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RLUIPA: A Powerful Federal Law Available to Religious Entities as They Seek Local Land Use Approval to Construct or Expand a Religious Facility

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It is no secret that across our divided nation there has been a rising wave of anti-Semitism. The Anti-Defamation League reports anti-Semitic incidents are at its highest recorded level since 1979. It is not surprising to see a similar rise in anti-Semitic incidents in New Jersey—with 408 reported anti-Semitic incidents in 2022 alone.[1]

In one particularly disturbing event last year, the FBI arrested an individual who made credible threats to New Jersey synagogues, putting the state's Jewish community understandably on edge.[2] This year, a Clifton man, donning a ski mask outside of an Essex County synagogue, was caught on surveillance footage at 3 a.m. throwing a lit Molotov cocktail in an attempt to firebomb the building, which fortunately was unsuccessful.[3]

Similar threats and attacks have plagued Ocean County, which has a growing Orthodox Jewish community. In fact, Lakewood—home to a large Orthodox Jewish population—was New Jersey's fastest growing municipality between 2020 and 2022, according to the new U.S. Census data.[4] After Lakewood, New Jersey towns with the largest surges in population during that same time period were Toms River, Cherry Hill, Brick and Jackson. All but Cherry Hill, in Camden County, share a border with Lakewood. As noted, with the increasing Orthodox Jewish population there has been a similar rise in threats to the community.

In 2020, Facebook removed the page of an Ocean County group, "Rise Up Ocean County," citing its racist and anti-Semitic content.[5] The group, which also operates its own webpage, opposes the overdevelopment and growth in Ocean County communities, which has seen an influx of Orthodox Jewish developments in recent years. Their mission statement claims the group "was founded on the simple belief that the continued, unchecked growth in Lakewood is contributing to diminished quality of life in the surrounding communities of Toms River, Jackson, Brick and Howell."[6] The New Jersey Attorney General's Office had voiced concerns that the group promoted violence against the Orthodox community, with comments appearing on the page such as "[w]e need to get rid of them like Hitler did."[7]

While these overt displays of prejudice are unsettling, there are also more insidious ways that discrimination can infect a community, and not in the way one would expect.

Exclusionary Zoning

Under the guise of "sound planning," municipalities have tried for years to hide behind zoning ordinances to keep the demographics of their community from changing. The methodology is usually inconspicuous, and it may take some parsing to see that religious institutions are often forced to jump through more regulatory hoops than nonreligious ones. For example, a zoning ordinance may impose a larger minimum lot size, more required parking, or greater setback requirements on a house of worship or related religious activities than a nonreligious assembly use, such as a municipal building, theater, or bowling alley. These more stringent requirements make it harder for the religious group to secure an approval for their proposed project than the nonreligious assembly use. For example, in one Ocean County municipality, houses of worship are permitted only as a conditional use in certain zones. A conditional use is a permitted use subject to the applicant meeting all of the conditional use standards. If the house of worship application meets all of the conditional use standards the application proceeds before the planning board where the applicant only needs to secure a simple majority of the board's vote. If the application cannot meet all of the conditional use standards, the applicant must seek use variance relief from the zoning board of adjustment where it must secure five affirmative votes for an approval.[8]

In order for a religious institution to be awarded a use variance, it must satisfy both the positive and negative criteria.[9] The positive criteria are established if an applicant can demonstrate "special reasons" for the grant of the variance. Those special reasons maybe satisfied if the proposed use is considered "inherently beneficial," which includes religious institutions.[10]

The negative criteria, on the other hand, are established if the applicant can show that the variance will not be a substantial detriment to the public good and will not substantially impair the intent and purpose of the municipal ordinance. For this determination, the case of *Sica v. Board of Adj. of Twp. of Wall*[11] is important because it established a four-part test to determine whether a proposed use satisfies the negative criteria. Specifically, the board must: 1) identify the public interest at stake; 2) identify the detrimental effect; 3) mitigate any detrimental effect by imposing reasonable conditions; and 4) weigh the benefits against the mitigated negative effects to determine if the variance would cause a substantial detriment to the public good.

