

ZONING**PRACTICE**

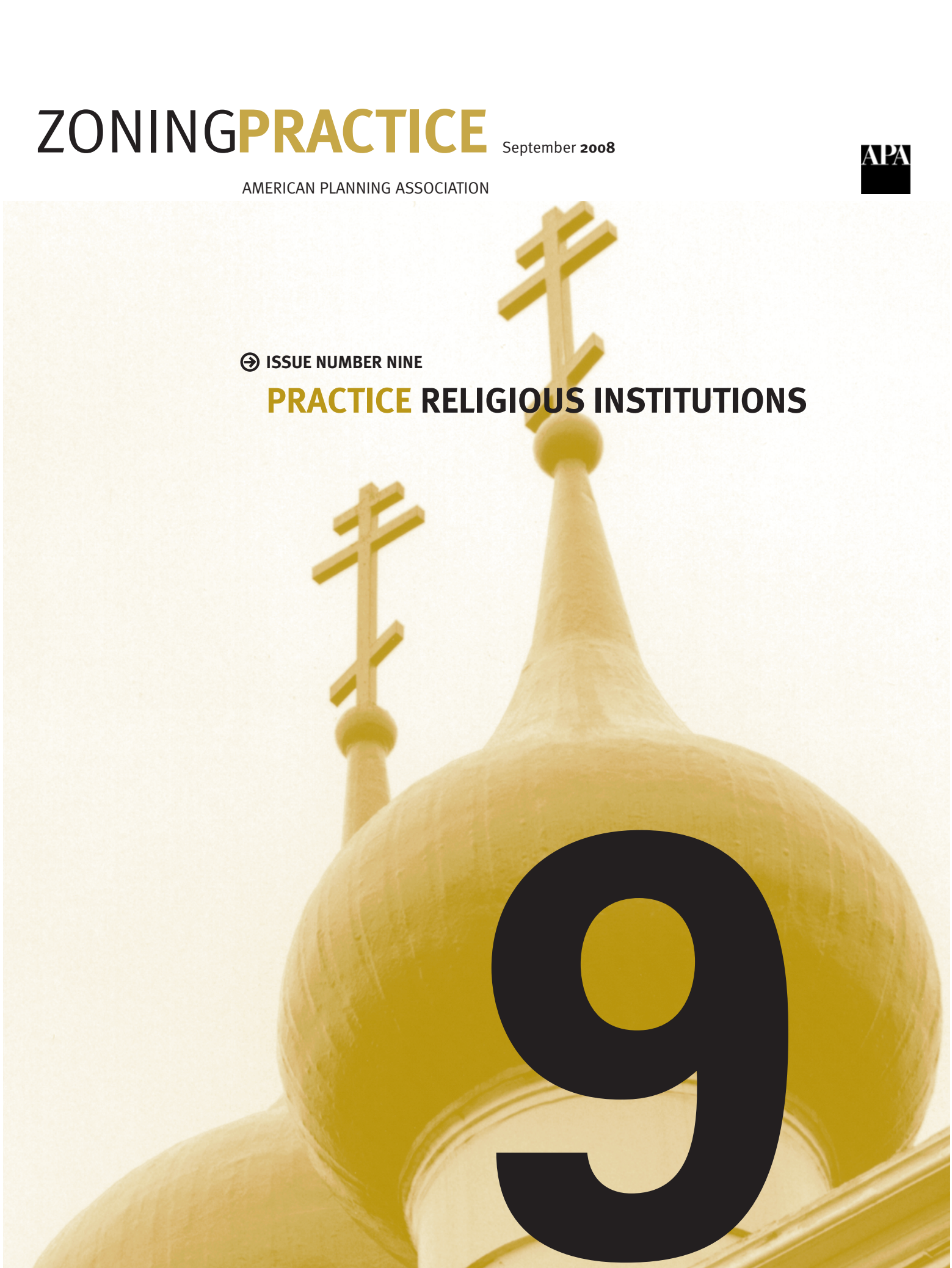
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PRACTICE RELIGIOUS INSTITUTIONS

The background of the cover is a photograph of a church dome and crosses, tinted in a warm, golden-yellow color. The dome is in the foreground, and two crosses are visible in the background, one slightly to the left and one slightly to the right of the dome's peak.

