman for that site had sought to have the building used for commercial purposes by a developer who was one of his substantial financial backers).

89. 396 F.3d 895 (7th Cir. 2005). The court noted that this was an as-applied challenge as opposed to the facial challenge in the earlier *CLUB* case. It did not help the city's case that a Protestant church was already located on one adjoining tract and another had been approved for the other side of the site. *See also* Rocky Mountain Christian Church v. Bd. of County Comm'rs of Boulder Cnty., 613 F.3d 1229 (10th Cir. 2010) (denial of most aspects of special use permit application for expansion of church complex in rural area).

A substantial burden has been found to exist in several federal district court cases. *See* Reaching Heart Int'l, Inc. v. Prince George's Cnty., 584 F. Supp. 2d 766 (D. Md. 2008) (county's actions, including denial of land classification change in water and sewer plan, increase in impervious surface limits, and denial of subdivision, improperly precluded church construction on vacant parcel); Chabad of Nova, Inc. v. City of Cooper City, 575 F. Supp. 2d 1280 (S.D. Fla. 2008) (invalidating exclusion of religious assemblies from suburban business district); Mintz v. Roman Catholic Bishop of Springfield, 424 F. Supp. 2d 309 (D. Mass. 2006) (denial of permit to construct parish center with social hall, kitchen, and offices adjacent to existing church and rectory due to lot coverage limits improper); Elsinore Christian Ctr. v. City of Lake Elsinore, 291 F. Supp. 2d 1083, 1088–96 (C.D. Cal. 2003) (denial of a conditional use permit for relocation of a church in a downtown district unlawful); Cottonwood Christian Ctr. v. Cypress Redev. Agency, 218 F. Supp. 2d 1203 (C.D. Cal. 2002) (enjoining city action to acquire vacant parcel for commercial redevelopment after denial of conditional use permit for a 4,700-seat church facility on the site); Alpine Christian Fellowship v. Cnty. Comm'rs of Pitkin Cnty., 870 F. Supp. 991 (D. Colo. 1994) (restricting establishment of a religious school within an existing permitted church building due to traffic concerns and neighborhood compatibility not compelling grounds for denial). *See also* Bikur Cholim, Inc. v. Vill. of Suffern, 664 F. Supp. 2d 267 (S.D.N.Y. 2009) (motion to dismiss denied, as denial of variance for communal home

rezone (based in large part on a concern that other institutional uses might locate on the site if the church's plans for construction were unsuccessful) posed a substantial burden under RLUIPA. The church had submitted multiple applications and modified its proposal to address municipal concerns, yet the court found the city had engaged in deliberate and unjustified delay. Likewise, in *Guru Nanak Sikh Society of Yuba City v. County of Sutter*,[90] the court held that the denial of the initial application for a conditional use permit for a temple on a small tract within the city and denial of a second conditional use permit application for a rural site zoned for agricultural use constituted a substantial burden without compelling governmental interests. The court concluded that the history of denials, coupled with the city's broad and inconsistent reasons for denial, showed that the county was likely to deny approval for almost any location, thus constituting a substantial burden. A third example is *Westchester Day School v. Village of Mamaroneck*.[91] This protracted dispute resulted from the denial of a permit for a new classroom and renovations of an existing building at a religious day school. The court noted that the local government's decision making was conducted with "an arbitrary blindness to the facts." The facts that the district court had found grounds for denial to be arbitrary and capricious under state land use law, that the school had no financially viable alternatives, and that their application was denied outright rather than approved with conditions were also factors in determining the denial to be a substantial burden.

