

Recent Developments in Land Use,
Planning and Zoning

The Religious Land Use and Institutionalized Persons Act Update

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THE CASE LAW INTERPRETING THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT (RLUIPA) continues to evolve and the cases decided in 2007 illustrate this point. While there is much litigation under the Act and more appellate decisions, there is no clear trend yet as to how to apply the statute. What is clear so far is that courts seem to utilize a case-by-case approach in making their decisions on a RLUIPA issue. A brief summary of the 2007 case law follows.

I. Church Victories¹

A. Shepherd Montessori Center Milan v. Ann Arbor Charter Township²

Shepherd Montessori Center Milan (the Center) operated a daycare program in the Domino's Farms Office Park.³ The area was zoned "OP" (office park district) but the ordinance expressly permitted the operation of day care centers for children of office park employees.⁴ In April 2000, the Center requested a zoning determination to see whether it could open a Catholic Montessori school for about twenty-five children

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1. Neither *E. Hill Synagogue v. City of Englewood*, 240 F. App'x 938 (3d Cir. 2007) nor *League of Residential Neighborhood Advocates v. City of Los Angeles*, 498 F.3d 1052 (9th Cir. 2007) is included because neither reached a decision under RLUIPA. *E. Hill Synagogue* deals with subject-matter jurisdiction and *League of Residential Neighborhood Advocates* concerns a city's ability to bypass the law in settlement agreements.

2. 739 N.W.2d 664 (Mich. Ct. App. 2007), *vacated*, 746 N.W.2d 105 (Mich. 2008) (case was remanded to the appellate court in light of the ruling in *Greater Bible Way Temple of Jackson v. City of Jackson*, 733 N.W.2d 734 (Mich. 2007)); *see infra* notes 228–31 and accompanying text.

3. *Id.* at 667.

4. *Id.*

grades K-3 adjacent to its day care facility.⁵ The zoning official for the township classified the Center's purpose as "primary school" and informed the Center that primary schools were not listed as permitted uses in OP districts.⁶ The Center appealed to the Ann Arbor Charter Township Zoning Board of Appeals (ZBA)⁷ and argued that the ZBA had previously granted a variance to the earlier owners, Rainbow Rascals, a non-religious, pre-school day care program.⁸ The Rainbow Rascals' variance expanded the use of the premises to allow children of non-office park employees.⁹ The Center also noted that the "proposed use of the property would be low impact and . . . involve less density than the currently approved use."¹⁰ The ZBA denied the appeal.¹¹

In September 2000, the Center filed a lawsuit alleging violations of RLUIPA and Equal Protection.¹² The trial court, despite finding that the Center's use of the property for religious education was a religious exercise within the meaning of RLUIPA, granted summary disposition in favor of defendants.¹³ On remand, the Michigan Court of Appeals directed the trial court to determine whether the denial of the Center's variance placed a substantial burden on the Center's religious exercise.¹⁴ Again, the trial court granted summary disposition in favor of defendants.¹⁵

The Michigan Court of Appeals reversed.¹⁶ After extensive analysis of alternative locations in the area that would allow the school the actual availability of alternative property in the area, the availability of property that would be suitable for a K-3 school, the proximity of the homes of parents who would send their children to the school, and the economic burdens of alternative locations, the court found a substantial burden on the Center's religious exercise in violation of RLUIPA.¹⁷ Because the ZBA "presented no evidence that [it] had a compelling governmental interest requiring [it] to deny [the Center's] variance," the court found in favor of the Center.¹⁸

5. *Id.* at 667–68.

6. *Id.* at 667 (internal quotation marks omitted).

7. *Shepherd Montessori*, 739 N.W.2d at 668.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Shepherd Montessori*, 739 N.W.2d at 668.

13. *Id.*

14. *Id.*

15. *Id.* at 669.

16. *Id.* at 675.

17. *Shepherd Montessori*, 739 N.W.2d at 669–73.

18. *Id.* at 673.