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The Zoning of Religious Institutions in the Wake of RLUIPA—A Guide for Planners

By Adam Kingsley and Thomas Smith

Since it was signed into law in 2000, the Religious Land Use and Institutionalized Persons Act (RLUIPA) has forced municipalities to rethink the way they plan for and zone religious institutions, as well as the manner in which they review discretionary applications regarding the siting or expansion of religious facilities.

Court decisions have provided some guidance as to what is and what is not acceptable under the law, but these cases are often fact-specific and leave many questions unanswered.

One theme that does emerge from these decisions is the importance of sound planning. Courts recognize that even with RLUIPA in place religious institutions are not entitled to locate wherever they want or build whatever they want, and an outcome where a religious institution is denied its preferred location or site plan may be perfectly legal. However, when a municipality denies the requested zoning relief, that decision is subject to serious scrutiny and must be justified by a well-supported planning rationale. This article explains why sound planning has become the best defense to a RLUIPA challenge and discusses what constitutes sound planning in the context of RLUIPA.

THE ORIGINS OF RLUIPA

In 1998, a select group of clergymen and attorneys for various religious institutions were invited to Washington, D.C., to testify before Congress regarding their experiences in obtaining land-use approval from cities and towns for new or expanded religious institutions. They told tales of rampant “hostility” to religious institutions, “discrimination” against religious institutions, and “arbitrary” decisions in the application of local zoning regulations. Each and every denial of a zoning charge, variation, or special use permit was presented as additional conclusive proof of a nationwide roadblock to the exercise of religious freedom. Members of Congress were led to believe that religious institutions were facing near-insurmountable obstacles in their



Thomas Smith

➡ This church in Hinsdale, Illinois, occupies a prominent corner location in accordance with Clarence Perry’s ideas about the neighborhood unit.

attempts to find appropriate sites and fulfill their religious missions.

The testimony at these hearings was largely one-sided, with municipal advocacy groups such as the National League of Cities barely recognized. If given the opportunity, municipal officials would have likely told a very different story—that religious users and institutions were welcome in their cities and towns but should be expected to navigate the same zoning and plan-

ning concerns and constraints as secular users. For example, the officials would probably have mentioned long-recognized planning concerns such as conflict among uses, the desire for economic development, issues associated with traffic and parking, and aesthetic preferences. They might have continued by listing regulatory constraints including a limited number of potential locations, intensive special use (or conditional use) review and processing, input from elected officials, and community curiosity.

In other words, the fact that religious institutions are required to go through the same zoning process as other uses and, like other uses, are sometimes disappointed or frustrated by that process is not evidence of “hostility” or “discrimination.” Instead, it is part and parcel of the community development and zoning approval process.

For better or worse, Congress largely accepted the version of events offered by religious institutions. This congressional “fact-finding” became the evidentiary basis for RLUIPA. The empirical debate over the prevalence of religious discrimination in municipal zoning decisions (both then and now) was not truly resolved before the passage of RLUIPA. In fact, it continues to this day. To illustrate, attorney Daniel Dalton writes in the April 2007 issue of *Planning & Environmental Law* about his frustrating experience representing a church seeking to relocate to a vacant office building in Southfield, Michigan, while attorney Dwight Merriam, FAICP, and planner Graham Billingsley, AICP, discuss the planning basis for Boulder County’s decisions regarding the proposed development of a large religious complex in a rural setting.

ASK THE AUTHOR JOIN US ONLINE!

Go online from October 20 to 31 to participate in our “Ask the Author” forum, an interactive feature of *Zoning Practice*. Adam Kingsley and Thomas Smith will be available to answer questions about this article. Go to the APA website at www.planning.org and follow the links to the Ask the Author section. From there, just submit your questions about the article using the e-mail link. The author will reply, and *Zoning Practice* will post the answers cumulatively on the website for the benefit of all subscribers. This feature will be available for selected issues of *Zoning Practice* at announced times. After each online discussion is closed, the answers will be saved in an online archive available through the APA *Zoning Practice* webpages.