In a case that received national attention, the court in *Murphy v. Zoning Commission of New Milford*[92] held an order limiting attendance at prayer meetings in a residence to be unlawful. The town had issued a cease and desist order under its zoning ordinance to prohibit attendance by more than twenty-five persons who were not family members at regularly scheduled prayer meetings in a residence. The trial court held that the order violated both RLUIPA and the Free Exercise Clause. The lower court also noted that the restriction could have been more narrowly tailored to specifically address parking and traffic concerns. However, the court of appeals subsequently held that the case was not ripe, as the homeowners had not sought a variance, which would have stayed all enforcement actions until a decision was made on the variance petition.[93]

In cases finding a substantial burden, it is notable that often the applicant made efforts to comply with land use regulations and concerns but suffered multiple rebuffs. In several instances the professional planning staff and planning board recommended approval but elected officials denied the application. The applicants often agreed to mitigation conditions.[94] Also, applications with a high degree of discretion, as is the case with a petition for a rezoning, have a greater potential for masking religious discrimination than do special or conditional use permits with clearly bounded discretion and the requirement for evidence and findings to support the decision.[95] In these situations it is incumbent upon the jurisdiction denying approval to clearly establish a legitimate, nondiscriminatory land use basis for its decision.

Defining a Compelling State Interest and Employing the Least Restrictive Means

Most land use regulations of religious uses have a legitimate secular basis[96] and are routinely upheld as such. Examples include concerns about traffic and parking impacts, property value impacts,

to provide temporary housing near hospital for use by observant Jews to visit the sick on the days travel could be a substantial burden, which is a question for the jury); Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp., 259 Mich. App. 315, 675 N.W.2d 271 (2003) (remanding appeal of denial of special use permit for K–3 religious school for findings).

In *Westchester Day School v. Village of Mamaroneck*, 386 F.3d 183 (2d Cir. 2004), the court noted that a denial of some aspects of a project is not equivalent to a total denial of the use and that the protection afforded by RLUIPA to the religious aspects of a use do not extend to the secular portions of the use.

90. 456 F.3d 978 (9th Cir. 2006). Applying this standard, the court in *Grace Church of North County v. City of San Diego*, 555 F. Supp. 2d 1126 (S.D. Cal. 2008), held that a conditional use permit for a religious use in an industrial park that was issued for a five-year term rather than the requested ten-year term (and with no reasonable expectation that an extension would be granted) constituted a substantial burden. The court noted that considerable hostility was expressed in the permitting process toward any religious use of this industrial area.

91. 504 F.3d 338, 351–52 (2d Cir. 2007). The litigation proved costly for the village. In addition to over $900,000 in its own legal fees, a newly elected village council settled this litigation with an agreement to issue the regulatory approvals and payment of $4.75 million in damages and legal fees for the plaintiff. Also see *Fortress Bible Church v. Feiner*, 734 F. Supp. 2d 409 (S.D.N.Y. 2010), where the court held that a denial of permission to construct a church that was motivated by bad faith and an improper purpose—here the failure to make a significant donation to the town—was a substantial burden.

92. 289 F. Supp. 2d 87 (D. Conn. 2003).

93. Murphy v. New Milford Zoning Comm'n, 402 F.3d 342 (2d Cir. 2005).

94. By contrast, challenges under RLUIPA are much less likely to be successful where there is evidence that the local government attempted to work with the applicant and it is the applicant who initiates litigation prior to exhausting reasonable efforts to secure approval. *Westgate Tabernacle, Inc. v. Palm Beach County*, 14 So. 3d 1027 (Fla. Dist. Ct. App. 2009), illustrates the point. This case involved continued operation of a homeless shelter in a zoning district that required a conditional use permit for such a use. The shelter opened without seeking the required permit. After a notice of violation, a permit application was submitted but then withdrawn, even though the county had offered assistance in seeking the permit. The court held that the requirement to apply for a special exception was not a substantial burden (nor was the requirement to find a location in an appropriately zoned area or to secure the proper permits).

95. For a discussion of these factors, see *Timberline Baptist Church v. Washington County*, 211 Or. App. 437, 154 P.3d 759 (2007) (finding denial of special use permit for parochial school proposed to be adjacent to permitted church and day care but outside urban growth boundary did not impose substantial burden under RLUIPA).

