Commentary

Editor's Note: The Religious Land Use and Institutionalized Persons Act ("RLUIPA") has generated considerable litigation around the country since its passage in 2000. Abstracts of many RLUIPA decisions can be found online at www.planning.org/pel as well as on our daily RSS feed. Most often, the decision rests on whether or not a land use regulation or its implementation substantially burdens an applicant's religious exercise. This month's commentary explains the various definitions of "substantial burden" that have evolved in the courts and reviews some of the most significant RLUIPA decisions from 2008.

Religious Land Uses, Zoning, and the Courts in 2008

Daniel P. Dalton

'SUBSTANTIAL BURDEN' CONTINUES TO PERPLEX

The Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §2000cc, generated more land use decisions in 2008 than in previous years. What constitutes a substantial burden under the Act continues to be the focus of much of this litigation. RLUIPA prohibits the government from imposing or implementing a land use regulation that imposes a substantial burden on religious exercise unless the government can demonstrate that there is a *compelling governmental interest* and the burden is the *least restrictive means* to further that interest (42 U.S.C. §2000cc (a) (1)(A)-(B)).The Supreme Court twice had the opportunity to define "substantial burden"[1] but declined to accept certiorari, leaving planners and lawyers with the task of deciphering and using one of the five definitions that have evolved in the different circuits.

I believe that once the Court takes a case to decide this issue, it will look at the language of RLUIPA and will define a "substantial burden" in light of the Court's previous decision in *Sherbert v. Verner*, 374 U.S. 398 (1963), where the Court found that "no showing merely of a rational relationship to some colorable state interest would suffice [to justify the denial]; in this highly sensitive constitutional area, 'only the gravest abuses, endangering paramount interest, give occasion for permissible limitation'" (citing *Thomas v. Collins*, 323 U.S. 516 (1945). Until that day, and depending on where a religious entity is located, the term "substantial burden" will be defined in one of the following ways:

The Sensible *Sts. Constantine* Standard

The Second, Seventh, and Ninth circuits have settled on a broad, flexible test that balances the needs of communities and religious entities. The leading case is *Sts. Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895 (7th Cir. 2005), 57 PEL 175. "That the burden would not be insuperable would not make it insubstantial," the court held, 396 F.3d at 901. Substantial burdens may result from the "delay, uncertainty, and expense" of multiple land use applications. *Id.*

The *Sts. Constantine* test focuses on the government's *treatment* of the religious land use applicant more than on any resulting coercion or on the availability of alternatives, something that Congress intended and directed when it enacted RLUIPA. The court also noted that, while broad, the definition was appropriate because the "state delegates essentially standardless discretion to nonprofessionals operating without procedural safeguards. . . . The 'substantial burden' provision backstops the explicit prohibition of religious discrimination in the latter section of the Act, much as the disparate impact theory of employment discrimination backstops prohibition of intentional discrimination" (396 F.3d 900).

The Ninth Circuit has adopted a similar approach, describing a "substantial burden" as a government restriction that "to a significantly great extent lessens the possibility that future [land use] applications would be successful" (*Guru Nanak Sikh Society v. County of Sutter*, 456 F.3d 978, 989 (9th Cir.

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1. The Greater Bible Way Temple of Jackson v. City of Jackson, Mich., 733 N.W. 2d 734 (2007), *cert. denied*, 128 S.Ct. 1894 (April 14, 2008)(NO. 07-1080); and Living Water Church of God v. Charter Twp. of Meridian, 258 Fed. Appx. 729, *cert. denied*, 128 S.Ct. 2903 (June 9, 2008) (NO. 07-1158).

The Third Circuit adopted a disjunctive test in an effort to define "substantial burden."

2006), 58 PEL 360.) In *Guru*, the history of the attempts by the Sikh temple to find a place to build its house of worship, and the expectation that it would be denied again, were crucial to finding the substantial burden. The Second Circuit has also embraced this fact-based approach. In one instance it found a substantial burden where "the arbitrary, capricious, or unlawful nature of the defendant's challenged actions suggested that a religious institution received less than even-handed treatment" (*Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338, 351 (2d Cir. 2007), 60 PEL 32). However, the court did not limit substantial burdens to such circumstances, suggesting it might also find burdens where an absolute permit denial might "place substantial pressure on [a religious organization] to change its behavior," so long as there is "a close nexus between the coerced or impeded conduct and the institution's religious exercise" (504 F.3d at 349).

The 'Effectively Impractical' Standard

In *Civil Liberties for Urban Believers (CLUB) v. City of Chicago*, 342 F.3d 752 (7th Cir. 2003) ("CLUB"), a case decided before *Sts. Constantine*, the Seventh Circuit defined a "substantial burden" as a law that "necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—effectively impractical" (342 F.3d at 761). The Seventh Circuit has since limited *CLUB* to cases where the religious organization is not simply challenging the denial of its individual permit, but rather is challenging the permitting process as a whole. (*See Sts. Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d at 899–900 (7th Cir. 2005)). Nevertheless, *CLUB*'s "effectively impractical" standard has taken on a life of its own. Notably, the Michigan Supreme Court has applied the effectively impractical standard to the denial of a church's individual rezoning application, holding that "the city's refusal to rezone the property so plaintiff can build an apartment complex does not constitute a 'substantial burden'" on plaintiff's religious exercise (*Greater Bible Way Temple of Jackson v. City of Jackson*, 733 N.W.2d 734, 750 (Mich., June 27, 2007), 59 PEL 335). The court explained the "city is not forbidding plaintiff from building an apartment complex, it is simply regulating where the apartment complex can be built. If plaintiff wants to build an apartment complex, it can do so; it just has to build it on property that is zoned for apartment complexes" (*Id*). This interpretation makes RLUIPA §2(A) a redundancy.

