

## Commentary

# RLUIPA: Two Sides to the Story

*Editor's Note:* In the seven years since President Clinton signed the Religious Land Use and Institutionalized Persons Act ("RLUIPA") into law, there has been a flurry of litigation, the vast majority initiated by inmates. In 2005, the U.S. Supreme Court ruled RLUIPA is constitutional, at least as it applies to prisoners, in *Cutter v. Wilkinson*, 544 U.S. 709, 125 S.Ct. 2113 (2005).

Last year was a busy time for RLUIPA in the land use context as well. Whether it was the denial of two conditional use permits which the court deemed was a substantial burden on the Sikh Society in *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, 456 F.3d 987 (C.A.9, Cal. 2006) or the contrary finding in Pennsylvania when a township denied the church's application for a campground and hiking trails as an accessory use in *City of Hope v. Sadsbury Township Zoning Hearing Board*, 890 A.2d 1137 (Pa. Cmwlth. 2006); or the holding in the Seventh Circuit that an involuntary annexation of church property is not a land use reg-

ulation under RLUIPA in *Vision Church v. Village of Long Grove*, 468 F.3d 975 (7th Cir. 2006), these decisions are very dependent on the facts. The most bizarre facts come from the District of Columbia, where nine Georgetown University students have declared themselves the Apostles of Peace and Unity in order to thwart the zoning code which allows no more than six unrelated individuals to live together in one home. (See <http://writ.news.findlaw.com/hamilton/20061130.html>.)

We've asked attorneys on both sides of the RLUIPA equation to share the "facts" in their cases in the two mini-commentaries that follow. There are lessons to be learned from each. Dan Dalton describes the exasperating experience his client has had for more than three years trying to obtain an occupancy permit for a church. Then Graham Billingsley, Boulder County planner, and Dwight Merriam, an attorney representing Boulder County defending against a RLUIPA challenge, describe the other side of the coin.

## The Lighthouse Story

Daniel Dalton

### IN THE BEGINNING

What is it like to represent a church asserting a claim against a local government under the Religious Land Use and Institutionalized Persons Act ("RLUIPA") (codified at U.S.C. § 2000cc, et seq.)? If there was a single word that encompasses "rewarding, challenging, and exhausting," I'd use it. I represent Lighthouse Community Church of God ("Lighthouse") in a RLUIPA claim against the City of Southfield, Michigan, located on the northwest side of Detroit. My story is not unlike that of David and Goliath, or Joshua at the walls of Jericho, or Moses imploring Pharaoh to let his people go. This story strikes at the heart of our nation's conscience, and reflects the very reason the Pilgrims came to the New World in the 1600s—religious freedom.

When I first met with my client, I never thought the city would oppose

having a church within the city limits. Yet, on the eve of trial, even after the federal district court granted summary judgment in my client's favor on the issue of liability, the city continues to deny the church an occupancy permit so that it can use its building for worship. *Lighthouse Community Church of God v. City of Southfield*, 2007 WL 30280 (E.D. Mich.).

Lighthouse has existed for more than 80 years. The congregation, part of the national Church of God, a Christian denomination of about 2,300 churches in the United States and Canada, first gathered on Wisconsin Avenue in Detroit. The congregation was small then—just 120 members—but faithful to its mission to serve the community. It had an elder care program that brought in senior citizens each day for fellowship and companionship. There were active ministries

for men, women, and children, who all gathered to share their joys and sorrows, to reestablish their relationship with God, and to learn what it means to be a Christian.

The Wisconsin Avenue facility in Detroit, however, had become too small for Lighthouse's ongoing work. After much deliberation and prayer, the congregation opted to seek a larger space, and the church elders began to search for a new building. In June 2003 they discovered that the two-story, 20,000-square-foot Rutland building in Southfield was for sale.