96. In *First Assembly of God v. City of Alexandria*, 739 F.2d 942 (4th Cir. 1984), the court upheld conditions in a special use permit that limited enrollment in a church day school to preschool through ninth grade and required erection of a fence and a landscaped buffer between the school and the surrounding neighborhood, finding these restrictions had a strictly secular purpose.

land use compatibility,[97] adequacy of utilities, revitalization of commercial areas,[98] health and safety concerns,[99] or preservation of historic and aesthetic attributes of a community.[100] This documentation can be in the form of staff analysis or planning studies, consideration of studies conducted in other communities, or comments received during the public participation and hearings leading to adoption of the regulation. This information should be developed and considered during the process of adoption of the regulation, not prepared as an after-the-fact rationalization.

However, *if* the regulation imposes a substantial burden, a more exacting compelling interest must be established. RLUIPA expressly requires that a substantial burden can only be justified by a compelling governmental interest and use of the least restrictive means of addressing that interest.[101]

As for a compelling interest, regulations of religiously-based conduct that have been upheld have generally addressed actions that "invariably posed some substantial threat to public safety, peace or order."[102] For example, a prohibition of religiously motivated but dangerous activity, such as handling poisonous snakes, has long been allowed.[103]

Typical land use concerns such as traffic congestion and neighborhood or plan compatibility rarely rise to the level of a compelling governmental interest.[104] On the other hand, building regulations on fire safety and similar concerns would.[105]

Particular attention should be given to the question of whether regulation leaves available reasonable alternative avenues for religious expression. For example, a zoning ordinance that prohibited all places of worship throughout the entire jurisdiction would almost certainly be invalid. On the other hand, a more carefully crafted zoning restriction (for example, one that restricted places of worship seating more than 200 persons to particular zoning districts or sites fronting adequate roads) would likely be acceptable.

Treating Religious Land Uses on "Equal Terms"

Land use regulations affecting religious uses must be equally applied to secular land uses with similar land use impacts. For example, a zoning restriction that prohibits a religiously sponsored soup kitchen while permitting an adjacent commercial restaurant would raise serious questions about whether there was in fact a legitimate secular purpose for the restriction. A discriminatory regulation would also raise due process[106] and equal protection[107] objections. That similar secular uses were not being similarly regulated

97. *See, e.g.*, Christian Gospel Church, Inc. v. City & Cnty. of S.F., 896 F.2d 1221 (9th Cir. 1990) (upholding denial of a conditional use permit for a church in a residential zoning district); Messiah Baptist Church v. Cnty. of Jefferson, 859 F.2d 820 (10th Cir. 1988) (upholding prohibition of substantial church complex in a rural area).

98. *See, e.g.*, Int'l Church of the Foursquare Gospel v. City of Chi. Heights, 955 F. Supp. 878 (N.D. Ill. 1996) (upholding the denial of a permit to locate a church in a vacant department store based on the city's need to preserve the area for commercial revitalization).

99. *See, e.g.*, Congregation Beth Yitzchok of Rockland, Inc. v. Town of Ramapo, 593 F. Supp. 655 (S.D.N.Y. 1984) (upholding a Ramapo, N.Y., requirement for zoning compliance as applied to a religious nursery school being operated by a synagogue). The court applied a balancing test and concluded that public fire safety regulations justified even a substantial burden on religious practices. Allegations that restriction is necessary to support a compelling interest must be factually supported. *See, e.g.*, Reaching Heart Int'l, Inc. v. Prince George's Cnty., 584 F. Supp. 2d 766, 788 (D. Md. 2008) (no evidence in record to factually support assertion that land use restriction needed to protect adjacent water supply reservoir).

100. *See, e.g.*, St. Bartholomew's Church v. City of N.Y., 914 F.2d 348.

101. 42 U.S.C. § 2000cc(a).

102. Sherbert v. Verner, 374 U.S. 398, 403 (1963).

103. *See, e.g.*, State v. Massey, 229 N.C. 734, 51 S.E.2d 179, *appeal dismissed*, 336 U.S. 942 (1949).