The 'Coercion' Standard

The 11th Circuit has expressly rejected *CLUB*'s "effectively impractical" standard and instead defines a "substantial burden" as something "akin to significant pressure which directly coerces religious adherence to conform his or her behavior accordingly" (*Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004), 56 PEL 301). In short, under this standard a "substantial burden" is something more than an exclusion from a particular piece of property, but something less than exclusion from the entire jurisdiction. Similarly, the Supreme Court of Oregon has held that "government regulation poses a substantial burden on religious exercise only if it 'pressures' or 'forces' a choice between following religious precepts and forfeiting certain beliefs, on the one hand, and abandoning one or more of those precepts in order to obtain the benefits, on the other" (*Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. City of West Linn*, 111 P.3d 1123, 1130 (Or. 2005) (en banc)).

The *Living Water* Standard

The unpublished "substantial burden" standard in the Sixth Circuit is a governmental action that "places substantial pressure on a religious entity to violate its religious beliefs or effectively bars the church from using its property in the exercise of religion" (*Living Water Church of God v. Charter Township of Meridian*, 258 Fed.Appx. 729, 739 (6th Cir. 2007)). Judge Moore pointed out in dissent that no other court has adopted this precise standard, although the language mimics somewhat the Eleventh Circuit's language in *Midrash*. The majority, however, seemed unconcerned with the split it was furthering, glossing over its differences with the other circuits.

The 'Hybrid' Standard

The Third Circuit adopted a disjunctive test in an effort to define "substantial burden." Under this test, a substantial burden exists where: 1) a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available to other[s], versus abandoning one of the precepts of his religion in order to receive a benefit; or 2) the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs (*Washington v. Klem*, 497 F.3d 272, 280 (3rd Cir. 2007)).

A new book on the topic explains the conundrum this way:

> Land use regulation, property rights and religion—a potentially volatile mix in any community. Add to the brew the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA, 42 U.S.C.A. §§ 2000cc et seq.) and, depending on who you talk to, there's either an explosion or a celebration. Some

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consider RLUIPA a shield to protect religious land use applicants (particularly minority religions) from the abusive, exclusionary zoning practices of local officials. Others view RLUIPA as a sword wielded by bullying applicants who want special treatment or want to avoid the land use regulatory process altogether. The truth probably rests somewhere in the middle.[2]

SIGNIFICANT RLUIPA DECISIONS IN 2008

While RLUIPA is far from clear, many of the cases decided in 2008 will assist communities and religious entities in asserting and understanding the application of the statute to the issues they face.

Are All Assemblies Treated Equally?

RLUIPA provides that "no 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" (42 U.S.C. § 2000cc(b)(1)). Furthermore, a land use regulation cannot totally exclude religious assemblies from a jurisdiction (42 U.S.C. § 2000cc(b)(3)). When can a religious land use applicant secure summary judgment on an equal terms and exclusions case? *Chabad of Nova, Inc. v. City of Cooper City*, 533 F.Supp.2d 1220, (S.D. Fla., Jan.16, 2008) provides the answer.

Chabad of Nova filed suit alleging, in part, an equal terms violation when the City of Cooper, Florida, prohibited religious assembly uses in all business districts, but permitted numerous nonreligious assembly uses within the business districts. In answering the complaint and admissions, Cooper City acknowledged that day care centers, indoor recreation, entertainment, and movie theaters are permitted in the business districts along with personal improvement services (identified as aerobic studios; art, music, dance, and drama schools; and handicraft or hobby instruction); offices; business or professional uses; places where people can gather for meetings; and other businesses related to trade associations or unions. While admitting that each of the nonreligious uses mentioned is permitted by the zoning code in the business districts, city officials denied that any of the enumerated uses constitute an "assembly."

The court found that based upon the answer to the complaint and admissions, Chabad of Nova was entitled to summary judgment under the equal terms prong of RLUIPA. In reaching its decision, the court applied the definition of "assembly" from *Webster's Third New International Unabridged Dictionary* (1993) as "a group of persons organizing and united for some common purpose" to the facts of the case. Relying on *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1223 (11th Cir. 2004), the court concluded that to the extent that other land uses that meet the definition of an assembly or institution are permitted in the business district, but religious assemblies are not, Cooper City violated the equal terms prong of RLUIPA. Moreover, Cooper City failed to allege that it employs a "narrowly tailored means of achieving a compelling governmental interest."

Chabad of Nova continued for several months under the "exclusion" prong of RLUIPA. It urged the court to evaluate whether the number of parcels available under the zoning scheme provided a reasonable opportunity for religious expression. Prior to a 2006 zoning ordinance amendment, the city prohibited religious assemblies from locating in the business district, the office park district, and the principal use district. Nonreligious community assemblies, by contrast, were permitted to locate in the latter two districts. Religious assemblies were only permitted to locate in the residential district or the agricultural district. Religious assemblies that were located in either one of these districts were subject to additional zoning requirements that required them to: (1) maintain 300 feet of main road frontage (compared to 200 feet required of community assemblies) in the residential district and (2) maintain a minimum of 1,000 feet of distance from any other nonresidential or nonagricultural use in the agricultural districts.

With respect to purchasing property, Chabad presented evidence that the average frontage of a residential property within the city was 60 feet, which meant that five properties would typically need to be aggregated to meet the frontage requirement in a residential district. Chabad also submitted extensive evidence regarding the cost incurred by religious land use applicants desiring to locate in the residential districts, including the range of prices required to meet the frontage requirement. In 2005, the additional cost that would have been incurred by a religious land use applicant to purchase more than one property ranged from approximately $600,000 to $2 million. The following year it jumped to between $880,000 to more than $2.5 million.