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THE LASTING IMPACT OF RLUIPA ON THE PLANNING COMMUNITY

Eight years after it was enacted into law, questions regarding whether RLUIPA was truly necessary and should have been passed in the first place are interesting, but beside the point. The fact is RLUIPA has forced municipalities to change the way they evaluate and respond to proposed religious uses. With an aggressive set of attorneys (including the United States Department of Justice) ready to support religious institutions, the threat of a lawsuit hangs over almost every zoning and planning decision that relates to the location, size, or operation of a religious institution (including accessory uses). While RLUIPA is by no means the first intrusion of federal law into the local zoning process (e.g., cell tower regulation, adult uses, the Fair Housing Act, and the National Environmental Policy Act, to name a few), the sheer number of zoning applications involving religious institutions arguably makes RLUIPA the most ubiquitous federal law impacting local government today.

Because of the implicit (and often explicit) threat of litigation that attaches to a religious-use zoning applications, and because the exact contours of RLUIPA are still being debated by attorneys and judges, many municipalities seek the input of their attorney at an early stage of the zoning process. Legal consultation and advice is certainly justified. However, what may be overlooked by lawyers and planners is the important role that sound planning plays in defending against a RLUIPA lawsuit. More and more courts are coming to the conclusion that zoning codes or decisions that deny religious institutions their preferred location or site plan do not violate RLUIPA if those individual decisions, as well as the municipality’s overall plan for religious institutions, are supported by legitimate planning principles.

Many legal commentators suggest that sound planning is a defense to zoning and land-use litigation, but courts generally afford cities and towns great deference in their zoning decisions. Moreover, depending on the state, the legal standard for what constitutes sound planning is sometimes akin to “any rational justification,” a standard very generous to municipalities. This is especially true in the typical federal case involving zoning decisions where the legal standard is usually “rational basis.” However, RLUIPA has upped the ante.

The sheer number of zoning applications involving religious institutions arguably makes RLUIPA the most ubiquitous federal law impacting local government today.

The law has instructed courts to assume that unsupported planning decisions are the product of anti-religious bias. This hard-look approach has forced municipalities to defend their land-use decisions with real facts rather than assumptions, speculation, or blind deference to community concerns. The good news is that those communities that have marshaled the facts and done the hard planning have, more often than not, prevailed in RLUIPA litigation. The remainder of this article explains the constraints and limitations that RLUIPA has imposed on planners, and gives suggestions as to what “sound planning” means in the context of RLUIPA.

THE ZONING OF RELIGIOUS USES—A BRIEF HISTORY

Historically, many zoning codes categorized religious institutions—often identified as churches—

as a distinct and unique use. Thanks in large part to Clarence Perry’s monograph on the neighborhood unit in the 1929 *Regional Plan of New York*, planners often considered religious institutions to be a crucial component of a complete neighborhood. Writing for the *Journal of the American Institute of Planners* in 1954, William Clair said that churches, like city or town halls, should be given prominent locations “near the center of the community or neighborhood activity” and “on the natural travel pattern of the community.” Planners considered religious insti-

tutions to be appropriate for large, preferably corner, lots either within a residential district or serving as a buffer between residential and business districts. The prototypical example of the place (both physical and spiritual) that churches played in the community might be the City of Chicago, where people of a certain age often identify themselves not by geographic neighborhood, but by the name of their Catholic parish, which served as a proxy.

The traditional way of thinking about the proper location of religious institutions has been buffeted by a series of changes over the last half-century including:

- increased religious diversity in formerly homogenous communities
- the divergent size of congregations (from the home-based or “storefront” church to the megachurch)

Many communities now consider scale and impacts when classifying religious institutions. These distinctions are most significant in communities in which a megachurch has located or for institutions that attract congregants from several communities.

For example, last April in North Carolina, Charlotte's city council adopted a zoning text amendment that contains the following classifications:

- ◆ *small religious institutions*—includes institutions with up to 400 seats in the largest assembly space
- ◆ *medium religious institutions*—includes institutions with 401 to 750 seats
- ◆ *large religious institutions*—includes institutions with 751 to 1,200 seats

In Charlotte, small and medium religious institutions can locate on smaller collector streets (versus minor or major thoroughfares) provided such religious institutions do not exceed a floor area ratio (FAR) of 0.25. Small and medium religious institutions with an FAR in excess of 0.25 but not exceeding 0.5 must be located on a minor or major thoroughfare.