If the application is ultimately denied by the zoning board, the congregation or religious institution may still want to

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defend its interests and challenge the board's decision in the Law Division of the New Jersey Superior Court. Land use attorneys will know that a board's decision may be overturned if found to be arbitrary, capricious or unreasonable under the Municipal Land Use Law (MLUL). A more powerful tool, however, when representing a religious entity exists under federal law.

What is RLUIPA?

In 1985, Congress enacted the Religious Freedom Restoration Act (RFRA), a broadly tailored statute designed to prevent the government from enacting laws that substantially burdened the right to free exercise of religion, relying on the authority of Section 5 of the Fourteenth Amendment. Significantly, RFRA reinstated the compelling state interest test in free exercise cases, meaning that the government had to show a "compelling governmental interest" and the law is "the least restrictive means" to achieve its goal if the regulation substantially burdened a person's exercise of religion. However, in 1997, the United States Supreme Court in *City of Boerne v. Flores*[12] —a case involving the zoning of a church, struck down the compelling interest test, finding that Congress had overstepped its constitutional authority and invalidating RFRA as it applied to state and local governments.

In response, Congress enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA) in 2000 to protect religious institutions against discriminatory regulations of their property through zoning restrictions. The act also protects the rights of individuals to assert their religious beliefs and practices while incarcerated.

While not intended to immunize religious institutions from land use regulations, RLUIPA prohibits the government from imposing a land use regulation that discriminates against an assembly or institution *on the basis of its religion*.[13] A "land use regulation" is defined under the act as a "zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land." Typically, the regulation will be a zoning ordinance or code that determines what type of building or land use can be located in what areas and under what conditions.[14]

The act's protections over "religious assemblies or institutions" include more than just houses of worship such as churches, mosques, or synagogues; religious activities are also protected, including summer camps, cultural centers, bookstores, etc. associated with a congregation. Further, the act permits plaintiffs to seek damages and attorney fees in addition to injunctive relief, remedies not available under state law.

How does RLUIPA Protect Religious Freedom?

Protection Against Substantial Burdens on Religious Exercise

Generally, the government may not impose a land use regulation that imposes a substantial burden on a religious assembly or institution. Issues under RLUIPA typically arise when the government is trying to make an individualized assessment of a proposed religious use for a property, thus placing higher standards on a religious use than a comparable nonreligious assembly use.

To prove a substantial burden, the plaintiff must show that the regulation places substantial pressure on an individual to modify their behavior and violate their beliefs.[15] Historically, this has been a difficult task for plaintiffs; therefore, the burden shifting under RLUIPA is a significant benefit to plaintiffs. Once a plaintiff has proven the substantial burden on their beliefs, the burden shifts to the government to demonstrate: 1) there is a compelling government interest, and 2) the regulation is the least restrictive means of furthering the government's compelling interest.[16] If the government cannot meet this burden, the regulation will be deemed unconstitutional.

A court's substantial burden inquiry is often fact-intensive, but generally considers whether a particular restriction or set of restrictions will be a substantial burden on a complainant's religious exercise based on factors such as the size and resources of the burdened party, the actual religious needs of an individual or religious congregation, space constraints, whether alternative properties are reasonably available, and the absence of good faith by the zoning authorities, for instance. Courts have upheld a government's compelling interest where there is "some substantial threat to public safety, peace, or order,"[17] but not to protect a municipality's interests in revenue generation and economic development, or aesthetics.

Protection Against Unequal Treatment

The equal terms provision of RLUIPA, Subsection b(1), provides that "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution."[18] This provision prohibits the government from imposing a stricter land use regulation on a religious assembly or institution that places it on less than equal terms with a nonreligious assembly or institution.

This provision was designed to address the problem of zoning ordinance excluding places of worship where secular assemblies are permitted, both facially and in application. As such, it is applicable to any discriminatory regulation, even when there is no substantial burden on the individual's worship practices or beliefs.

Determining if a religious assembly is treated on "less than equal terms" than a nonreligious assembly or institution requires a comparison of how the two entities are treated on the face of a zoning code or in its application.[19] While there is no set test, a congregation may look at the other types of assembly uses permitted in the zoning district—if a reli-

gious use is prohibited while a private club or assembly hall is permitted, they may find an equal terms violation.