While the court agreed with the city that religious assemblies cannot complain when they are subject to the same real estate market as everyone else, it concluded that religious assemblies are not participating in the same marketplace when they are required to aggregate two to seven times the number of properties as the average land use applicant and are required to obtain more frontage than any other nonresidential land use applicant in the same district, as the zoning ordinance required.

Cooper City argued that after it amended its ordinance in 2006, approxi-

2. American Bar Association and APA Planners Press, RLUIPA Reader: Religious Land Uses, Zoning, and The Courts, p.1 (2009).

The court also found that the jail's policy prohibiting Greene from attending group religious services substantially burdened his ability to exercise his religion.

mately 85 percent of the property within the municipal limits was zoned to permit religious assemblies as-of-right. There are 19 other places of worship within its borders; therefore, the city maintained it had "remedied" its exclusions and equal terms violations. The court rejected this argument because the frontage specifications in the residential districts still require religious assemblies to aggregate several properties together to meet the zoning requirements, and religious assemblies are, therefore, subject to approximately $500,000 to $1.4 million in additional costs to locate in those districts. Under both the pre-2006 zoning ordinance excluding the uses, and the post-2006 revisions to the ordinance allowing religious assemblies to locate in some zoning districts without restriction, the city violated RLUIPA because the amended ordinance continued to provide inadequate opportunities for new religious assemblies to locate by imposing unreasonable restrictions on their purchase of property.

In August 2008, the case went to trial on damages and a federal jury awarded Chabad of Nova $325,750 on its RLUIPA claims. On April 27, 2009, it was reported that Cooper City's insurer has agreed to pay the award, plus interest, to Chabad and to also pay its attorneys fees in the amount of $470,000.[3]

Does Group Worship Constitute 'Religious Exercise?'

The Ninth Circuit came to an interesting conclusion in *Greene v. Solano County Jail*, 513 F.3d 982 (9th Cir., Jan. 22, 2008), regarding the definition of "religious exercise" in a case involving the "institutionalized persons" prong of RLUIPA, which can also be used in land use cases.

Greene, a maximum security prisoner, was awaiting trial for approximately three months. During this time he requested, but was denied, the opportunity to attend group religious worship services. Jail officials responded that they would not permit a group religious service for security reasons, but rather would allow Greene to have a chaplain visit. He rejected this offer and filed suit seeking injunctive relief that would permit him to participate in group worship.

In reviewing his claim, the court determined that RLUIPA's plain language and the Ninth Circuit's case law interpreting RLUIPA compels the conclusion that "religious exercise" includes "group worship." The court relied on *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005), for the proposition that group worship is an example of religious exercise under RLUIPA, as well as other courts that have held that the relevant religious exercise was the maximum security inmate's ability to preach to other inmates.[4]

The court also found that the jail's policy prohibiting Greene from attending group religious services substantially burdened his ability to exercise his religion. Addressing the issue of whether the prohibition of group worship in a jail is a compelling governmental interest, the court agreed that a policy precluding maximum security prisoners from participating in group worship served the compelling governmental interest of maintaining prison security. However, the court concluded that a genuine issue of material fact remained as to whether a total ban on religious worship by maximum security prisoners is the least restrictive means of maintaining jail security.

Can RLUIPA Save a Church Billboard?

Trinity Assembly of God of Baltimore City, Inc. v. People's Counsel for Baltimore County, et al., 941 A.2d 560 (Md. App., Feb. 6, 2008), *aff'd*, 962 A.2d 404 (Md., Dec. 24, 2008) 60 PEL 155, highlights the intersection between RLUIPA and sign law. The church is located on 15 acres on the inner loop of the Baltimore Beltway in the Towson area, where churches are a permitted use. Many of the properties along the highway are walled off by sound barriers. The church has two signs visible from the highway. One measures four feet by six feet and is double-sided, illuminated, and can be seen from the beltway. The sign is not directional and is not close to an exit from which drivers could access the church.

Trinity Assembly of God filed a petition with Baltimore County seeking a variance to the height and square footage limitations for a sign on its property near the Interstate. Electronic copy is allowed as an accessory to an institutional structure, such as a church. Without considering RLUIPA, the county denied the request to replace the sign with one that is illuminated with electronic copy, 250 square feet in area and 25 feet in height. The sign code allows signs 25 square feet and six feet in height. After the church filed suit, the trial court remanded to the county Board of Appeals to consider the variance application under RLUIPA. The Board again denied the application, and the trial and appeals courts affirmed.

On appeal, the question before the court, in part, was whether the Board erred as a matter of law when it found that the proposed sign constitutes religious exercise, but compelling interests exist which present no substantial burden on religious exercise. The court found the church was not denied any use of a "sign as a means of evangelism, but only the nonconforming use of a sign that cannot be as large and eye-catching as the church might desire. Denial of its variance request burdens the church's religious exercise, but not substantially, so as to make any use of a sign for uplift and recruitment 'effectively impractica-

3. See Susannah Bryan, *Chabad and City Reach Deal After Two-year Legal Battle; Discrimination Suit to be Settled for $800,000*, South Florida Sun-Sentinel (April 28, 2009, p. B.3); Chabad of Nova Inc. v. City of Cooper City, 2008 WL 4073151 (Verdict and Settlement Summary) (S.D. Fla. Aug. 7, 2008) (NO. 007-CV-60738).

4. *See eg.*, Spratt v. R.I. Dep't of Corr., 482 F.3d 33, 38 (1st Cir. 2007); Baranowski v. Hart, 486 F.3d 112, 124 (5th Cir. 2007) and Lovelace v. Lee, 472 F.3d 174, 187 (4th Cir. 2006).

