

2019 RECOMMENDED AMENDMENTS  
TO  
LAND USE SECTIONS OF RLUIPA

POSSIBLE CHANGE

1. Define “substantial burden” in land use context.

PRINCIPLES TO CHANGE

- Establish criteria for courts to weigh such as:
  - (a) size of congregation and financial resources;
  - (b) cost, complexity and customary length of zoning process relative to
    - (i) freely permitted uses,
    - (ii) neighboring jurisdictions;
  - (c) length and extent of congregation’s property search;
  - (d) delay, uncertainty and expense of obtaining an option to buy or contract to buy contingent on zoning relief.

SUGGESTED LANGUAGE

“**Substantial burden**” shall have the meaning given in U.S. Supreme Court decisions. In determining whether a governmental land use provision has created a substantial burden on a religious assembly or institution, a governmental unit or a court shall consider the following facts:

- (1) the extent to which the effect of a land use regulation infringes upon the ability of a religious assembly or institution to put its beliefs into practice;
- (2) the time, effort and expense a religious assembly or institution has expended in an attempt to locate a particular site or must expend in the future to locate any possible site;

- (3) the availability and affordability, to the particular religious assembly or institution, of alternative locations within the jurisdiction where the religious assembly or institution seeks to locate or expand;
- (4) the degree to which social, religious, political, ethnic, language, economic or racial attitudes, prejudices or stigmas may negatively influence a land use decision affecting the religious assembly or institution; but only if the court finds a land use decision by a particular jurisdiction involves discretion.
- (5) the size of the religious assembly or institution relative to the effort and planning by a particular jurisdiction to facilitate land uses for varied sizes of religious assemblies and institutions;
- (6) if the jurisdiction has a Comprehensive or Master land use plan and such plan:
  - (a) fails to consider and provide for the religious assembly or religious institutional land use needs of the people to the same extent that it considers the land use needs of the people for housing, parks and schools; or
  - (b) does satisfy the requirements of 6(a) but the jurisdiction has not shown that it has taken, within a reasonable time after enactment of the plan, substantive measures to implement the plans to provide for the religious assembly or land use needs of the people.
- (7) the relative length of time a religious assembly or institution has existed as compared to other religious assemblies or institutions then located within a particular jurisdiction but only to the extent:
  - (a) a shorter length of existence for a religious assembly or institution has caused it to be at a competitive disadvantage in acquisition of land for religious assembly or institution use relative to those religious assemblies or institutions within that jurisdiction and which:
    - (i) have established a location prior to the establishment of zoning regulations (within that jurisdiction);

- (ii) had established a location under local use regulations which historically were less restrictive of religious assemblies or institutions;
- (iii) have established a location within that jurisdiction when more land was available or when use as a religious assembly or institution was freely permitted.

This factor (7) is intended to be applied in the context of the Establishment Clause because in some localities existing religious assemblies or institutions become *de facto* established by prior governmental land use regulations while current governmental land use regulations have the effect of restricting, burdening or excluding newer, smaller, faster growing or minority religious assemblies or institutions.

## POSSIBLE CHANGE

### 2. Sec. 2(b)(1) – Define “non-religious” assembly use.

## PRINCIPLES TO CHANGE

Clarifies meaning and narrows conflicts; assures that zoning decisions do not depend upon the content, reason for or subject matter of the assembly. Clarify that provision is “strict liability” and that a use qualifies as a “non-religious assembly” if a significant or substantial portion of the activity consists of assembly.

## SUGGESTED LANGUAGE

“Non-religious assembly use” is a land use consisting of an assembly of persons for social, business, civic, fraternal, educational, political or recreational purposes.

The assembly component of such non-religious assembly must be significant or substantial and be regular or recurring but may or may not be the primary land use at a particular location and may or may not be for-profit or not-for-profit.

Non-religious assembly uses include but are not limited to:

1. theaters
2. auditoriums
3. stadiums
4. arenas
5. community centers
6. schools
7. clubs and lodges
8. meeting halls
9. funeral parlors
10. banquet halls
11. hotels
12. city halls and civic buildings

13. home meetings, parties and gatherings not to exceed 25 persons
14. sports and concert venues.

When restaurants and taverns are the principal uses of a parcel they are not considered to be assembly uses for the purposes of Sec. 2(b)(1).

POSSIBLE CHANGE

3. **Sec. 2(b)(3)(A) – RLUIPA prohibition on exclusion – requirement that religious assemblies be permitted somewhere.**

PRINCIPLES TO CHANGE

Clarify by adding a definition of Total Exclusion to Sec. 8 that if religious assemblies are only allowed by “special use,” “variance” or “conditional use,” then they are excluded.