Large religious institutions may have FARs in excess of 0.5 but all such institutions must be located on major thoroughfares and are limited to higher density residential districts and mixed use zoning classifications.

Additionally, all religious institutions must meet the following standards:

- ◆ They must provide at least 25 percent on-site open space.
- ◆ They must provide landscape screening especially from adjoining residential properties.
- ◆ Offices within these institutions must be limited to 25 percent or less of the total floor area of buildings on the lot.
- ◆ The site plan must show that accessory structures and buildings are contiguous to the principle structures.

In Texas, El Paso's Development Services Department has prepared a draft ordinance that uses a similar classification system for assembly uses:

- ◆ *neighborhood facilities*—public assembly uses (including religious institutions) designed for and serving the residents of a neighborhood, which is defined as an area of one square mile
- ◆ *community facilities*—public assembly uses designed for and which serve the residents of several neighborhood areas, where such neighborhoods are in the same approximate geographic area (defined as an area of four square miles)
- ◆ *regional facilities*—public assembly uses designed for and serving the residents of the entire city, nearby communities, and unincorporated areas

For all three facility types the maximum square footage of any building is limited to one-fifth of the total land area of the lot. Neighborhood facilities can locate on any public street. However, they must have lot areas between one and five acres. In contrast, community facilities must locate on arterial streets. In addition, they must have lot sizes between five and 15 acres. Following this pattern, regional facilities must have a minimum lot size of 15 acres.

- the growth of accessory or auxiliary functions within religious institutions (e.g., school, day care, adult education, and homeless services)
- the willingness of religious institutions to locate in nontraditional and converted buildings
- suburbanization, "greenfield" churches, and the concept of a religious institution as a destination site
- the intensive use of religious facilities on more than just one day a week

Even without RLUIPA, all of these changes were forcing planners to reconsider the appropriate manner in which to regulate religious land uses. For example, in 1988, suburban Northbrook, Illinois, changed its zoning code to allow religious institutions only in the IB (Institutional Building) zoning district. This change required religious institutions to obtain a rezoning to the IB district and approval as a special use (both legislative acts) wherever they wished to locate. Because each potential religious institution presented its own set of issues, the village thought it best to review every application on a case-by-case basis. This classification scheme was later challenged as violating RLUIPA and, as discussed below, was subsequently amended in 2003. Planners should note, however, that despite the fact that religious institutions could not locate as of right in any particular district, every religious institution that applied for a rezoning and special use approval in the 1988 to 2003 time period obtained approval through a process of negotiation and compromise.

Other communities responded to these changes in a similar manner by, for example, opening their business and commercial districts to religious institutions, sometimes treating them as special or conditional uses and subjecting them to the same type of detailed site plan and traffic analysis more typically associated with commercial development.

SOUND PLANNING AND RLUIPA

RLUIPA has two main provisions, each of which imposes new constraints on planners. The Equal Terms provision provides that a municipality may not treat "a religious assembly or institution on less than equal terms with a nonreligious assembly or institution" (42 U.S.C. §2000cc(b)(1)). This provision is based upon the idea that gatherings (i.e., assembly) for religious worship should, for zoning purposes, be treated no differently than gatherings for the purpose of discussing or celebrating secular issues.

The assembly uses most obviously comparable to religious institutions are private clubs and lodges, country clubs, union halls, and private assembly halls. Planners might better describe these as privately owned buildings where members regularly meet, socialize, or discuss civic issues. For example, one court said that if a city's zoning code allows a Cub Scout troop to hold a weekly meeting in someone's house, the neighbor next door should be allowed to host similarly sized meetings for the purpose of religious worship or Bible study (*Konikov v. Orange County, Florida*, 410 F.3d 1317 (11th Cir. 2005)). Likewise, if a nonreligious assembly use, such as an Elks Lodge, is allowed to locate in a particular zoning district

without the need for a variance or special use approval, so too should a religious institution (*Digrugilliers v. Consolidated City of Indianapolis*, 506 F.3d 612 (7th Cir. 2007)).