104. *See, e.g.*, Int'l Church of the Foursquare Gospel v. City of San Leandro, 634 F.3d 1037 (9th Cir. 2011) (expressing doubt that preservation of land for industrial development is a compelling interest); Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 353 (2d Cir. 2007) (denial based on "undue deference to the opposition of a small group of neighbors" is not a compelling interest); Rocky Mountain Christian Church v. Bd. of County Comm'rs of Boulder Cnty., 612 F. Supp. 2d 1163, 1174–75 (D. Colo. 2009) (neighborhood and plan compatibility, protection of agricultural lands not compelling interests when comparable secular use not similarly restricted); Mintz v. Roman Catholic Bishop of Springfield, 424 F. Supp. 2d 309, 323–24 (D. Mass. 2006) (setback and lot coverage limits not a compelling interest). In *Grace Church of North County v. City of San Diego*, 555 F. Supp. 2d 1126 (S.D. Cal. 2008), the court held that preservation of land within an industrial park for industrial uses could not be considered a compelling interest when the regulation allowed religious uses with a conditional use permit, allowed office uses, and granted a conditional use permit for five years rather than the requested ten-year permit.

105. *See, e.g.*, Peace Lutheran Church & Acad. v. Vill. of Sussex, 2001 WI App 139, 631 N.W.2d 229 (upholding requirement for a fire sprinkler system in a church building challenged under state constitutional provision on free exercise).

106. *See, e.g.*, Catholic Bishop of Chi. v. Kingery, 371 Ill. 257, 20 N.E.2d 583 (1939) (prohibition of parochial school in zoning district that allows public schools is capricious and invalid).

107. Reaching Heart Int'l, Inc. v. Prince George's Cnty., 584 F. Supp. 2d 766, 781–84 (D. Md. 2008) (actions to prevent church use of rural land while allowing others to use land in this way, when accompanied by statements indicating intentional religious discrimination, violates Equal Protection Clause); Open Homes Fellowship, Inc. v. Orange Cnty., 325 F. Supp. 2d 1347 (M.D. Fla. 2004) (denial of permit for group home housing faith-based substance abuse program, while allowing other group homes by right in same zoning district, has no rational basis and violates both due process and equal protection); Vineyard Christian Fellowship v. City of Evanston, 250 F. Supp. 2d 961, 975–79 (N.D. Ill. 2003) (ordinance prohibiting religious institutions from conducting services in zoning district while allowing cultural and membership organizations violates Equal Protection Clause).

would certainly undercut an argument that there is a compelling need for the regulation.

A local government must avoid disproportionate impacts among different religions.[108] If one religion is singled out for favorable treatment, the regulation may well violate the Establishment Clause. On the other hand, if the regulation is tailored to prevent a particular religious practice, such as Santería animal slaughter in the *Lukumi Babalu Aye* case, the regulation violates the Free Exercise Clause. It is critical therefore that a land use regulation be applied uniformly across the board to all religious uses with similar impacts. Toward this end it is advisable to use objective land use standards where possible, thereby avoiding discretionary standards that heighten the risk of discriminatory application to those religious uses not favored by a particular community.

A case illustrating this principle is *Islamic Center of Mississippi, Inc. v. City of Starkville*,[109] which invalidated the denial of approval to use an existing house in a residential zone for a mosque. Considerable circumstantial evidence of religious discrimination was at play in this case, as the city had routinely approved all similar requests made by Christian entities. Yet the city council denied the approval for the Islamic Center on the basis of a neighbor's complaint about congestion, parking, and traffic problems. The court applied a *Sherbert*-like analysis in concluding that this application of the zoning ordinance substantially burdened religious practices by allowing no sites for worship within walking distance of a local campus and that it was not narrowly drawn in support of a substantial governmental interest.

