

RLUIPA

BACKGROUND

The land use portions of the Religious Land Use and Institutionalized Persons Act of 2000 were enacted to help religious assemblies deal with increasingly restrictive zoning laws in the thousands of towns, villages, cities, and counties of our nation. It provided three primary protections against zoning laws affecting religious assembly which (1) substantially burdened; (2) unequally treated; or (3) excluded them. The legislation has clearly helped thousands of congregations, congregants and governmental units achieve greater religious freedom and improved land use policies.

NEED FOR REVIEW

All far-reaching legislation needs periodic review in light of (1) changed social circumstances; (2) judicial interpretation; and (3) examination of its over or under breadth. The nineteen year interval since RLUIPA became law has shown where each of those three categories may afford improvement.

CHANGED SOCIAL CIRCUMSTANCES: In the years leading up to RLUIPA there were significant concerns across the spectrum that religious assemblies were being shut out or seriously restricted in growth because of zoning laws. Factors perceived to have caused governmental hostility or indifference to new or expanding religious facilities included:

1. Lack of real estate or sales tax revenue generated by a “church;”
2. Increasing secularization resulting in less understanding, in the cumulative opinion of governmental authorities, of the social value of a “church”;
3. Ever tightening land use restrictions as virtually every zoning code in America was updated every 15-20 years and virtually every update contained

manifold new regulations on location, size, parking, height setbacks, lot coverage, etc. Although these revisions would apply to all land users, they cut particularly hard on smaller, newer or immigrant religious assemblies which lacked the expertise or deep pockets to address the growing regulatory burden;

4. Unspoken racial, religious, immigrant ethnic fears;

5. The automobile. In the 50's and 60's many Americans worshipped close to their homes. By the 90's most American worshippers drove past 5 or 10 other religious assemblies to attend the one they preferred because of social concerns, preaching, family, youth programs, doctrine or facilities. As the automobile opened vistas, it also diminished local governmental accountability. Many zoning boards have heard the query: "How many of these people live in our town?!"

6. As more people drove to church, parking seemed to be more of a concern to governments.

Yet few codes recognized that religious assemblies are used less intensely than other land uses. For example, Whole Foods' significant traffic may need a sizable parking lot seven days a week. Likewise a movie theater showing the latest Star Wars release might host capacity audiences every night for two or three weeks. In contrast, most religious assemblies operate at 20-70% capacity only once a week with the occasional full house on a holiday, wedding or funeral.

Parking restrictions have become particular choke points. Typically based upon maximum utilization, parking codes restrict the size of commercial, retail, residential, social and religious assemblies. However, the many parking codes which inflexibly restrict new religious assemblies need to be reconsidered and limited by federal law – particularly for the benefit of religious and racial minorities, new religious groups and immigrant congregations.

2019 CIRCUMSTANCES:

1. Addressing the tax and secularization issues academic studies since 2000 have concluded:

(a) Churches are a net financial and social contributor to their communities: What's a Congregation Worth?; If you do not count it, it does not count: a pilot study of valuing urban congregations, and A study asks: What's a church's economic worth?

(b) The presence of a new church has extremely minor or no negative effect on surrounding property values: An Empirical Examination of Externalities of Neighborhood Churches on Housing Values, and The Impact of LDS Temples on Local Property Values.

While these studies are yet to be widely appreciated in local governmental councils, they hold promise that negative biases towards religious assemblies may abate. They certainly belie the fears of some that RLUIPA's tempering of local regulation adumbrated chaos.

2. Addressing the increased regulatory complexity, the trend evident in the 90's has continued. Every new code is always more restrictive than its predecessor. Free exercise and the concomitant freedoms of speech and association continually diminish whenever over zoning causes congregations not to grow. However, if codes must of necessity become increasingly complex, they must also become more nuanced. For example, most codes categorize religious assemblies as "one size fits all." Churches being "permitted" in R zones and prohibited elsewhere. The more rational approach – better for towns and people is to categorize religious assemblies by capacity, e.g.:

- 2 – 30 permitted in all zones;
- 2 – 500 permitted in R zones;
- 300-1,000 permitted in B zones;
- 500 and over in M zones.

Several proposed RLUIPA amendments help congregants and their communities discover compatibilities.