There is no question that RLUIPA commands that religious institutions be given, at a minimum, whatever zoning rights govern the location of these secular assembly uses and that it essentially compels planners to review existing zoning codes and compare the treatment of religious institutions with comparable secular assembly uses. Using the Northbrook example, the village's 1988 zoning code allowed "membership organizations" to locate in its industrial district by right, but required religious institutions to obtain a rezoning and special use approval. After the passage of RLUIPA, the village recognized that it needed to modify its code to equalize treatment—even though most religious institutions had been successful in obtaining the necessary legislative approvals. After much consideration, Northbrook determined that neither religious nor secular assembly uses should be allowed in industrial districts and it amended its code accordingly. At the same time, it modified its code to allow religious uses to operate in certain residential districts as of right, and in certain business and commercial districts as a special use. The Seventh Circuit court of appeals found that these changes put all assembly uses on the same footing and brought the code into compliance with RLUIPA's Equal Terms provision (*Petra Presbyterian Church v. Village of Northbrook*, 489 F.3d 846 (7th Cir. 2007)).

To ensure that there is no distinction in the treatment of religious and secular assembly uses, some municipalities have done away with "church" or "religious institution" as a separate category of use. For example, the Village of Long Grove, Illinois, enacted a public assembly ordinance that places the same maximum square footage restriction on all assembly uses, and links the maximum square footage to the size of the property and type of roadway to which the property has access. Again, this type of equal treatment was upheld by the courts (*Vision Church, United Methodist v. Village of Long Grove*, 468 F.3d 975 (7th Cir. 2006)).

Some courts have suggested that the definition of "nonreligious assembly or institution" is broader and includes theaters, restaurants, and bars where people assemble for commercial or entertainment purposes. We do not believe that RLUIPA was intended to give religious institutions the same zoning rights as restaurants and other retail uses. In zoning terms these uses have never

been thought of or categorized as assembly uses.

This is one area where planners can play an important role in educating the courts as to the distinctions between true assembly uses (characterized by exclusivity and noncommercial operation) and retail and commercial uses where people happen to gather in groups. The good news is that the courts that have characterized restaurants and other retail uses as assembly uses have also concluded that the exclusion of religious institutions from purely commercial districts is not a violation of RLUIPA, because there is no unequal treatment when taking into consideration the purpose of the distinction—such as the creation of a district devoted solely to economic development

2. Larger institutions may be required to provide open space or landscaping, especially if located in or near residential areas. Larger institutions should be also expected to provide adequate parking and have access to appropriate secondary or collector roads.

3. Because of land-use conflicts, assembly uses may be inappropriate for, and wholly excluded from, certain areas of the municipality, including manufacturing districts, entertainment districts, and business development districts.

4. Although no land must be made available as of right, planning staff should be prepared to affirmatively identify sites that are appropriate



➊ The building and parking footprint of this megachurch in Eden Prairie, Minnesota, shows how new large-scale religious institutions can contribute to urban sprawl.

(*Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253 (3rd Cir. 2007)).

Of course, even if the decision is made to treat all assembly uses in the same manner, the question becomes, where should they go? There is no one right answer to this question as it depends on jurisdiction-specific facts such as size of the community, development trends, the location of existing assembly uses, and the community's land-use and economic development goals.

We offer the following planning principles to provide guidance:

1. Different areas of the municipality may be appropriate for differently sized assembly uses (as measured by square footage, floor-area-ratio, number of seats, or parking), with smaller institutions acceptable in traditional neighborhood locations and larger uses more appropriate for nonresidential locations.

for the institution in question, especially if the institution's preferred site is considered unavailable or inappropriate.

While compliance with RLUIPA's Equal Terms provision is somewhat mechanical and can be achieved by a review of, and edits to, zoning codes, compliance with RLUIPA's second provision is a bit more complicated because it is triggered by individualized review of zoning applications.

RLUIPA's Substantial Burden provision (42 U.S.C. §2000cc(a)) prohibits a municipality from imposing or implementing a "land-use regulation" (further defined as "a zoning or landmark law or the application of such law") in a manner that imposes a "substantial burden" on "religious exercise." The phrase substantial burden is not defined, but religious exercise is defined to include "the use,

ISSUES RELATED TO MEGA AND STOREFRONT CHURCHES

A megachurch is a very large church, generally defined as having 2,000 or more worshippers for a typical weekly service. According to the Hartford Institute (a religious research institute), there are more than 1,300 such Protestant churches in the United States. According to the Institute, about 50 churches have congregations ranging in size from 10,000 to 47,000.