RLUIPA's "substantial burden" provisions apply only when the government makes or can make an "individualized assessment" of the proposed use.

ble' or to compel the congregants to 'violate [their religious] beliefs'" (941 A.2d at 575). The intermediate court engaged in an inquiry as to whether there were effective alternatives to the proposed sign and concluded the church has multiple alternative means to preach to and inspire sought-after members other than by use of a sign that is significantly larger than what the zoning regulations allow. As a "regional" congregation that draws members from the greater Baltimore County area, even from Pennsylvania, the church could spread its word and recruit members by means of commercial billboards and signs, as would a business seeking to advertise its product.

Maryland's highest court noted:

> Essentially, Trinity argues that the sign it wants constitutes religious exercise; that the Board will not let it have the sign it wants; and, thus, the Board's refusal substantially burdens Trinity's religious exercise. This rote application of the RLUIPA does not persuade us because it renders the "substantial burden" element largely nugatory; it suggests that a restriction on land use qualifies as a "substantial burden," even if it actually poses only a slight impediment to religious exercise (citation omitted). Although it is true that the definition of religious exercise includes the use of real property for a religious purpose, 42 U.S.C.A. § 2000cc-5(7)(B), a zoning restriction affecting that property is not a substantial burden on religious exercise unless the restriction "prevents adherents from conducting or expressing their religious beliefs or causes them to forgo religious precepts" (citations omitted). Stated in more concrete terms, "[w]here the denial of an institution's application to build [on its property] will have minimal impact on the institution's religious exercise, it does not constitute a substantial burden, even when the denial is definitive." (citation omitted) (962 A.2d at 429–430)

Special Exception is Not an Individualized Assessment

The Cambodian Buddhist Society applied for a special exception to build a 7,618-square-foot temple and meeting hall on a 10-acre lot it had purchased. The property included two acres of wetlands and a three-acre pond in a farming and residential zone. The planning and zoning commission denied the application, noting evidence that the applicant actually planned to operate a health care facility, which would cause a 100 to 200 percent increase over existing traffic volume during peak times; that the design of the temple was not in harmony with neighboring buildings; and that the applicant had not established that the septic and water supply systems would comply with state law. The trial court rejected an appeal and the state's highest court affirmed in *Cambodian Buddhist Society of Connecticut, Inc. v. Planning and Zoning Commission of the Town of Newtown*, 941 A.2d 868 (Conn., Feb.12, 2008), 60 PEL 149.

The court found that the neutral and generally applicable land use regulations were designed to protect public health and safety. RLUIPA's "substantial burden" provisions apply only when the government makes or can make an "individualized assessment" of the proposed use. In this case, while the planning and zoning commission has some discretion to determine whether a proposed use is consistent with residential uses, it may not apply the standards differently to religious facilities than to other uses permitted by special exception. The denial of the special exception was not motivated by religious bias, but rather by neutral considerations, and so RLUIPA did not apply.

Jury Finds No Constitutional Violation but a Violation of RLUIPA

Rocky Mountain Christian Church (RMCC) is a nondenominational Christian church founded in 1984 to serve the religious needs of people in the area of Niwot, Colorado. The church owns a 54.4-acre parcel in an unincorporated area of Boulder County, subject to the Boulder County Land Use Code. The property is located in an agricultural zoning district, and prior to 1996 a church building of any size was a by-right use in the agricultural zoning district.

In 1996, the Code was changed to require any church with an occupancy load of more than 100 persons to obtain a special review from the Board of County Commissioners. RMCC's building became a nonconforming use. That same year, RMCC filed an application for a special use and sought authorization to begin operating a school serving kindergarten through eighth grade with a maximum of 400 students. The church also wanted to build a two-story addition of about 54,000 square feet for administrative space and classrooms and to expand the seating capacity of the worship center from 997 to 1,380 people through interior renovations. RMCC filed two additional applications for special uses in 2000 and 2002 to increase the size of the church's storage building by 1,600 square feet, and to authorize the addition of a seventh and eighth grade with a maximum of 120 students and the installation of a temporary middle school building for those grades. The county approved each of these applications.

In 2004, RMCC sought to expand its facilities again, and submitted another special use application to enlarge the facilities from 116,000 square feet to 240,800 square feet. The county denied this application and RMCC filed suit alleging "substantial burden" and "equal terms" violations (*Rocky Mountain Christian Church v. Board of County Commissioners of Boulder County, Colorado*, 2008 WL 906043 (D.Colo.,

The court concluded that an award of attorneys fees was warranted because the case was not the "usual" civil rights case in which a nominal fee award is indicative of merely a nominal or pyrrhic victory.

March 31, 2008), 61 PEL 2030). RMCC claimed the county applied its facially neutral code in a way that constituted unequal treatment. Relying on *Primera Iglesia Bautista Hispana of Boca Ratan, Inc. v. Broward County*, 450 F.3d 1295 (11th Cir. 2006), 58 PEL 331, the court allowed the equal terms claims to move forward to trial. The court also found questions of fact concerning the "substantial burden" claim.

In November 2008, the jury ruled that county officials did not discriminate against the church and there was no constitutional violation. At the same time, the jury ruled the county's denial was a substantial burden on the church in violation of RLUIPA. No damages were awarded and the decision about what permits to issue for the facility was left in the hands of the district court judge.[5] Both sides claimed victory.[6]

In post-trial motions, county attorneys asked the court to declare RLUIPA unconstitutional because it requires the county (or so it seems by the jury's verdict) to give preferential treatment to churches over secular entities based solely on religion. The court found that RLUIPA is constitutional, upheld the verdict, and ordered county officials to approve the 2004 special use permit application.[7] The district court's opinion provides a very good history of the decisions leading up to RLUIPA's enactment in 2000.[8] Boulder County has filed its appeal in the 10th Circuit.