Built in 1965 as an office building, the Rutland building is located in a zoning district in which churches are a permissible use. The city had previously granted approval in 1996 to use the building as a church. Both Evangelistic Holiness Church and AME Zion Church used the building

Lighthouse was required to obtain a survey and prepare a site plan before the city would approve any interior renovations.

for worship services and outreach programs during the next eight years. According to a 2002 appraisal, the building had an additional 29-year life expectancy, plus a parking lot with 73 marked spaces and adjacent two-hour, on-street parking. It was perfect for Lighthouse's needs.

#### CHURCH AND CITY OFFICIALS MEET

In June 2003, Rev. Demetrious Booker, Lighthouse's senior pastor, began a series of meetings with a Southfield city planner to confirm that the Rutland building could, indeed, continue to be used as a church. Over the next eight months, the city planner encouraged Rev. Booker to proceed with the purchase and bring his church to Southfield. This long saga might not have occurred if city officials had informed Lighthouse from the beginning that the Rutland building could never accommodate a church for worship and religious assembly.

However, based on the representations of city officials, Lighthouse sought financing for the purchase. The lender required Lighthouse to obtain a letter from the city affirming that the building could be used as a church. In November 2003 a planning department official agreed to write such a letter for a fee of \$50. Based on this letter, Lighthouse sold the Wisconsin Avenue building, secured financing to purchase and improve the new Rutland property, and closed on the sale in February 2004.

Back in June 2003 when Rev. Booker had asked the city to approve his planned interior building renovations, he was told the planning department had not approved site plan or any other documents regarding the Rutland building or its uses and could not give the requested approval without those documents. Lighthouse was required to obtain a survey and prepare a site plan before the city would approve any interior renovations. However, according to the city building official, Lighthouse should not have been required to submit a site plan because the church was requesting interior renovations only. Did the right hand know what the left hand was doing?

To receive a certificate of occupancy for an existing building, the city requires site plan approval. Following site plan approval, the building department inspects the structure. Any code violations must be corrected by the owner to meet current Michigan standards. Once this is done, the city issues a certificate of occupancy. If site plan approval is never received, the building cannot be brought up to code. Based on the building's exterior alone—without looking at the planning department file confirming that two churches were previously housed in the building and that one had received a certificate of occupancy—the planner concluded Lighthouse was proposing a change of use and a site plan would be necessary, requiring city council approval.

Rev. Booker, his architect, and several city planners met on numerous occasions between June 2003 and January 2004 to review the proposed site plan and parking requirements. The city zoning ordinance requires a church to have one parking spot for every three seats in its sanctuary, but no city official can explain the governmental interest, reason, or rationale for such a requirement. The planner also met with the architect employed by Lighthouse and told her that the project would be difficult, but never discouraged her from proceeding.

#### THE PROBLEMS BEGIN

In February 2004, Lighthouse presented a site plan to city officials with the existing 73 parking spaces noted on the plan, and first learned that there was a problem! The city planner told Rev. Booker that he had made a mistake encouraging Lighthouse to purchase the building. Lighthouse was informed that city officials were supporting the efforts of the owner and developer of an adjacent nine-acre parcel who wanted to develop the entire area—including Lighthouse's property—as a \$30 million gated residential community. The city planner gave Rev. Booker the developer's name and phone number, suggesting that he sell the property. He said if they instead wanted to pursue the certificate of

occupancy, they must request a parking variance from the zoning board of appeals.

In June, the planner informed Lighthouse that it needed 95 parking spaces, 7,719 square feet of landscaping, a 75-foot front yard setback, and a 75-foot rear yard setback. The requirement for 95 parking spaces was not based on the number of seats in the sanctuary as the code required. Rather, it was based on an unwritten policy the city planner created that required parking calculations of churches to be based on all the cumulative uses in the building, regardless if they were being used at the time. This unwritten policy only came to light after the planner declared the church would never be allowed to occupy the building. The parking calculation included spaces for the Sunday school rooms, the pastors' offices, the fellowship hall, and the warming center even though those uses were not, nor had they ever been, used concurrently. The parking lot is too small to accommodate 95 parking spaces. Moreover, since the lot is only 150 feet deep the setbacks make any building on the site impossible.