Protection Against Religious or Denominational Discrimination

RLUIPA also prohibits discrimination "against any assembly or institution on the basis of religion or religious denomination."[20] These types of regulations may be discriminatory on their face or facially neutral but applied in a discriminatory manner based on religion or religious denomination. An issue may arise under this provision if an applicant is denied where the same application would have been granted had it been part of a different religion or religious denomination, or if it is clear that the zoning officer or other municipal officer harbors personal animus toward a specific religious group.

This provision applies even where a municipality may not be discriminating against all members of a religion, but just a particular sub-group or sect.

Protection Against Total Exclusion or Unreasonable Limitation of Religious Assemblies

Subsections (b)(3)(A) and (B) of 42 U.S.C. § 2000cc state that the government may not impose a regulation that *totally excludes* religious assemblies from a jurisdiction, nor may it impose a regulation that *unreasonably limits* religious assemblies, institutions, or structure within a jurisdiction. An unreasonable limitation, for example, may include regulations that left only few available sites for the construction of a house of worship through bulk standards like excessive frontage and spacing requirements.

Filing An RLUIPA Claim

In order to file a RLUIPA claim, the claim must be ripe, which many courts interpret to require a "final" decision by the board. However, facial challenges are generally ripe the moment the challenged regulation or ordinance is passed.[21] Claims must be filed within four years of the alleged RLUIPA violation.

While a RLUIPA claim can of course be filed in federal court, it can be added in conjunction with a prerogative writ action in state court, and can be a valuable asset for land use attorneys to have in their vault. In towns that have traditionally been less than welcoming to certain religious groups, a successful RLUIPA claim can not only ensure that your client is compensated with damages and attorney's fees, but also permit them to practice their religious beliefs where they choose. ■

Endnotes

1. *U.S. Antisemitic Incidents Hit Highest Level Ever Recorded, ADL Audit Finds*, Anti-Defamation League (Mar. 23, 2023), adl.org/resources/press-release/us-antisemitic-incidents-hit-highest-level-ever-recorded-adl-audit-finds.
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6. *About Us*, Rise Up Ocean Cnty., riseupoceancounty.com/about-us (last visited June 7, 2023).
7. O'Dea, *supra* note 5.
8. N.J.S.A. 40:55D-70(d).
9. *See Medici v. BPR Co.,* 107 *N.J.* 1 (1987).
10. *See Smart SMR of New York, Inc. v. Fair Lawn Bd. of Adj.*, 152 *N.J.* 309, 323 (1998); *House of Fire v. Zoning Bd.*, 379 *N.J. Super.* 526, 535 (App. Div. 2005).
11. 127 *N.J.* 152, 164 (1992).
12. 521 U.S. 507 (1997).
13. 42 U.S.C. § 2000cc(b).
14. *See Martin v. Houston*, 196 F. Supp. 3d 1258, 1264 (M.D. Ala. 2016).
15. *See Thomas v. Review Bd. of the Indiana Employ. Sec. Div.*, 450 U.S. 707, 718 (1981).
16. 42 U.S.C. § 2000cc(a)(1).
17. *Congregational Rabbinical Coll. of Tartikov, Inc. v. Village of Pomona*, 138 F. Supp. 3d 352, 456 (S.D.N.Y. 2015) (citing *Sherbert v. Verner*, 374 U.S. 398, 403 (1963)).
18. 42 U.S.C. § 2000cc(b)(1).
19. *See, e.g., Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1173 (9th Cir. 2011); *Third Church of Christ, Scientist, of New York City v. City of New York*, 626 F.3d 667, 669 (2d Cir. 2010).
20. 42 U.S.C. § 2000cc(b)(2).
21. *Congregation Rabbinical Coll. of Tartikov, Inc. v. Village of Pomona,* 915 F. Supp. 2d 574, 595 (S.D.N.Y. 2013) (quoting *Lamar Advert. of Penn. LLC v. Town of Orchard Park. New York*, 356 F.3d 365, 374 (2d. Cir. 2004)).