Remedies for a Prevailing Religious Land Use Applicant

Layman Lessons, a Christian ministry formed to aid the homeless and destitute, filed a complaint against the City of Millersville, Tennessee, alleging constitutional, RLUIPA, and §1983 violations based on the city's delay in issuing a certificate of occupancy and arbitrary enforcement of the city's zoning ordinance. Layman Lessons asked for declaratory and injunctive relief and $100,000 in compensatory damages. Two weeks later, the court entered a stipulated order that provided that the city was temporarily enjoined from enforcing a proposed zoning ordinance against the ministry. The parties spent nearly a year conducting discovery and then filed motions for summary judgment. The court granted partial summary judgment to Layman Lessons and awarded nominal damages in the amount of $2. The court found that the plaintiff prevailed on the issue of the city's delay in issuing a certificate of occupancy and improper enforcement of its zoning ordinance, based either on §1983 or RLUIPA. Layman Lessons withdrew its request for compensatory damages and demand for a jury trial. However, Layman Lessons subsequently filed a motion requesting attorneys fees and costs in the amount of $55,570.50.

The question presented in *Layman Lessons, Inc. v. City of Millersville, Tennessee*, 550 F.Supp.2d 754 (M.D. Tenn., April 29, 2008), was whether attorneys fees would be allowed given the award of nominal damages. The appropriate legal standard, the court decided, was the degree of success compared to the relief sought; the significance of the legal issues on which the plaintiff prevailed; and whether plaintiff's success accomplished some public goal. The court concluded that an award of attorneys fees was warranted because the case was not the "usual" civil rights case in which a nominal fee award is indicative of merely a nominal or pyrrhic victory. Layman Lessons succeeded in light of its primary objectives of the litigation: It prevailed on significant legal issues and its success accomplished some public goal beyond simply "occupying the time and energy of counsel, the court and the client" (550 F. Supp.2d at 765). The court analyzed the reasonableness of the attorneys fees—$300 per hour for the attorney and $50 per hour for the law clerk who had not yet been admitted to the bar and $150 per hour after she was admitted. They provided detailed billing records documenting the work they performed as well as their experience. The court found the rates were reasonable but disallowed 4.08 hours of the attorneys' time and 5.5 hours of the law clerk's time for work that was either unrelated to the claims on which Laymen Lessons prevailed or were not sufficiently detailed.

A Five-Year Conditional Use Permit Substantially Burdens the Church

Grace Church is a nondenominational Christian church that has operated since 1995 in the Rancho Bernardo area of San Diego, California, a central location for members of the church. Beginning in the summer of 1997, the church met at a local high school. The high school became an insufficient meeting place because of the limitation of using it only once each week and because the membership of the church began to exceed the capacity of the high school's public assembly hall. With the goal of eventually securing a permanent location in Rancho Bernardo, Grace Church decided to lease a facility on a longer term basis. After evaluating the needs of the church using a commercial broker, and finding no parcel available in the section of Rancho Bernardo where zoning regulations permitted the religious institutional use as a use-by-right, the church found three sites potentially meeting its needs within an industrial park. The industrial park zoning designation allows nonindustrial uses, including the church, with a conditional use permit (CUP).

On February 9, 2006, the church filed a CUP application with the city's Developmental Services Department

5. Jury Finds Denial of Church's Special Use Permit was Wrongful, 2008 WL 5979847 (Verdict and Settlement Summary) (D. Colo., Nov. 19, 2008) (NO. 106-CV-00554).

6. *See* http://www.dailycamera.com/news/2008/now/21/religious-discrimination-unclear.

7. Rocky Mountain Christian Church v. Bd. of County Comm'rs of Boulder County, 2009 WL 840762 (D. Colo. March 30, 2009).

8. Rocky Mountain Christian Church v. Bd. of Comm'rs of Boulder County, 2008 WL 906043 (D. Colo. Mar. 31, 2008).

The church was cited with 105 building, fire code, and life-safety code violations, including 27 imminent life-safety violations.

and signed a 10-year CUP consistent with the period of the lease. City staff responded with an assessment letter determining that the church's proposal was not in conformance with the community plan. Accordingly, the next step was a public hearing before the Rancho Bernardo Community Planning Board. The board voted to recommend denial of the CUP because its "proposed use is inconsistent with the adopted community planned land use designation." The report indicated that the "discussion at the meeting was focused on the preservation of industrial lands for industrial uses within this community and not to allow a church within the industrial park."

The city hearing officer received a report from city staff indicating that they would support the issuance of a CUP "with a limited term not to exceed five years." The staff could not support a "longer or indefinite term" because the city would consider that a "permanent use which would conflict with the community's master plan." Over the objections of the church, the city hearing officer approved a CUP for a term of seven years. The hearing officer stated that the decision was based, in part, on her observation that the average length of CUPs citywide was 10 to 20 years. She also noted that the average length of CUPs in the Rancho Bernardo Industrial Park was five to 10 years. The planning board decided to appeal to the city planning commission.

The planning commission held public hearings and the planning staff reported that it supported a five-year CUP despite the fact that the hearing officer recommended a seven-year CUP. At the conclusion of its hearings, the planning commission approved a five-year CUP. Then the planning commission appointed a committee to "formulate guidelines for future requests for religious organization CUPs in the Rancho Bernardo Community Plan industrial park." The committee recommended guidelines allowing religious uses but in a highly controlled environment, limiting the time period to four years, to facilities less than 8,000 square feet, and stating that services were to be held in off-peak hours and that child care facilities were not permitted on the premises.