On the Center's equal protection claim, the court found that Ann Arbor treated a secular entity more favorably than the Center, a religious entity¹⁹ by denying the Center's request for a variance to operate an educational program in the same space formerly occupied by the similarly situated Rainbow Rascals, despite the fact that there would be far fewer children at the school and it would cause fewer traffic problems.²⁰ The City did not offer any evidence of a precisely-tailored plan to achieve a compelling government interest.²¹

B. *Digrugilliers v. Consolidated City of Indianapolis*²²

Toby Digrugilliers is the pastor of the Baptist Church of the West Side (the Church).²³ The Church is located in a part of Indianapolis zoned C-1.²⁴ The Indianapolis zoning ordinance refers to C-1 districts as buffer districts between residential and commercial zones.²⁵ C-1 zones allow for an extensive list of uses including assembly halls, day-care centers, auditoriums and the like; notably missing from the list are religious institutions.²⁶ Because the Church's building is a religious use, the City told Digrugilliers that he would either have to move his church or apply for a variance.²⁷ He did neither and brought suit, alleging violation of the "less than equal terms" provision of RLUIPA.²⁸

The district court denied Digrugilliers' request for a preliminary injunction on the grounds that the suit had negligible prospects of success.²⁹ Digrugilliers appealed from the denial.³⁰ The central question on appeal was whether, in requiring the Church to obtain a variance, the City was treating a religious institution on less than equal terms with a nonreligious institution.³¹ The district judge thought not because the zoning code defines religious use to include residential uses, such as a rectory for the minister.³² Therefore, the judge reasoned, to allow the Church without a variance would give churches greater rights than those of secular uses.³³

19. *Id.* at 675.

20. *Id.*

21. *Id.*

22. 506 F.3d 612 (7th Cir. 2007).

23. *Id.* at 614.

24. *Id.*

25. *Id.*

26. *Id.* at 614–15.

27. *Digrugilliers*, 506 F.3d at 614.

28. *Id.* (quoting 42 U.S.C. § 2000cc(b)(1) (2006)).

29. *Id.*

30. *Id.*

31. *Id.* at 615.

32. *Digrugilliers*, 506 F.3d at 615.

33. *Id.*

Judge Posner of the Seventh Circuit Court of Appeals disagreed. The City, he reasoned, “may not, by defining religious use so expansively as to bestow on churches . . . more rights than identical secular users of land have, justify excluding churches from the districts in which, were it not for those superadded rights, the exclusion would be discriminatory.”³⁴ Using the same reasoning, Judge Posner addressed the Indiana law which forbids sale of liquor within 200 feet of a church.³⁵ He found it irrelevant that the one law is created by the State and the other by the City; both are part of the government of Indiana:

[A] state cannot be permitted to discriminate against a religious land use by a two-step process in which the state’s discriminating in favor of religion becomes a predicate for one of the state’s subordinate governmental units to discriminate against a religious organization in violation of federal law.³⁶

The case was reversed and remanded to consider the claim.

C. Lighthouse Community Church of God v. City of Southfield³⁷

A church congregation wanted to relocate because an increasing number of members lived in another part of town.³⁸ The church found a two-story building in the target area and “began considering its purchase for use as a church.”³⁹ The building was located in a zoning district in which churches were a permissible use.⁴⁰ To operate as a church, however, a “certificate of occupancy” had to be obtained.⁴¹ The church’s pastor began meeting with the city’s zoning director.⁴² The pastor claimed that the director welcomed the church’s purchase of the property and assured him that “the building could be used as a church.”⁴³ Based on these representations, the church purchased the building.⁴⁴ The pastor later alleged that the church would never have purchased the building if the zoning director had not represented that the building could be used as a church.⁴⁵

Several months later, after discovering that the building was being used for church services, the city sent a letter to the pastor indicating

34. *Id.* at 615.

35. *Id.* at 616.

36. *Id.* at 617.

37. No. 05-40220, 2007 WL 30280 (E.D. Mich. Jan. 3, 2007).

38. *Id.* at *1.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Lighthouse Cmty.*, 2007 WL 30280, at *2.

