

Religious Land Use and Institutionalized Persons Act A substantial burden?

By Howard D. Geneslaw and Michael Miceli

The Religious Land Use and Institutionalized Persons Act (RLUIPA) prohibits government regulation that substantially burdens religious exercise unless the regulation serves a compelling interest and is the least restrictive means to achieve that interest. The plaintiff bears the burden of proving the challenged law substantially burdens the plaintiff's exercise of religion. RLUIPA's legislative history indicates Congress did not intend this substantial burden standard to receive any broader interpretation than the Supreme Court's articulation of the concept of substantial burden.



Inconsistent interpretations

Despite Congress' clear intent, judicial interpretation of the substantial burden standard under RLUIPA has been somewhat inconsistent.

In *Civil Liberties for Urban Believers v. City of Chicago*, 342 F. 3d 752 (7th Cir. 2003), the court defined substantial burden as one that necessarily bears direct, primary and fundamental

Howard D. Geneslaw is a director and Michael Miceli is an associate with the Real Property & Environmental Department at Gibbons, Del Deo, Dolan, Griffinger & Vecchione. The firm has offices in Newark, Trenton, New York and Philadelphia.

responsibility for rendering religious exercise, including the use of real property for a religious purpose, effectively impracticable.

In *San Jose Christian Coll. v. City of Morgan Hill*, 360 F. 3d 1024 (9th Cir. 2004), the court defined it as government action imposing a significantly great restriction or onus on exercise of religion or rendering such exercise effectively impracticable.

In *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F. 3d 1214 (11th Cir. 2004), substantial burden was defined as being akin to significant pressure that directly coerces a religious adherent to conform behavior or forces an adherent to forego religious precepts. And in *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002) substantial burden was defined as government action preventing one from engaging in conduct or having a religious experience which faith mandates.

The inconsistent judicial interpretation has blurred the point at which a government regulation or action creates a substantial burden. Although a substantial burden clearly requires "something more than an incidental effect on religious exercise," (*Midrash*), a review of RLUIPA and analogous case law fails to crystallize the substantial burden standard, though some clear-cut principles emerge.

Requiring a religious organization to file an application for a permit does not constitute a substantial burden. RLUIPA neither grants immunity from nor relieves religious institutions of the obligation of applying for permits and variances.

Further, ordinary application fees and administrative expenses do not create a substantial burden under RLUIPA. In *Civil Liberties for Urban Believers*, the 7th Circuit found the pivotal factor in determining whether fees amount to a substantial burden is whether the cost borne by a religious group is equal to that borne by a secular entity. There, several churches claimed costs associated with a special use application violated their religious rights under RLUIPA because the costs substantially burdened religious exercise. Factoring out expenses for application, title search, legal fees, appraisal fees and neighbor notification, the aggregate cost of obtaining a special use approval approached \$500.

The court found that while such expense contributed to the difficulties associated with locating in a large city, the costs did not discourage churches from locating in the city or prohibit the use of real property for religious exercise. The court also found the churches' expenditure of time and money did not entitle them to relief under RLUIPA's substantial burden provision, reasoning that holding otherwise would force municipal governments to favor religious land uses with exemptions from land use regulations. No such exemption existed in RLUIPA.

Municipalities should be consistent

Based on the 7th Circuit's reasoning in *Civil Liberties for Urban Believers*, application and other fees associated with an application for a religious assembly use are permissible if the fees mirror those for similar non-religious uses, such as non-profit fraternal organizations. Therefore, a municipality should not waive such fees unless it does so for similar non-religious uses. Municipalities must ensure application and administrative fees are not extraordinary because courts considering free exercise claims have found that regulations imposing significant administrative or financial costs may constitute substantial burden. See *Rector of St. Bartholomew's Church v. City of New York*, 914 F. 2d 348 (2d Cir. 1990), where the court stated the Landmarks Law drastically restricted a church's ability to raise revenues to carry out various charitable and ministerial programs. Municipalities may factor out legal fees, appraisal fees, and costs associated with neighbor notification when determining whether its application process creates a substantial financial burden.

Some courts have held the denial of a religious group's right to build in a convenient place does not constitute a substantial burden under RLUIPA, particularly if the religious group can locate its facilities in other districts within the municipality. See *Lighthouse Inst. for Evangelism v. City of Long Branch*, 406 F. Supp. 2d 507 (DNJ 2005).

In *Lighthouse*, a religious organization owned property located in an area the city had designated in need of rehabilitation. The redevelopment ordinance did not permit religious uses. The religious organization applied to become the designated redeveloper for its property and requested amendment of the redevelopment ordinance to allow its religious use. The city council denied the application and rejected the proposed amendment to the redevelopment ordinance. Plaintiffs sued the city, alleging the establishment of any burden on its religious exercise amounted to an impermissible substantial burden.

Both parties moved for summary judgment; Judge Walls granted summary judgment in the city's favor. Defining substantial burden as a burden that bears direct, primary and fundamental responsibility for rendering religious exercise effectively impracticable, Judge Walls found no substantial burden existed because the religious organization had suitable alternative venues in 90 percent of the rest of the city. Indeed, the religious organization had operated at another location across the street for many years, and the reverend admitted other locations were available. Even though a finding of a compelling interest was not required due to the absence of a substantial burden, Judge Walls found the city had a compelling interest in revitalizing the downtown district through development of a performing arts center, supported by restaurants, cafes, bars and specialty retail stores. The presence of a church would not advance that interest and could hinder it considering local and state restrictions on the sale of alcohol within a certain distance of a religious organization.

Interference with religious exercise

Other courts applying RLUIPA have found substantial burden where a regulation or an order interfered with religious exercise or an activity associated with a religious mission.