Meanwhile, claims were made that the proposed development next door—the residential gated community—would increase the taxable value of the property from \$465,000 to \$15,849,480. The developer wanted the city to purchase the Lighthouse property and sell it to him at a discount.

In October 2004, nine months after Lighthouse had purchased the property and 15 months after initially contacting the city about the potential acquisition, Lighthouse received a letter from the building department instructing it to vacate the building immediately since it did not have a certificate of occupancy. This came as a complete surprise, since Lighthouse had been in discussions with city officials regarding the site plan.

In early December 2004, Lighthouse met informally with the city's planning commission to review the site plan—one that would renovate the sanctuary (interior space) only. Planning commission members recommended that Lighthouse either reduce

At every turn, city officials have continually erected insurmountable roadblocks that prevent the church from using its building for worship and congregational functions.

the number of seats in the sanctuary or sublease parking spaces from the Philippine Community Center, the tenant of an adjacent property that the city owned and had recently leased to the center. The planning commission indicated that it would recommend approval of the site plan to the city council (over the planning department's contrary recommendation) if these changes were made. In response, Lighthouse submitted a revised site plan reducing the number of seats in the sanctuary from 204 to 144, and contacted the Philippine Center to sublet parking.

Lighthouse returned to the planning commission for a second informal meeting in January 2005, telling the commission that the parking issue had been resolved as requested, the number of seats in the sanctuary had been reduced, and they had plans to use a bus to ferry members of the congregation back and forth. In a complete switch, the planning commission upheld the planning department's recommendation to deny the site plan based on inadequate parking. The planning staff directed Lighthouse to appear before another informal city council committee in February 2005, and then before the entire city council in April. At the February meeting, Lighthouse was summarily informed that the congregation would never be allowed to occupy the building for worship and an outreach center, and a few days before the scheduled hearing in April, the Lighthouse site plan was removed from the council agenda without explanation.

#### FROM CITY HALL TO THE COURTHOUSE

In May 2005, the city issued Lighthouse a civil infraction ticket for occupying the building without a certificate of occupancy and the court ordered Lighthouse to cease and desist using the building. With no other option left to them, Lighthouse filed suit in federal district court alleging a cause of action under RLUIPA and related constitutional claims, then obtained an *ex parte* temporary restraining order. Prior to the preliminary injunction hearing, the building department had refused to

inspect the property or allow Lighthouse to apply for a certificate of occupancy, maintaining that the church had to obtain site plan approval first. However, at oral argument for the preliminary injunction, the building official agreed to permit Lighthouse to apply for a certificate of occupancy, which occurred in August. The city inspected the building and issued a report that noted the deficiencies and repairs required to bring the building up to code.

The biggest item yet to be resolved, however, was site plan approval from the planning department. Lighthouse was prepared to make interior renovations and remedy the minor code deficiencies, but city officials have never allowed the church to make these necessary changes until a site plan is approved. Lighthouse believes the city has no intention of approving the site plan.

On February 27, 2006, more than 20 months after Lighthouse submitted its site plan to the planning commission, and more than 10 months since the site plan was initially placed on the city council's agenda for a vote, the city council scheduled, heard, and denied Lighthouse's site plan. On the same day, the city approved the rezoning and the site plan for the residential gated community on the property next door.

Following oral arguments on the summary judgment motions, the federal district court, concerned about whether Lighthouse had sufficiently exhausted its administrative remedies, directed the church to apply for a parking variance. Lighthouse did so immediately. Although the zoning board of appeals ("ZBA") granted setback and landscaping variances to the church in October 2006, it denied the critical parking variance because it concluded that there would be "a negative impact on surrounding properties because [the variance] will result in overflow parking onto adjacent properties, street rights-of-way, and residential properties to the north." *Lighthouse Community Church of God v. City of Southfield*, 2007 WL 30280 at \*6.