The religious beliefs of a person or a group are beyond the scope of governmental regulation. A land use regulation aimed at religious activities alone, at a particular religion, or even at a particular religious land use would violate both the Constitution and RLUIPA. It is impermissible for a regulation to be targeted at minority or unpopular religious uses while exempting mainstream religious uses with similar land use impacts.[110] Regulating a particular land use activity out of disdain for the religious beliefs underlying that conduct or based on the type of people practicing those beliefs is impermissible. A rezoning aimed directly at preventing the construction of a particular church was held to be potentially invalid in *Abierta v. City of Chicago*.[111]

One provision of RLUIPA explicitly requires that land use regulations not be imposed "in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution."[112] This section of RLUIPA does not include the qualifications included in the law's general rule. It does not reference a substantial burden, a similarly situated secular use, or a compelling governmental interest. Courts have therefore held that no showing of a substantial burden is required if there is a violation of the equal terms provision. In *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*,[113] the court noted that the statute includes the substantial burden test in one section but not in this section, indicating an intent not to require such a showing (and noting that free exercise jurisprudence does not require such a showing where there is religious discrimination involved). The court, however, did not read this section to create strict liability for any and all disparate treatment, as only differential treatment of a similarly situated use constitutes treatment on less than the requisite equal terms. The *Lighthouse Institute for Evangelism* court held that the critical inquiry is whether there is differential treatment of an analogous secular use that has a similar impact on the aims of the regulation.[114] Therefore an examination of the purposes of the regulation, and a principled rationale for any differential treatment, are important parts of this inquiry.

Not all courts have inquired into the purpose of a regulation and have thus been more demanding that generally similar uses be treated equally, particularly in facial challenges.[115] It has been held to be a RLUIPA violation to prohibit places of worship in a commercial district that allows other nonprofit uses, such as private clubs and lodges;[116] to prohibit religious assembly where comparable

108. Facial neutrality of the ordinance is inadequate. Consideration must also be given to the neutrality of the ordinance as applied. *Id.* at 534.

109. 840 F.2d 293 (5th Cir. 1988). See also *Church of Jesus Christ of Latter-Day Saints v Jefferson County*, 741 F. Supp. 1522 (N.D. Ala. 1990), where the court held that a refusal to rezone to allow construction of a church on an eleven-acre tract in a low-density residential area of the county impermissibly burdened free expression of religion.

110. "[T]he First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general. [citations omitted]" Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993).

111. 449 F. Supp. 637 (N.D. Ill. 1996) (refusing to dismiss a claim based on an allegation that a rezoning initiated after notice of church's offer to purchase violated free expression, equal protection, free speech, and RFRA). *See also* Storm v. Town of Woodstock, 944 F. Supp. 139 (N.D.N.Y. 1996) (remanding case for additional fact-finding as to whether parking restriction was motivated by intent to inhibit "expressive, spiritual, and religious gatherings" at an open air meadow).

112. 42 U.S.C. § 2000cc(b)(1) (2010). Some of the cases also approach land use regulatory distinctions between comparable religious and secular uses as an "unreasonable limitation" under 42 U.S.C. § 2000cc(b)(3) (2010). *See, e.g.*, Chabad of Nova, Inc. v. City of Cooper City, 575 F. Supp. 2d 1280 (S.D. Fla. 2008). *See generally* Sarah K. Campbell, Note, *Restoring RLUIPA's Equal Terms Provisions*, 58 DUKE L.J. 1071 (2009) (arguing for strict implementation of the plain text of the provision).

113. 510 F.3d 253, 262–64 (3d Cir. 2007). *See also* Hollywood Cmty. Synagogue, Inc. v. City of Hollywood, 430 F. Supp. 2d 1296, 1317–19 (S.D. Fla. 2006) (showing of substantial burden not required if unequal treatment is established).

114. *Lighthouse Institute for Evangelism*, 510 F.3d at 266. The court in *River of Life Kingdom Ministries v. Village of Hazel Crest*, 611 F.3d 367 (7th Cir. 2010), applied a variation of this test. Rather than inquire as to the "regulatory purpose," which the court concluded might be too subjective and manipulative, the court inquired into the "regulatory criteria" being employed (such as addressing traffic impacts, promoting uses that generate shopping opportunities and sales tax revenues, impact on demand for public services, and the like). The court upheld the exclusion of churches, community centers, and schools from a relatively small downtown commercial district.

115. Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1230–31 (11th Cir. 2004). *See also* Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty., 450 F.3d 1295, 1308 (11th Cir. 2006).

116. *Midrash Sephardi, Inc.*, 366 F.3d 1214. *See also* Elijah Group, Inc. v. City of Leon Valley, 643 F.3d 419 (5th Cir. 2011) (violation of equal terms provision where ordinance prohibited churches from business district but allowed

secular civic assembly is allowed;[117] and to deny a special use permit for expansion of a nonconforming church and religious school where a permit had previously been issued for a somewhat similar expansion of a school in the same agricultural zoning district.[118]

The law has also been applied in a zoning enforcement context, with a court holding that it violates RLUIPA to revoke a church's accessory use approval for a catering operation by a for-profit lessee while allowing neighboring non-religious uses to conduct identical uses.[119] On the other hand, exclusion of all institutional uses, including both places of worship and schools, from an industrial zoning district, is acceptable.[120]

It is possible in narrow circumstances to treat a religious use more strictly than comparable secular uses. Courts have allowed ordinances to distinguish commercial from non-commercial places of assembly. For example, in *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*,[121] the court upheld denial of a conditional use permit for a church in a small commercial redevelopment area even though other places of assembly, such as theaters were allowed. The city established a long-standing, clear effort to redevelop this three-block area for commercial and tourism purposes. Location of a religious use there would preclude new bars, breweries, and other purveyors of alcohol given the state's rules prohibiting new liquor licenses within 300 feet of a place of worship. If there is different treatment of places of religious assembly than is the case for some other secular places of assembly, it is incumbent upon the local government to establish that this is being done to address legitimate differential land use impacts and is undertaken without any religious animus.

Another question presented by a standard of uniform application of regulations is how far a local government can go in exempting religious uses from otherwise uniform regulations, such as exempting a church message board from sign regulations. A degree of accommodation of religious practices by way of exemption is permissible.[122] For example, the federal government exempted sacramental use of wine from the general ban on alcohol use during Prohibition. In *Employment Division, Department of Human Resources v. Smith*, Justice Scalia noted that the Oregon legislature could choose to exempt sacramental use of peyote from state criminal sanctions.[123] However, an exemption that is overly broad may well raise a question as to the legitimacy of the avowed secular purpose of the regulation. Local governments should establish a record that an exemption will not significantly undermine the secular purposes of the regulation.

Special care is warranted if individualized exemptions are possible or if individualized conditions are being imposed. In these instances there is a reasonable possibility that the *Sherbert* rule may still apply: If there would be a substantial burden on religious practice, relief must be granted unless there is a compelling governmental interest not to do so and the least restrictive regulation has been employed.[124] The Court has noted also that precision in findings justifying a restriction on constitutionally protected rights is necessary when individualized land use determinations are made (such as with special or conditional use permits and variances).[125]

Exemptions come with an additional concern: Do they violate the Establishment Clause by improperly favoring a religious use over a secular use with similar land use impacts? Justice Stevens' concurring opinion in *Boerne* expressed the view that exemption

non-retail, non-religious private clubs by special use permit); Vietnamese Buddhism Study Temple in Am. v. City of Garden Grove, 460 F. Supp. 2d 1165, 1174 (C.D. Cal. 2006) (preliminary injunction halting ordinance enforcement appropriate under RLUIPA where ordinance allows private clubs and other secular assemblies by right but requires religious assemblies to secure conditional use permit).

117. Konikov Orange Cnty., 410 F.3d 1317, 1327–29 (11th Cir. 2005) (cannot prohibit religious meetings in home where family, social, and civic gatherings of same size and frequency would be allowed). *See also* Hollywood Cmty. Synagogue, Inc. v. City of Hollywood, 430 F. Supp. 2d 1296, 1319–21 (S.D. Fla. 2006) (RLUIPA violated if comparable nonreligious assemblies and institutions are allowed in a residential district while religious assembly is prohibited or if there is discrimination between religious affiliations).