43. *Id.*

44. *Id.*

45. *Id.*

that the church “would have to vacate the building because it did not have a certificate of occupancy permitting [the] use” of the property as a church.⁴⁶ A state trial court later issued an order requiring the church to cease and desist using the building.⁴⁷ The main reason the church was unable to obtain a certificate of occupancy was that the city required ninety-five parking spaces and the property only had seventy-three.⁴⁸ The church filed suit in federal court, claiming that the city’s denial of the certificate of occupancy violated RLUIPA.⁴⁹

The court noted there are three steps in evaluating the application of RLUIPA to a particular case: (1) Does it apply? (2) Is there a substantial burden to religious exercise? (3) Does the government have a compelling interest that is achieved by the least restrictive means?⁵⁰ The court disagreed with the city’s position:

Based on the language of RLUIPA, the land use regulation need not specifically target religious exercise. A land use regulation that is specifically blind to religious use of land can still substantially burden religious exercise. . . . It is undisputed that the parking ordinance prohibits the church from using its building, and that the church wants to use its building for religious exercise. The city had the power to grant a variance to the parking requirement currently barring the church from use of the building, but it did not do so. Therefore, there is an application of a land use regulation which prevents or burdens the church from using its building for religious exercise. . . . Here, it is undisputed that the church cannot use its building for worship purposes. Worship services are fundamental to the practice and exercise of one’s religious beliefs. Selling its current building and searching for another is not a mere inconvenience to the church. Instead, the court finds that the burden is substantial. Consequently, the court finds that the church has established a prima facie case of a RLUIPA violation by demonstrating that the application of the parking ordinance imposes a substantial burden on its religious exercise.⁵¹

Two days before trial, the City settled, paying what was then the largest settlement in the nation for a RLUIPA violation.⁵² This case is important for three reasons. First, it represents an excellent analysis of the application of RLUIPA to a city land use regulation restricting a church’s ability to engage in worship. The three-step analysis, and the court’s rejection of each of the city’s predictable arguments, will be

46. *Id.* at *2.

47. *Lighthouse Cmty.*, 2007 WL 30280, at *2.

48. *Id.*

49. *Id.*

50. *Id.* at *5–8.

51. *Id.* at *8.

52. The author was counsel for Lighthouse Community Church of God and has personal knowledge of the settlement amount, which was not disclosed to the public. *See generally Oakland County News Briefs: Southfield*, DETROIT FREE PRESS (Michigan), June 17, 2007, at 2 (indicating that the lawsuit had settled, but that the amount of the settlement “remains sealed”).

helpful to any other church that finds itself in a similar situation. Second, the court upheld the constitutionality of RLUIPA.⁵³ Significantly, it relied on the United States Supreme Court's 2005 ruling which upheld the constitutionality of RLUIPA's "institutionalized persons" protections.⁵⁴ Third, the case demonstrates that the constitutional guarantee of the equal protection of the law bars a city from applying land use regulations to a church in a way that is inconsistent with the treatment of other churches in the community.

D. *Westchester Day School v. Village of Mamaroneck*⁵⁵

Westchester Day School (the School) is a private Jewish school located in the Village of Mamaroneck.⁵⁶ The School is situated in an R-20 district, which allows private schools as long as the Zoning Board of Appeals (ZBA) grants a special permit.⁵⁷ Numerous other private schools operate within the zone.⁵⁸ In 1998, the School determined its current facilities inadequate to satisfy the School's needs.⁵⁹ Based on professional recommendations, the School decided to build a new building.⁶⁰ In October 2001, the school submitted its application for a special permit to build the new building.⁶¹ The ZBA unanimously allowed consideration of the permit to continue.⁶² A group of influential Mamaroneck citizens, however, opposed the project, and the ZBA rescinded the declaration.⁶³ After a prolonged battle in district court, the district court found that the Village had violated RLUIPA and ordered the Village to issue the School's special permit immediately.⁶⁴ From this ruling, the Village appealed.

The Second Circuit Court of Appeals agreed with the district court that the Village had violated RLUIPA.⁶⁵ The court, after extensive analysis of Supreme Court precedent, and giving great weight to the district court's determination that the School's application was arbitrary and

53. *Lighthouse Cmty.*, 2007 WL 30280 at *10.