Such megachurches have significant traffic impacts and some contribute to problems of associated with suburban sprawl. Many locate on the urban fringe where there is ample land. In some cases, this means converting productive farmland to the religious assembly use. Due to their locations, few megachurches have access to transit. Consequently, these uses require large fields of parking, which can have significant environmental impacts in terms of stormwater runoff and seasonal flooding.

Currently in Montgomery County, Maryland, Bethel World Outreach Ministries, a 2,000-member Baptist church, is challenging county zoning regulations and the rejection of its water and sewer permit applications. Lawyers for the county contend that the zoning ordinance is based on the county's land-use plan and that the proposed location for the 119-acre megachurch is within an area designated as an "agricultural reserve," which prevents the construction of a wide variety of private institutions and assembly uses.

In 2006, the church filed a lawsuit in state court but that suit was unsuccessful. The new lawsuit moves the case to the federal courts where the church is making RLUIPA claim.

At the other end of the spectrum are small storefront churches. The term storefront church is used to describe places of religious assembly that occupy buildings designed for retail or office uses along a commercial corridor. Many of these institutions have small congregations of 30 to 50 persons.

Storefront churches in urban areas often operate without permits or zoning certifications. In many cases, this happens because the storefront church operator is not aware of permit requirements and because such institutions are not subject to the typical license requirements that apply to small businesses.

A common concern of local chambers of commerce is that the storefront churches unfairly compete for retail locations. Since such churches are typically exempt from property taxes and certain licensing requirements, they may find it easier to establish themselves in these neighborhood business districts.

More importantly, local business owners often complain that storefront churches do not generate retail traffic. Because these institutions are usually closed during normal business hours, local retailers may complain that a storefront church creates a dead space in the retail corridor. Similarly, they may object when a church boards up existing storefront windows in an effort to create a quiet, private space for religious services.

Last year, the planning department in Long Beach, California, recommended prohibiting storefront churches in the city's Commercial-Neighborhood Pedestrian (CPN) districts due to concerns that storefront churches do not add significant pedestrian traffic during peak shopping hours. At the same time, the planning department recommended deregulating many storefront churches in other commercial districts by eliminating the time-consuming and costly conditional use approval process and replacing it with an administrative review handled by the zoning administrator.

Elsewhere in California, Oakland has modified its "small project design criteria" to clarify that they apply to a variety of "civic uses," including storefront churches. The city applies its standards through an administrative review process, and its criteria require that storefront churches and other institutional and civic uses retain display windows when reusing an existing retail space. The design standards also require that storefront churches use signage and bulletin boards compatible with the signage of nearby businesses.

building, or conversion of real property for the purpose of religious exercise" (42 U.S.C. §2000cc5(7)(B)).

The question of substantial burden often comes up in the context of individual review of special use, conditional use, or planned unit development applications. If an application is denied (or approved with major modifications), the religious institution may assert that denial of its preferred site constitutes a substantial burden and a violation of RLUIPA. Many religious institutions have asserted that virtually any denial of zoning approval is a substantial burden on their religious exercise.

Courts generally reject this argument and hold that a religious institution's inability to locate, expand, or develop accessory facilities at a particular location is not, in and of itself, a substantial burden on its exercise of religion. This consensus begins with the idea that RLUIPA is not a free pass that allows religious institutions to escape the difficulties that many landowners face in finding suitable (or affordable) land and in obtaining zoning approval. Nor is RLUIPA a guarantee that a religious institution will be able to locate or expand at its favored site, even when denial of that site will cause inconvenience, disappointment, or a loss of congregants. Rather, courts have been focusing on objective questions such as the amount of land in the city or town potentially available for religious use, the ability of the religious institution to find other suitable locations, and the size of the facility that the municipality is willing to allow as compared to what is reasonably necessary for the institution's purposes.

Here is where sound planning comes into play. Courts are mostly likely to find a substantial burden when denial of zoning relief is accompanied by a set of facts that demonstrates bad faith or hostility on the part of the municipality (i.e., because the municipality's reasons for denial appear disingenuous, illogical, or unsupported by planning principles).