The court concluded that the denial of the parking variance constituted an

individualized assessment, thus satisfying RLUIPA's jurisdictional hurdle. *Id.* at \*7. The court also found that Lighthouse had established a *prima facie* case of a RLUIPA violation because the ZBA's denial of a parking variance precluded the church from using its building for worship purposes. *Id.* at \*9. Finally, when the city was unable to demonstrate a compelling government interest for keeping Lighthouse from using its building for worship, the court granted partial summary judgment in favor of the church. *Id.* at \*11. Trial began in March 2007 on the issue of damages and injunctive relief under RLUIPA and liability and damages on the church's equal protection, substantive due process, and procedural due process claims. The city has never offered any type of settlement resolution.

#### LESSONS LEARNED

At every turn, city officials have continually erected insurmountable roadblocks that prevent the church from using its building for worship and congregational functions. Lighthouse has lost nearly half of its congregation and is struggling to retain its remaining members. Because city officials denied Lighthouse a permanent spiritual home, the congregation now lacks suitable space to gather for worship, meetings, or even counseling. Members are limited in their ability to access their pastor. The lack of a building hinders religious education for the congregation's children. In addition, Lighthouse is now in dire financial straits and cannot pay its mortgage, salaries, and other costs, and may be forced to close its doors permanently. The church has been forced to pay property taxes, even though the state constitution precludes the compulsion of a tax payment. The state tax tribunal has rejected the city's arguments to compel a tax payment, yet under state law, the church must pay taxes until the matter reaches a final resolution. Realizing this, and hoping the church will not be able to pay the taxes and thus lose the building in foreclosure, the city continues to appeal.

In my experience in representing local governments, I believed at the

The city has relied on time and an insurance policy to guide their actions.

outset that this could, and should, have been resolved through proper site planning. In hindsight, however, my client and I should have understood that the city never intended to resolve this case. Instead of believing that they would act in good faith, we should have filed suit immediately. The lawsuit should have been filed before the city filed a civil infraction ticket to avoid abstention arguments. The reason Lighthouse did not file suit is that it thought the city was going to work with them to resolve their concerns about the site plan. During our first interaction with the city staff, I raised potential RLUIPA violations. The response was "RLUIPA does not apply to this city." I thought they were kidding, but in reality, they were sending a message that this is a battle that they would not give in on.

The city has relied on time and an insurance policy to guide their actions. Realizing that the church has been drained financially and members have drifted away, the city is doing its best to delay matters because justice delayed is justice denied. The case will continue for many years as the city has already publicly announced that it will appeal the jury's verdict—even before the jury has been selected.

When thinking of filing a RLUIPA action, a church must realize that a city may look at the big picture of time and expense rather than good planning principles. Therefore, churches must prepare themselves for a very lengthy and expensive case. The church must also consider that members will leave the congregation, as people do not come to church to fight—they come for solace and peace. Litigation will cast a cloud over the spiritual, financial, and physical growth of the church.

Furthermore, a church must be aggressive in discovery. At first, Lighthouse mistakenly took the word of the city regarding documents, depositions, discovery, and e-mails. Yet not one deposition, document, or interrogatory was answered without a court order. Only after multiple motions and orders were entered did Lighthouse learn that the city's goal was to eliminate the church, drive it to financial ruin so that it would lose its building in foreclosure, then take the land and use it for the \$30 million residential gated community.

It has been an honor representing Lighthouse Community Church of God in this case. I hope one day it can return to its primary function of helping the community—the same community that is rejecting it today.

#### RELIGIOUS LAND USE & INSTITUTIONALIZED PERSON ACT ("RLUIPA")

42 U.S.C. § 2000cc. Protection of land use as religious exercise

(a) **Substantial burdens.**

- (1) General rule. No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution
  - (A) is in furtherance of a **compelling governmental interest**; and
  - (B) is the **least restrictive means** of furthering that compelling governmental interest.
- (2) Scope of application. This subsection applies in any case in which
  - (C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, **individualized assessments** of the proposed uses for the property involved.  
[emphasis added]