54. *Id.* (citing *Cutter v. Wilkinson*, 544 U.S. 709 (2005)).

55. 504 F.3d 338 (2d Cir. 2007).

56. *Id.* at 344.

57. *Id.*

58. *Id.*

59. *Id.* at 345.

60. *Westchester Day Sch.*, 504 F.3d at 345.

61. *Id.*

62. *Id.* at 345-46.

63. *Id.* at 346.

64. *Id.* at 346-47.

65. *Westchester Day Sch.*, 504 F.3d at 352.

capricious under New York law, concluded that the failure to approve a variance was a substantial burden on the School's religious exercise.⁶⁶ The court used two other factors in reaching such a burden determination: "(1) whether there are quick, reliable and financially feasible alternatives [the School] may utilize to meet its religious needs absent its obtaining the construction permit; and (2) whether the denial was conditional."⁶⁷ In addition, the court found no compelling government interest; instead, it found the permit was denied because of undue deference to the opposition of a small group of neighbors.⁶⁸

The Village also challenged RLUIPA on two constitutional grounds: the Tenth Amendment and the Establishment Clause.⁶⁹ In regards to the Tenth Amendment, the court found that RLUIPA does not "directly compel[] states to require or prohibit any particular acts."⁷⁰ Using the *Lemon* test, the court found that RLUIPA (1) has a secular purpose; (2) RLUIPA does not advance religion; and (3) RLUIPA's land use provisions do not foster an excessive government entanglement with religion.⁷¹ Therefore, RLUIPA does not violate the Establishment Clause.⁷² The case settled on remand for \$4,750,000.00 in damages and \$900,000.00 in attorney fees and costs.⁷³

II. Government Victories⁷⁴

A. Living Water Church of God v. Charter Township of Meridian⁷⁵

Living Water is a Christian congregation with educational and day-care ministries in Meridian Charter Township, Michigan (Township).⁷⁶ Living Water owns a six-acre parcel in the Township.⁷⁷ The parcel is

66. *Id.* at 348–53.

67. *Id.* at 352.

68. *Id.* at 353.

69. *Id.*

70. *Westchester Day Sch.*, 504 F.3d at 355.

71. *Id.*

72. *Id.* at 356.

73. *Mamaroneck and School Settle Dispute*, N.Y. TIMES, Jan. 27, 2008, at WE2, available at <http://www.nytimes.com/2008/01/27/nyregion/nyregionspecial2/27schoolwe.html?scp=3&sq=mamaroneck+settlement&st=nyt>.

74. *Beth-El All Nations Church v. City of Chicago*, 486 F.3d 286 (7th Cir. 2007), a case in which RLUIPA was raised, is not discussed in this update because the decision addressed subject-matter jurisdiction and there was no discussion of RLUIPA or First Amendment issues.

75. 258 Fed. App'x 729 (6th Cir. 2007).

76. *Id.* at 730.

77. *Id.*

zoned for single family residential use, medium density.⁷⁸ To build a religious or educational institution in a residential zone, the Township requires a Special Use Permit (SUP).⁷⁹ To construct a building larger than 25,000 square feet, the Township requires an additional SUP.⁸⁰

In 1995, the Township granted Living Water an SUP to build a single-story 10,925 square-foot building to be used as a daycare for forty children.⁸¹ Living Water constructed and now occupies the building. In 2000, pursuant to a multiphase expansion plan, Living Water applied for and received an SUP to build a 28,500 square-foot elementary school and increase its daycare enrollment.⁸² On March 7, 2001, the Township informed Living Water that the 2000 SUP would expire on May 19, 2001 unless Living Water began construction or obtained an extension on its SUP.⁸³ Living Water timely requested an extension.⁸⁴