For example, in *Elsinore Christian Ctr. v. City of Lake Elsinore*, 291 F. Supp. 2d 1083 (C.D. Cal. 2003), the U.S. District Court for the Central District of California considered whether a municipality's denial of a proposed church site constituted a substantial burden. Elsinore Christian Center and Church was located in the downtown area of Lake Elsinore. Due to lack of onsite parking, members parked on the street. During certain events, congregants were forced to park a considerable distance from the church. The church complained these conditions posed difficulties for elderly and disabled members and that the existing facility was too small to accommodate a growing congregation. The church sought approval to locate a new facility in a commercial zone, in which churches were a conditional use. Additionally, the property was located in a blighted area, which acted as an overlay to the zoning provision.

The city's planning commission denied the church's conditional use application because (1) the church would replace a grocery store and recycling business resulting in the loss of jobs and tax revenue; (2) the church provided insufficient parking; and (3) the denial would not work a substantial burden on the church considering it could continue to operate at its downtown location. The church appealed this denial to the District Court.

In considering a summary judgment motion, the District Court found that because the use of land was religious exercise under RLUIPA, the city's denial prevented the church from using the property, thereby creating a substantial burden. The District Court reasoned "this is not a case where the Church's proposed use of land — equated with 'religious exercise' by RLUIPA — is restricted in a minor or 'insubstantial' way. Rather, the denial ... bars the Church's use altogether."

A year earlier, this same court came to a similar conclusion. In *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002), the court found a substantial burden where a municipality denied construction of a church because preventing a church from building a worship site fundamentally inhibits its ability to practice its religion.

There, Cottonwood Christian Center was seeking to build a church to accommodate its present and future ministries and sought a location in the northwestern part of the county because a large number of its members lived in that area. After acquiring the necessary parcels, Cottonwood submitted a conditional use application.

The city planning manager deemed the application incomplete because it lacked design review studies the city staff desired. While Cottonwood was seeking approvals to build the church, the city placed a moratorium on development in the area in which the church was proposed to investigate creation of a mixed-used town center. The moratorium prevented granting a land use permit to an incomplete application.

Because the planning manager found Cottonwood's conditional use application incomplete, the city could not consider its application. Cottonwood appealed the incompleteness finding to the city council which overturned the finding and directed city staff to review Cottonwood's application. Thereafter, the city's redevelopment agency offered to purchase the property from Cottonwood even though the city had reduced the size of the town center plan. Cottonwood refused. After the city council approved the scaled-down redevelopment plan, the redevelopment agency adopted a resolution determining that Cottonwood's property was necessary for the redevelopment and directed counsel to file an eminent domain action. Cottonwood appealed to the District Court.

The District Court found these actions constituted a substantial burden. Cottonwood was unable to practice its religious beliefs in its current location because the facility could not handle its large and growing membership and its small quarters prevented Cottonwood from meeting as a single body. According to the court, preventing a church from building a worship site fundamentally inhibits its ability to practice its religion because "[i]f Cottonwood could not build a church, it could not exist." The District Court found the burden substantial because the denial burdened more than 4,000 Cottonwood members.

This interpretation of substantial burden does not square with cases holding no substantial burden exists when a church is denied the right to build in a particular location, as in *City of Morgan Hill* and *Midrash*. And in *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of West Linn*, 86 P. 3d 1140 (Or. Ct. App. 2004), the court stated that denial of a variance to construct a particular design did not constitute a substantial burden because there was no unreasonable inconvenience to members who must travel to attend church and no allegation from church that building design was required by religious beliefs.

Carte blanche?

The *Cottonwood* interpretation appears to grant religious organizations carte blanche in determining the size and location of their worship houses. Under the California approach, almost any obstacle to religious

exercise caused by the regulation of land would constitute a substantial burden under RLUIPA if it made the practice of religion inconvenient, thereby triggering the need for a compelling state interest to justify the burden. Absent a compelling interest, which may be a very limited field in religious freedom cases, RLUIPA would impermissibly require a municipality to approve virtually every application for a worship facility, even if construction of the facility would merely make religious practice more convenient. Essentially, this interpretation renders the term “substantial” almost meaningless.

Moreover, under the California approach, a similarly situated, non-religious assembly use — a citizen group — would be forced to comply with the municipality’s regulations, even in light of a growing membership, while its religious counterpart would be exempt. This situation rattles the foundations of the Equal Protection Clause. Through the application of the substantial burden standard, RLUIPA would be providing religious uses more protection than non-religious uses and would be impermissibly elevating religious uses to favored status. Congress did not intend such a broad interpretation of substantial burden when it passed RLUIPA: in *Cong. Rec.* 7774-01 776 (2000) it was stated RLUIPA is not intended to be given any broader interpretation than the Supreme Court’s articulation of the concept of substantial burden or religious exercise.

Reconciling the interpretations

The more appropriate interpretation of RLUIPA is that a substantial burden exists when a regulation or application of the regulation renders religious exercise effectively impracticable. Despite the court’s contention in *Elsinore*, the denial of a particular configuration or refusal to allow a worship house to locate on a specific property, though burdensome, does not automatically create a substantial burden on the practice of religion. See *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of West Linn*, 86 P. 3d 1140 (Or. Ct. App. 2004), where the court stated denial of variance to construct a particular design did not constitute a substantial burden because there was no unreasonable inconvenience to members who must travel to attend church and no allegation from that church that the building design was required by religious beliefs.

Indeed, if a municipality allows the religious organization to propose an alternate configuration more consistent with the zoning code — assuming the standards have a rational basis — or a more-suitable property in the same or another zoning district, religious exercise is not rendered effectively impracticable. Unlike the interpretations in *Elsinore* and *Cottonwood*, this interpretation recognizes the need to protect religious exercise and achieves equal, rather than favorable, treatment of religious land uses Congress sought by enacting RLUIPA.