SUGGESTED LANGUAGE

SECTION 8 DEFINITIONS:

“Total Exclusion” shall mean that a particular jurisdiction has no zones where religious assemblies are freely permitted rather than prohibited or only allowed in the discretion of the jurisdiction. Requirement that a religious assembly obtain a special use, conditional use permit or other discretionary permission in order to operate within particular zone constitutes exclusion within that zone.

The presence of legally existing religious assemblies in a particular jurisdiction or within particular zones shall not be evidence that a jurisdiction has a zone where religious assemblies are freely permitted.

POSSIBLE CHANGE

4. **Sec. 4(d)(3) – Amend to cure *Buckhannon* decision.**

PRINCIPLES TO CHANGE

Reinstate “catalyst” theory allowing religious assemblies to recover attorneys’ fees when they have been the procuring cause of a change in the law or the relationship between the assembly or institution and the governmental entity or land use regulation.

SUGGESTED LANGUAGE

SEC. 4(D)(3):

If a person, religious assembly or institution receives relief for a claim of a violation of this act prior to suing or after suing but prior to receiving court judgment, such claimant shall be given “prevailing party” status and be entitled to recover reasonable attorneys’ fees for obtaining such relief.

POSSIBLE CHANGE

5. Amend definition of “land use regulation” in Sec. 8(5).

PRINCIPLES TO CHANGE

Extend protection to also include eminent domain, annexation, deannexation, landmark/historic designation, and building codes.

SUGGESTED LANGUAGE

SECTION 8 DEFINITIONS

(5) LAND USE REGULATION – The term “land use regulation” means a zoning, landmarking historic designation, annexation, deannexation, building code or eminent domain law or the application of such law, that limits or restricts a claimant’s use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such interest.



## POSSIBLE CHANGE

6. **Add to Sec. 2(b)(3)(B) and clarify circumstances where “unreasonable limitation” occurs.**

## PRINCIPLES TO CHANGE

Correct problem that many municipalities allow churches only in “R” zones and the “R” zones are already built up, thus effectively excluding religious assemblies by requiring them to acquire numerous adjacent lots and tear down houses to build.

## SUGGESTED LANGUAGE

### 2(b)(3)(B)

A jurisdiction which freely permits new religious assemblies, institutions or structures on less than 10% of the land within it shall be unreasonably limiting them.

A jurisdiction which freely permits new religious assemblies, institutions or structures on less than 40% of the land within it shall be presumed to be unreasonably limiting them but it may overcome such presumption by proving a compelling governmental interest for having less than 40% of the land within it freely available.

When jurisdiction unreasonably limits religious assemblies, institutions or structures, or violates Sec. 2(b)(3)(D), then such uses shall be allowed anywhere in such jurisdiction unless the government can show that the health or safety of persons is endangered by the location of a religious assembly, institution or structure at a particular location.

## POSSIBLE CHANGE

7. **Add new Sec. 2(b)(3)(D) requiring that religious assemblies and institutions must be freely allowed in at least 25% of the jurisdiction which is not zoned residential or used for institutions, parks or roads.**

## PRINCIPLES TO CHANGE

Together with Sec. 2(b)(3)(C) amendment attempts to ensure that religious assemblies and institutions can locate in some of those areas (business, commercial, manufacturing and transitional) where uses are most often changed and buildings are recycled.

## SUGGESTED LANGUAGE

### SEC. 2(B)(3)(D)

Every jurisdiction must freely allow religious assemblies or institutions in at least 25% of the jurisdiction (excluding all land zoned for residential, institutions, parks, roads or waterways).

POSSIBLE CHANGE

8. Add new Sec. 2(b)(3)(E) that provides if a government has a zoning approval process such as requiring a “Special Use Permit”, “Conditional Use Permit”, or other process involving discretion, neighborhood input or public hearing, then the use shall be presumed acceptable and the permit shall be granted unless the governmental agency shows by a preponderance of the evidence that it has a compelling governmental interest for denying the permit and also shows that the governmental interest cannot be protected in less restrictive ways.

PRINCIPLES TO CHANGE

Lessen the excessive discretion which allows for bias and carries friction.

SUGGESTED LANGUAGE

SEC. 2(B)(3)(E)

Whenever a government requires zoning approval through a conditional use, special use or other conditional process or requires a public hearing for a religious assembly or institution, such use shall be presumed acceptable and the zoning approval shall be granted unless the government proves it has a compelling governmental interest for denying such approval and such governmental interest cannot be protected in a less restrictive way.

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