Grace Church sued the planning board, the planning commission, and the city for $2.2 million, claiming they had violated RLUIPA. Both sides moved for summary judgment (*Grace Church of North County v. City of San Diego*, 555 F. Supp.2d 1126 (S.D. Calif., May 9, 2008), 60 PEL 362). The court agreed with Grace Church that the application of the city's CUP procedures constituted an "implementation of a land use regulation" under which a government makes "individualized assessments" of the proposed uses for the property (42 U.S.C. §2000cc(a)(2)(C)). The court also found that the plaintiff's use fell within the "religious exercise" definition of RLUIPA.

The court relied on *Guru Nanak*, 456 F.3d 978, 985 (9th Cir. 2006), 58 PEL 360, which held that "for a land use regulation to impose a substantial burden, it must be oppressive to a significantly great extent. That is, a substantial burden on religious exercise must impose a significantly great restriction or onus upon such exercise." The court concluded that the mandatory CUP process constituted a substantial burden because the church received a CUP for only half the length of time it requested with no reasonable expectation that the city would approve any extension.

The court then turned to the issue of whether the imposition of the substantial burden on Grace Church's exercise of religion was "in furtherance of a compelling governmental interest" and the "least restrictive means" of furthering that compelling governmental interest. The city argued that it had a compelling interest in enforcing zoning and planning regulations, particularly when it is enforcing those regulations with the purpose of protecting industrial lands for industrial use. The court decided the preservation of industrial lands for industrial uses does not constitute a "compelling interest" for purposes of RLUIPA (555 F. Supp.2d at 1140). Furthermore, the city failed to produce any evidence demonstrating that they used the "least restrictive means" (555 F. Supp.2d at 1141).

On April 25, 2009, it was reported that a settlement had been reached. Under the settlement, the church will receive $950,000 in damages and a permit to occupy its space for another 10 years.[9]

No RLUIPA Violation Where Church Fails to Apply for Conditional Use Permit

Family Life Church brought a RLUIPA claim against the City of Elgin, Illinois, challenging both the conditional use permit it was required to obtain in order to operate a homeless shelter in its church building located in the city center and for the delays in obtaining the permit. The federal district court granted summary judgment in favor of the city (*Family Life Church v. City of Elgin*, U.S. Dist., N.D. Ill., 561 F. Supp. 2d 978 (June 18, 2008), 60 PEL 364).

The church opened the shelter in October 2005 without seeking any permits from the city. After being cited for three code violations, including operating a shelter without a CUP and without an occupancy permit, the church submitted an application in September 2006. The church was cited with 105 building, fire code, and life-safety code violations, including 27 imminent life-safety violations. In November 2006, the zoning hearing board held a public hearing and recommended that the

9. See http://www.northcountytimes.com/articles/2009/04/25/news/inland/rb/ze28509208d0d9d1d682575a20074eb7f.txt.

When a church wants to locate in an area of the community designated for revitalization as a tax increment district (TIF), do the interests of the church outweigh the interests of the community in a motion for temporary injunction?

CUP be approved. When the application was not on the city council's January 11, 2007, agenda, the church filed a complaint in district court. The CUP was ultimately approved in May 2007 with the condition that the building, fire, and life-safety violations be cured before reopening the shelter.

The court determined that the city's ordinance requiring a CUP to operate a homeless shelter in the CC2 district is facially neutral—it applies to both religious and nonreligious shelters. The harm to the church's religious exercise was no more than incidental to the city's neutral land use ordinances. The church argued that the "delay, uncertainty, and expense" of applying for the CUP constitutes a substantial burden, citing *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895 (7th Cir. 2005). Although the eight-month application process might be inconvenient for the church, the district court did not find that it rose to the level of a substantial burden. Much of the burden on the church was self-imposed by its premature opening of the shelter before seeking a permit and then having to close down the shelter during the permit application process.

Religious Land Use Competes with Economic Development

When a church wants to locate in an area of the community designated for revitalization as a tax increment district (TIF), do the interests of the church outweigh the interests of the community in a motion for preliminary injunction? That was the issue presented in *River of Life Kingdom Ministries v. Village of Hazel Crest, Illinois*, 2008 WL 4865568 (N.D. Ill., July 14, 2008). The federal district court weighed the competing interests and concluded "that the irreparable harm the Village would suffer from interference with the goals of the TIF outweighs that of the Church's inability to occupy the premises" and denied the motion for a preliminary injunction.

When a community establishes a TIF, it captures the growth in future tax revenues from the new development that occurs in the district and pumps those funds back into the district for infrastructure improvements. In this case, the Village of Hazel Crest had amassed more than $500,000 in TIF funds and had an additional $450,000 in grant money. The plans called for "transit-oriented development"—businesses of interest to commuters such as convenience stores and dry cleaners. The Village had already begun work on new parking facilities and bicycle trails.

In October 2007, River of Life Ministries purchased an old warehouse and office within the district with the intention of converting the building to use as a church. The B-2 zoning for the property does not permit churches because the area is reserved for commercial development. In January 2008, the board of trustees denied the church's request and the church sued, claiming, among other things, that the denial constituted a violation of the equal terms provision of RLUIPA.

Responding to a motion for preliminary injunction, the court discussed three important RLUIPA cases which have addressed the equal terms provision[10] and decided to use the four-part test enunciated in *Primera Iglesia Bautista Hispano of Boca Raton, Inc. v. Broward County* for determining a violation: "(1) the plaintiff must be a religious assembly or institution, (2) subject to a land use regulation, that (3) treats the religious assembly on less than equal terms, with (4) a nonreligious assembly or institution" (450 F.3d 1295 (11th Cir. 2006)). Using that test, and the four prerequisites for granting a preliminary injunction, the court concluded the community's interest in its revitalization project outweighed the church's interest in occupying the building. Granting the church its requested relief would essentially invalidate the village's zoning ordinance and that would "cause confusion and uncertainty for current and potential property owners in the B-2 District" (2008 WL 4865568 *12).