118. Rocky Mountain Christian Church v. Bd. of Cnty. Comm'rs of Boulder Cnty., 613 F.3d 1229 (10th Cir. 2010). *Cf.* Grace Church of Roaring Fork Valley v. Bd. of Cnty. Comm'rs, 742 F. Supp. 2d 1156 (D. Colo. 2010) (distinguishing church use from schools and clubhouses for which county had no regulatory review, uses in other areas of the county, and substantially smaller uses).

119. Third Church of Christ, Scientist v. City of N.Y., 626 F.3d 667 (2d Cir. 2010).

120. Petra Presbyterian Church v. Vill. of Northbrook, 489 F.3d 846 (7th Cir. 2007).

121. 615 F. Supp. 2d 980 (D. Ariz. 2009). Exclusion of places of worship from a commercial redevelopment area for similar reasons was upheld in Lighthouse Institute for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 270 (3d Cir. 2007). By contrast, the court found the exclusion of places of worship included in an ordinance in effect *prior* to adoption of the redevelopment plan was a violation of the equal terms provision because its purpose was not clearly identified and it allowed secular noncommercial uses such as government services and a municipal building that had similar land use impacts to the excluded religious noncommercial uses. The court in *Digugilliers v. Consolidated City of Indianapolis*, 506 F.3d 612, 616–17 (7th Cir. 2007), was not sympathetic to the alcohol–adult use buffer rationale as support for differential treatment when applied to an entire zoning district classification. The court approved a preliminary injunction to stay an order that a small church in an industrial area be vacated or obtain a variance.

122. Ehlers-Renzi v. Connelly Sch. of the Holy Child, Inc., 224 F.3d 283 (4th Cir. 2000) (upholding ordinance that exempted parochial schools from special use permit requirements); Boyajian v. Gatzunis, 212 F.3d 1 (1st Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001) (upholding Massachusetts statute that forbade municipal zoning from excluding religious and educational uses from any zoning district). These cases generally employ the Establishment Clause analysis of *Lemon v. Kurtzman* to find that the exemptions serve a secular purpose rather than advancing or endorsing religion. 403 U.S. 602 (1971). *See also* Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) (invalidating on Establishment Clause grounds a Massachusetts statute giving churches veto power over liquor license applications for facilities within 500 feet of churches). *See generally*, Walz v. Tax Comm'n of City of N.Y., 397 U.S. 664 (1970) (upholding property tax exemption for religious organizations).

123. "But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required." 494 U.S. 872, 890 (1990).

124. "The *Sherbert* test, it must be recalled, was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct." *Smith*, 494 U.S. at 884.

125. Dolan v. City of Tigard, 512 U.S. 374, 395–96 (1994).

of a religious use from a historic preservation ordinance, but not a similar secular use, would violate the Establishment Clause.[126] For the most part, though, Establishment Clause challenges of exemptions have been unsuccessful.[127] A typical result is *Goforth Properties, Inc. v. Town of Chapel Hill*,[128] in which the court held that a zoning provision exempting churches in the central business district from off-street parking requirements was reasonable given differences between churches and businesses relative to the times they generate peak parking demands.[129] However, an exemption based solely on religious grounds rather than on differential secular impacts would be suspect.

126. *Boerne*, 521 U.S. 507, 536–37 (1997).

127. *See, e.g.*, United States v. Maui Cnty., 298 F. Supp. 2d 1010, 1015 (D. Haw. 2003).

128. 71 N.C. App. 771, 323 S.E.2d 427 (1984).

129. *See also* Cohen v. City of Des Plaines, 8 F.3d 484 (7th Cir. 1993) (upholding day care regulation exception for church nursery schools). Accepting the city's contention that the purpose of the exemption was to reduce governmental interference with religious organizations, the court held that this was an adequate secular purpose that did not endorse religious activities. *Id.*