Despite a past policy of freely granting extensions, the Township denied the extension.⁸⁵ The Township's new legal counsel determined that the Code of Ordinances did not provide for extensions.⁸⁶ Living Water resubmitted its 2000 SUP, and, in 2003, amended it to include a Christian Education Building totaling 34,989 square feet.⁸⁷ The Township's Board granted an SUP for the non-residential use of a school in the residential district, but denied any addition that resulted in a gross floor area above 25,000 square feet.⁸⁸ The Board explained that

the size of the proposed church and school facility in relationship to the size of the subject site is out of proportion to similarly situated schools and combined church and school facilities within the Township and inconsistent with those review criteria and standards for the granting of a special use permit.⁸⁹

Following the denial, Living Water brought suit against the Township seeking an injunction restraining the Township from enforcing its denial and a declaratory judgment that the Township violated RLUIPA.⁹⁰ Following removal to federal court, the district court ruled in favor of

78. *Id.*

79. *Id.*

80. *Living Water*, 258 Fed. App'x at 731.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Living Water*, 258 Fed. App'x at 731.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 732.

90. *Living Water*, 258 Fed. App'x at 732.

Living Water.⁹¹ The district court held that the Township's denial "imposed a substantial burden on Living Water's religious exercise, that the denial did not further a compelling government interest, and that it was not the least restrictive means of furthering a compelling governmental interest."⁹² In doing so, the district court focused on the insufficient space for expansion and the issues and costs of having two separate locations for the church and school.⁹³ The Township appealed.⁹⁴

The Sixth Circuit Court of Appeals reversed.⁹⁵ At the heart of the debate, the court wrestled with what constituted a "substantial burden."⁹⁶ After an extensive survey of the different ways other circuits have handled the question in light of the Supreme Court's Free Exercise jurisprudence, the court declined to set a bright line test.⁹⁷ Nevertheless, the court suggested a "framework" to address the question: "though the government action may make religious exercise more expensive or difficult, does the government action place substantial pressure on a religious institution to violate its religious beliefs or effectively bar a religious institution from using its property in the exercise of its religion?"⁹⁸

The court concluded that while the denial of the SUP did indeed burden Living Water, the burden did not amount to substantial pressure on Living Water to violate its religious beliefs or effectively bar the church from using its property in the exercise of its religion:

The Township's denial does not preclude the church from moving its school to the church property; it does not require the church to forgo providing religious education; it does not preclude the church from enrolling students in its school; it does not prevent church members from entering the property and conducting worship or prayer services; it does not preclude the church from running religious programs and meetings in the evenings and on weekends; it does not preclude the church from . . . building a 14,075 square-foot facility to house the school.⁹⁹

Ultimately, the court reasoned, Living Water's complaint "is that it cannot operate . . . on the *scale* it desires."¹⁰⁰ RLUIPA, however, "does not

91. *Id.*

92. *Id.* at 732–33.

93. *Living Water Church of God v. Charter Twp. of Meridian*, 384 F. Supp. 2d 1123 (W.D. Mich. 2005).

94. *Living Water*, 258 Fed. App'x at 733.

95. *Id.* at 742.

96. *Id.* at 733.

97. *Id.* at 736–37.

98. *Id.* at 737.

99. *Id.* at 738–39.

100. *Id.* at 741.

protect the church from all land use regulation, but only from those regulations that substantially burden its religious exercise.”¹⁰¹

B. Lighthouse Institute for

Evangelism, Inc., v. City of Long Branch¹⁰²

In 1994, Lighthouse Institute for Evangelism (Lighthouse) bought property at 162 Broadway in downtown Long Branch, New Jersey (the Property).¹⁰³ At the time, the Property was subject to City of Long Branch Ordinance 20–6.13 (the Ordinance).¹⁰⁴ The Ordinance set forth a number of permitted uses such as theaters and assembly halls; however, a church was not listed as a permitted use.¹⁰⁵

On April 26, 2000, Lighthouse attempted to obtain a zoning permit to use the Property as a church.¹⁰⁶ Long Branch denied the application, stating that the proposed use was not permitted in the zone.¹⁰⁷ In response, Lighthouse filed suit alleging a variety of constitutional and other violations.¹⁰⁸ The district court dismissed all claims as either unexhausted or unripe and the Third Circuit Court of Appeals affirmed.¹⁰⁹