City Refuses to Consider Church's Special Exemption Application

What happens if the government refuses to consider an application submitted by a religious land use applicant? The question is answered in *Calvary Temple Assembly of God v. City of Marinette, Wisconsin*, 2008 WL 2837774 (E.D. Wis., July 21, 2008). Calvary Temple requested an exemption from the city's zoning code to allow it to operate a faith-based counseling center in the fellowship hall located in a house next to the church. The counseling service would be available to church members as well as the general public on a sliding-fee scale. Both the church and fellowship hall are authorized as special exceptions under the zoning code. City staff concluded the counseling service would be categorized as a "professional office," which the zoning code does not allow in the R-2 district where the church is located.

The church applied for a special exception, which was scheduled for a public hearing before the planning commission. However, the issue was removed from the agenda after the city attorney issued an opinion that the planning commission did not have the legal authority to consider the application because the special exception requested was not allowed in the R-2 district. The church sued, arguing that the city's failure to consider its application violated RLUIPA as well as the federal and state constitutions.

The district court granted summary judgment in favor of the city, concluding that the city's decision not to consider or grant the application for a special exception was not a substantial burden on the church. There are alternative sites where the church can establish its counseling

10. Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253 (3d Cir. 2007), *cert. denied*, 128 S.Ct. 2503 (2008); Primera Iglesia Bautista Hispano of Boca Raton, Inc. v. Broward County, 450 F.3d 1295 (11th Cir. 2006); Digrugilliers v. City of Indianapolis, 506 F.3d 612 (7th Cir. 2007).

RLUIPA is inapplicable because Olsen was not challenging a land use regulation.

center. The fact that the church "may incur additional expense to sell its [property] so that it can purchase a property in a district that allows professional offices does not amount to a substantial burden on religious exercise" (2008 WL 2837774 at *9).

Controlled Substances Act is Not Land Use Regulation Subject to RLUIPA

There are limits to what claims may be brought under RLUIPA, as discussed in *Olsen v. Mukasey*, 541 F.3d 827 (8th Cir., Sept. 8, 2008). Olsen was previously convicted of possession of marijuana with intent to deliver despite his assertion that he adheres to the teachings of the Ethiopian Zion Coptic Church, which advocates use of marijuana. After enactment of the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb, Olsen sought, and the federal Drug Enforcement Administration denied, a "religious use" exemption. The trial and appeals courts affirmed. The Controlled Substances Act (CSA) is not subject to RFRA and federal claims are barred by collateral estoppel because the controlling law has not changed. RLUIPA is inapplicable because Olsen was not challenging a land use regulation and was not an institutionalized person. The drug laws are neutral laws of general applicability that do not require application of a compelling interest test.

What Constitutes a Church?

An IRS-recognized exempt religious organization wanted to build a 9,700-square-foot, two-story building on a six-acre parcel in a low-density residential district. Churches are considered special uses and the zoning ordinance does not define "church." The organization ministers to people with chemical and environmental sensitivities. The proposal called for a 2,400-square-foot sanctuary for up to 60 worshippers, with a reception area, coatroom, bathrooms, and kitchen; a 1,600-square-foot counseling area; a 1,500-square-foot taping and publication area; an 1,800-square-foot ministerial training area; a 1,200-square-foot administration area; a 375-square-foot health ministry area (to provide nutritional counseling and products); a youth center; and a large garage. After the application was filed, the ordinance was amended to require 200 feet of frontage on a major street; the property only has 66 feet of frontage. The zoning board denied a special use permit and variance.

The proposed use was not a "church," the trial court ruled, but the denial violated RLUIPA and the Michigan and U.S. constitutions. In *Great Lakes Society v. Georgetown Charter Township*, 761 N.W.2d 371 (Mich. App., Oct. 30, 2008), 61 PEL 63, the Michigan Court of Appeals reversed in part, first holding that the use would constitute a church even if its "principal use" is not for worship. The structure is to be used for worship and reasonably related uses. Upholding the denial of a variance, the court noted that the requested variance was large. The ordinance amendment was a clarification, not an excuse to deny the application, the court said. The requirement serves important traffic safety purposes and the same requirement has been applied to other churches almost universally (761 N.W.2d at 421).

The court then held that the denial did not impose a substantial burden on religious exercise as the decision did not coerce actions contrary to religious beliefs and the church could be located elsewhere (761 N.W.2d at 424). Rejecting constitutional claims, the court stated that the requirement is part of a generally applicable zoning scheme, neutral to religion; is narrowly tailored to meet valid purposes; and leaves open other channels for association among members of the association (761 N.W.2d at 427).

Treating Assemblies Equally

What types of assemblies are "equal" within the meaning of an equal terms RLUIPA case? In *Covenant Christian Ministries, Inc. v. City of Marietta, Georgia*, (N.D. Ga., March 31, 2008), No. 1:06-CV-1994-CC, the church argued that the city's zoning ordinance violated the equal terms prong of RLUIPA because it allowed private parks and playgrounds, public buildings, schools, a conference center and resort, neighborhood recreation centers, and funeral homes in residential areas, but not religious institutions. The court agreed that at a minimum private parks and playgrounds and neighboring recreation centers are assemblies or institutions within the meaning of RLUIPA, because these uses are areas where "groups or individuals dedicated to similar purposes—whether social, educational, recreational, or otherwise—can meet together to pursue their interests" (*Midrash*, 366 F.3d at 1231). The court found that the zoning ordinance, on its face, treated religious assemblies and institutions differently than similar uses and thus violated the equal terms provision of RLUIPA.