3. Addressing the discriminatory aspects of zoning as applied to the racial, religious, immigrant ethnic make-up of religious assembly remains an important issue. Certainly the concerns about immigrants have become prominent. The proposed amendments to RLUIPA intend to lessen those conflicts by more tightly limiting discretion of local governmental powers when the risk of actual or perceived discrimination outweighs the regulatory benefit.

4. How about the Chevy and where do we park it? In many ways the automobile continues to strongly influence zoning. The proposed amendments ameliorate that impact by addressing congregational size and parking.

5. Congress needs to evaluate the ever changing circumstances in religious land use and make needed adjustments.

JUDICIAL INTERPRETATIONS: Of course, a law is usually only as effective as the courts will enforce it. Since the enactment of RLUIPA, Church land use litigation has shifted from 100% state 0% federal to an estimated 30% state 70% federal. On the plus side, the federal courts (where most RLUIPA cases are litigated) have come to recognize that RLUIPA involves the weighing of fundamental rights — free exercise, speech, association, equal protection, as well as property rights — against appropriate land use regulations. Federal judges generally understand constitutional issues better than state court judges. On the negative side, few federal judges have any practical experience in zoning or real estate law and many, if not most, have governmental backgrounds.

Consequently Congress, by making more explicit amendments to RLUIPA, can help them overcome their experienced-based bias in favor of governmental control.

SUBSTANTIAL BURDEN: The first prong of RLUIPA protects religious assemblies and institutions when zoning has created a “substantial burden” on their minority. The federal circuits are in conflict as to what constitutes such a burden and the Supreme Court has declined several opportunities to decide a RLUIPA land use case. The proposed amendments provide about a dozen or more factors which courts have considered in determining what constitutes a substantial burden. Codification of these factors will greatly help courts and litigants apply that aspect of the law fairly.

EQUAL TREATMENT: In general the courts have enforced the protection that religious assemblies be treated at least as well as non-religious assemblies. However, the proposed amendments answer many of the recurring questions which municipalities and religious assemblies face when considering what constitutes “equal treatment” in context.

EXCLUSION: Despite eighteen years of RLUIPA litigations the courts have not been definitive on when the total exclusion prohibition 2000cc(b)(3)(A) is triggered. If a town has no zone where a religious assembly can meet as of right or through the conditional special use process, everyone agrees that there is total exclusion. However if a municipality has no zones where churches are freely permitted but does have zones where by “conditional” or “special use” they can possibly locate, then the question of total exclusion is open. Civil libertarians say exclusion is total whenever discretionary governmental approval throughout a jurisdiction is a precondition to use. Municipalities counter that the existence of the conditional/ special use process in some zones means there is no total exclusion. An appropriate RLUIPA Amendment would resolve this uncertainty.

POLITICAL CONCERNS

RLUIPA was originally enacted with broad bi-partisan enthusiasm. Ted Kennedy, co-sponsor, represented those Democrats who were concerned with the rights of small congregations, those consisting of primarily African-American and Hispanic membership and newer groups immigrating to America such as Muslims, Hindus, Sikhs and Buddhists. These groups had particular concern for the protections of RLUIPA because they generally lacked the facilities which, for example, Presbyterians, Catholics, Episcopalians and Methodists had constructed over the preceding 300 years largely without zoning restraints. Orrin Hatch, co-sponsor, represented more conservative religious groups who were growing faster through evangelism/recruitment, “church planting” and immigration. Among that constituency were Southern Baptists, Latter Day Saints, African Pentecostals and Koreans..

All the major religious groups united in supporting RLUIPA as they learned how their civil liberties were often unduly restricted by zoning laws and zoning boards. Although the law eventually passed both houses of Congress unanimously and was championed by President Clinton, it was also bottled up by municipal opposition for about four years. The version eventually passed was decoupled from the Religious Freedom Restoration Act and paired with religious freedom protection for prisoners – which was also broadly popular. As opposition decreased, the opponents reportedly neglected to object to a motion for approval by the House sponsors, resulting in a voice vote for approval “without opposition”!