In one California case, for example, a county overrode the recommendation of its own planning division and denied a conditional use permit for a Sikh temple. The temple then identified another location that did not raise the same concerns regarding potential conflicts with residential uses. Again, planning staff issued a favorable report. Neighbors, however, complained about "traffic and property values" and the board of supervisors rejected the second site as well. Although each denial might be independently justifiable and not necessarily the product of discrimination, the courts found that, as an overall course of conduct, the county placed a substantial burden on the religious organization and appeared to give it "the runaround" (*Guru Nanak Sikh Society of Yuba City v. County of Sutter*, 456 F.3d 978 (9th Cir. 2006)).



📍 In Chicago, many storefront churches board up display windows to limit street noise and to give the interior space the look and feel of a sanctuary.

Thomas Smith

Other cases are marked by municipal decision making that can best be characterized as confused and contradictory, which, in turn, raises an inference of discriminatory intent (e.g., *Sts. Constantine and Helen Greek Orthodox Church v. City of New Berlin*, 396 F.3d 895 (7th Cir. 2005)). Alternately, some cases include a record that is long on complaints and accusations by neighbors or members of the zoning board but short on actual facts. In one New York case, the court found that the zoning board's factual conclusions regarding the evidence presented with respect to a proposed expansion of religious day school were "characterized not simply by the occasional errors that can attend the task of government but by an arbitrary blindness to the facts" (*Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338 (2nd Cir. 2007)).

When the municipality has discretion in reviewing a zoning application, it's important for it to adhere to best practices. Indeed, when a municipality denies the zoning application of a religious institution, that denial is subject to a greater degree of court scrutiny as compared to the denial of an application for commercial development.

These best practices include:

1. Sensitivity on the part of zoning staff so as to avoid any comments that might be perceived as hostility or bias toward a particular religion or religious use in general
2. Decision making on the basis of sophisticated, professional analyses of traffic, parking, property value, or other impacts, rather than on the basis of assumptions, unfounded fears, or questionable data

3. Consistency in staff review and the application of various standards, so that the institution cannot point to a similar use that received preferential treatment

4. A process that is not only fair on paper, but fair, open, and not predetermined

5. Flexibility on the part of planning staff, evidenced by a willingness to compromise and solve problems rather than a tendency to rely on bureaucratic responses

Perhaps most important, if the municipality is likely to deny the application it should be prepared to offer meaningful suggestions and alternatives to the applicant (e.g., ways for the application to improve its site plan to satisfy planning concerns or, if the site is simply not acceptable, the identification of other feasible locations). If the religious institution is intent on litigating over the site or plan in questions, it is important that the municipality give solid justifications for its decision and be proactive in offering reasonable alternatives to the institution.

At the end of the day, the entire course of interaction should lead a neutral observer to conclude that the municipality was willing to be reasonable and accommodating and that the lack of approval was due to the religious institution being unreasonable or obstinate.

In the Long Grove case, for example, the village's code allowed for a 55,000-square-foot facility (the same that any other assembly use would be entitled to at that location). The church's own architectural expert testified that this was more than enough space for a congre-

gation of approximately 200. The church, however, demanded approval of a 100,000-square-foot complex to accommodate "future growth." The village denied this request. The court of appeals found no RLUIPA violation and observed that the village's planning decisions were well thought out, while the church was overstretching.

Planners cannot, of course, bind corporate authorities. Indeed, some of the adverse court decisions involve a positive recommendation by planners but an override at the political level. Nevertheless, planners should offer their expertise with respect to the locations that are most appropriate and compatible with municipal planning goals, the conditions for approval that are most important and justifiable, and the evidence that does (or does not) support denial or modification of an application. In RLUIPA lawsuits, courts have been skeptical of rote or unfounded objections to religious institutions, but have shown a willingness to uphold the discretionary denials when they are justified by recognized planning principles.

Cover photo: "The High and Lofty" by Herman Krieger, from the series *Churches Ad Hoc: A Divine Comedy* at www.efn.org/~hKrieger; design concept by Lisa Barton.

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HOW DOES YOUR COMMUNITY HANDLE RELIGIOUS USES?

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