The city submitted evidence that it had a compelling interest in regulating places of assembly through the zoning ordinance. The purpose of the zoning code, the city argued, is to protect the value of land and public health, to protect against overloading public infrastructure systems, to prevent traffic hazards, and to facilitate adequate provision of public services along with conserving natural resources and preserving the natural beauty of the city. The court recognized the importance of these interests in imposing land use regulations and protecting residential areas, but also noted that the city must show more than a compelling interest in enforcing zoning regulations in general. Referring to the landmark decision of *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007), the court concluded that even if the city could satisfy this burden, it could not establish that its ordinance is the least restrictive method for accomplishing its objective.

At the public meeting, the county council first approved the water and sewer request but then reversed itself after a councilman was observed whispering to other council members.

> Recreation centers, parks, and playgrounds have similar potential for community disruption, increased traffic, and encroachment into residential neighborhoods as religious institutions, but such uses have been allowed as a matter of right in residential neighborhoods throughout the city. The city has not set forth any basis for distinguishing these assemblies. Moreover, it appears that the city could satisfy its goal for protecting residential neighborhoods in a manner that does not differentiate between churches and aforementioned assemblies. While the planned development of certain religious institutions on residentially zoned property, including perhaps Covenant's plan for the subject property, may not comport with the city's interest in preserving residential neighborhoods and properly may be disallowed by the city, there appeared to be no justification for a blanket institution of religious institutions from residential zones." (*Covenant Christian Ministries, Inc. v. City of Marietta, Georgia* (N.D. Ga., March 31, 2008, No. 1:06-CV-1994-CC at 26-27)

County's Actions Motivated, at Least in Part, by Religious Discrimination; Congregation Entitled to Permanent Injunction

In November 2008, a federal district court in Maryland provided a very good description of how the abuse of governmental power can thwart any attempts by a religious land use applicant to locate in the community, and the usefulness of RLUIPA in leveling the playing field for religious institutions in land use matters (*Reaching Hearts International, Inc. v. Prince George's County*, 584 F.Supp.2d 766 (D. Md., Nov. 4, 2008), 61 PEL 62). The court upheld the jury award of $3,714,822.36 to the church and directed the county to process any water and sewer applications the church might file.

Reaching Hearts International, Inc. (RHI) was formed in 2000 as a congregation of the Seventh Day Adventist Church. At the beginning, it did not have its own building but leased a conference center, which proved to be an unsatisfactory arrangement. In 2002, RHI purchased property in the county for $795,000 with a down payment of $195,000 and a five-year mortgage at 7.5 percent. The property is comprised of two parcels zoned R-A where construction of a church is permitted as a matter of right. The property is located down the road and across the county line from another church.

RHI attempted to work with the local community association for the next six years, but the association was "very hostile" to the building plans. RHI tried to obtain a change in the water and sewer category for the property to allow development. At the public meeting, the county council first approved the water and sewer request but then reversed itself after a councilman was observed whispering to other council members. At the same meeting, they approved a similar request for a residential development of five homes in the vicinity of RHI's property.

After RHI's water and sewer request was denied, the county council passed an ordinance in November 2003 that effectively prevented RHI's plans to build a church. RHI sought approval to merge its two parcels, but was told by staff that the councilman representing the district was opposed to RHI's project. The planning commission denied the merger request, stating that a portion of the property was in the wrong water and sewer category. RHI again applied for a change in its category, but the request was denied despite no adverse comments. Following the denial, the councilman advised RHI that "it was wasting its time and money in attempting to proceed with the County" (584 F.Supp.2d at 779).

RHI filed suit in June 2005, alleging an Equal Protection Clause violation, as well as a violation of RLUIPA. Following a seven-day trial in April 2008, the jury ruled that the county's laws, regulations, and administrative actions were motivated, at least in part, on the basis of religious discrimination and imposed a substantial burden on RHI's exercise of religion. The jury was instructed on the four factors that the Fourth Circuit recognizes are probative of whether decision makers are motivated by discriminatory intent: (1) evidence of a "consistent pattern" of actions disparately impacting members of a particular class of persons; (2) historical background of the decision; (3) the specific sequence of events leading up to the particular decision being challenged; and (4) contemporary statements by decision makers on the record or in the minutes. The jury made a provisional award of $3.7 million.

Following supplemental briefing and the county's motion for judgment as a matter of law, the district court ruled in November 2008 that RHI is entitled to relief under the Equal Protection Clause and RLUIPA; that the county's 2003 ordinance is unconstitutional and violates RLUIPA; and that the county must process any water and sewer application RHI may file without regard to the ordinance and "without any discriminatory animus" (584 F.Supp.2d at 795). The court included a good summary of cases discussing RLUIPA's "substantial burden" provision from the various circuits and noted that:

> It is clear that Defendant engaged RHI in a fruitless three-year-long shadowboxing match that was doomed from the start. Certainly, Defendant never leveled a knockout punch with one decision or action over the course of the three years in which RHI presented applications to build its church in conformity with the applicable laws at the time. Yet the jury was presented with legally sufficient evidence during trial of Defendant's combination of uppercuts, hooks, crosses, and jabs coupled with Defendant's bobbing and weaving, which ensured that RHI was always facing a moving target without ever having the time or opportunity to recover or any hope for success. (584 F.Supp.2d at 784)

CONCLUSION

There is little certainty and uniformity of the law through the decisions rendered in 2008. The parameters of RLUIPA continue to be defined and it may be many years before both religious land use applicants and local governments reach an understanding of this statute. The only certainty is that RLUIPA's boundaries will continue to be tested.