Because of the widespread use of RLUIPA throughout the country since 2000, hundreds of articles in magazines for religious leaders and the extensive publicity generated whenever a local church sues the town it wants to minister in, there is a strong probability all religious groups will follow any proposed amendments far more closely than they did in the following of the original law. They have ascended the

learning curve! Certainly they will appreciate and reward with votes those politicians who sponsor or support them.

Municipal concerns will also be expressed as churches “driving out business and taxes.” Yet, one may expect the factual basis for such fear will be lessened in comparison to the original concerns expressed about RLUIPA for a number of reasons:

1. The academic studies aforementioned showing churches to be positive or neutral economic influences.
2. The dearth, if not total absence of, reports of dilatory RLUIPA effects.
3. The amendments will remove or ameliorate ambiguities which will make zoning administration easier and fairer.
4. The playing field between municipalities will be further leveled. Not infrequently, towns have used zoning laws as invisible walls to keep out certain races, religions or immigrants. Such prohibitions can result when a church or two of different folks locate in a community. Consequently zoning walls are understood and used as a defense against inundating community change. The unhappy result can be escalating barriers from neighboring municipalities.

A strengthened RLUIPA, by increasing accessibility for religious assemblies everywhere, will assuage the municipal fortress mentality and reduce racial, religious and ethnic bias.

5. For every new church constructed or building converted to a house of worship, one or more properties will go back on the tax rolls. Statistics on this assertion do not exist but the long term decline in overall American church attendance is consistent with this thought. Perhaps more importantly, the rise of the 10,000 member megachurch replaces the need for 20 to 50 smaller properties with one campus.

THE MEGACHURCH'S POLITICAL IMPACT

“There’s a trend all across America moving away from the small neighborhood churches to larger regional-type churches. It’s the same phenomenon with malls replacing the mom and pop stores on the corner. People will drive past all kinds of little shopping centers to go to a major mall, where there are lots of services and where they meet their needs. The same is true in churches today in that people drive past dozens of little churches to go to a larger church which offers more services and special programs.” **Russell Chandler, “Test-Marketing the Gospel – a Consumer Survey Helped Design Willow Creek Church for Its ‘Customers’,”** *San Francisco Chronicle* December 24, 1989.

Megachurches are big. While some attach a threshold to the number of attenders a megachurch contains – 1,500 regular attenders is a popular threshold – it is sufficient to say that these are the very largest of the large. According to research analyzing the National Congregations Study, the largest 1 percent of Protestant congregations in the United States attracts 1,000 or more attenders¹. **Scott Thumma, “Exploring the Megachurch Phenomena: Their Characteristics and Cultural Context,”** (Hartford Institute for Religious Research, 1996) and **Chaves, “All Creatures Great and Small: Megachurches in Context.”**

They estimate that in 1970, 50 churches with an attendance of more than 1,500 people existed in the United States but by 2005, that number had grown to more than 1,200.

¹ Of course the Roman Catholic Church is the megachurch epitomized. Its political influence appears to be widely understood. Although its need for RLUIPA protection is not great as to new church buildings, its ministries, such as shelters for battered women and half-way houses, strongly benefit from legal safeguards against discriminating zoning.

Protestant megachurches have increased from 600 at the turn of the century to more than 1,600 today. In Illinois there are 56 megachurches. **“Where are all the Megachurches?” Factsandtrends.net by Steven Kopp 2017.**

The Evangelical megachurches — 5,000 to 20,000 members — are now on the land use scene. In 1990 these were only a handful. They provide enormous benefits to a community:

1. A depth of social programs such as housing, employment and transportation assistance.
2. Counseling for teens, families and marriages.
3. Educational programs for constituents and community members.
4. Economies of scale in delivery of faith-based services.

As some religious assemblies expand, there are many avoidable conflicts. Thousands of communities have figured out ways to accommodate large school campuses, colleges, universities, hospital complexes and other civic benefit large assembly uses including megachurches. However for historical reasons, racial minority and immigrant churches and non-Christian faiths are disadvantaged in efforts to acquire and create properties for large assemblies.

A RLUIPA amendment allowing large assembly in all M zones (not necessarily – heavy Industrial) makes sense because those M zones usually have excellent parking, properties which are not in demand (many smaller manufacturers have outsourced to Mexico and China) and have significantly decreased traffic on weekends when most religious assembly activity occurs.