During the litigation, Long Branch adopted the Broadway Redevelopment Plan (the Plan) which superseded the Ordinance.¹¹⁰ The Plan’s purpose of redevelopment of the Broadway corridor called for—among other things—“attracting more retail and service enterprises.”¹¹¹ The Plan allowed for theatres, dance studios, restaurants, bars and the like.¹¹² Churches, schools and governmental buildings were not listed as permitted uses.¹¹³ The design guidelines under the plan stated that “[a]ny uses not specifically listed” were prohibited.¹¹⁴ The Plan did not include an individual waiver procedure, but could be amended by the City Council.¹¹⁵

101. *Id.*

102. 510 F.3d 253 (3d Cir. 2007).

103. *Id.* at 257.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Lighthouse Inst.*, 510 F.3d at 257.

108. *Id.*

109. *Id.* at 257–58.

110. *Id.* at 258.

111. *Id.*

112. *Lighthouse Inst.*, 510 F.3d at 258.

113. *Id.*

114. *Id.*

115. *Id.* at 259.

In November 2003, Lighthouse submitted a request to be designated the developer for the Property and “a waiver of the prohibition of church use.”¹¹⁶ The request was denied.¹¹⁷ The City Council denied an appeal, stating that (1) “the proposed use was ‘not permitted in the zone’” and (2) the inclusion of a church would jeopardize the envisioned entertainment/commercial zone because of a New Jersey law that “prohibits the issuance of liquor licenses within [200] feet of a house of worship.”¹¹⁸

Following the passage of RLUIPA in September 2000, Lighthouse filed an amended complaint, claiming that the Plan violated the Free Exercise Clause and RLUIPA.¹¹⁹ The district court held that “neither the Ordinance nor the Plan violated RLUIPA’s Equal Terms provision” because Lighthouse did not “show it was being treated worse than a similarly situated secular assembly or institution.”¹²⁰ The court also found that the “substantial burden” requirement of section 2(a)(1) of RLUIPA applied to section 2(b)(1) Equal Terms provision and that “Lighthouse could not demonstrate that Long Branch’s actions imposed a substantial burden on Lighthouse’s exercise of religion.”¹²¹ In regards to the Free Exercise Clause, the district court held that neither the Ordinance nor the Plan violated it because “both were neutral laws of general applicability.”¹²²

Lighthouse appealed only with regards to its Free Exercise and RLUIPA Equal Terms claims.¹²³ The Third Circuit Court of Appeals affirmed in part and vacated in part.¹²⁴ Upon analyzing the structure of the statute, legislative history and other circuits’ decisions, the court found (1) the substantial burden requirement does not apply to claims under the Equal Terms provision; (2) the Equal Terms provision requires a secular comparator that is similarly situated as to the regulatory purpose of the regulation in question; and (3) the Equal Terms provision operates on a strict liability standard—strict scrutiny does not come into play.¹²⁵

116. *Id.*

117. *Lighthouse Inst.*, 510 F.3d at 259.

118. *Id.*

119. *Id.*

120. *Id.* at 259–60.

121. *Id.* at 260.

122. *Lighthouse Inst.*, 510 F.3d at 260.

123. *Id.*

124. *Id.* at 277.

125. *Id.* at 260–69.

The court stated that in order for a plaintiff to assert a claim under RLUIPA Equal Terms provision, it must show:

(1) it is a religious assembly or institution, (2) subject to a land use regulation, which regulation (3) treats the religious assembly on less than equal terms with (4) a nonreligious assembly or institution (5) that causes no lesser harm to the interests the regulation seeks to advance.¹²⁶

The court found the dispositive issue to be the prohibition of alcohol that legislation demands around churches.¹²⁷ Lighthouse was unable to show any secular assembly with a similar effect that was better treated.¹²⁸

As for the original Ordinance, the court found Lighthouse entitled to summary judgment in its favor.¹²⁹ The Ordinance lacked any specific purpose and there is no reason why a church would create any more harm than an assembly hall.¹³⁰

On Lighthouse's Free Exercise claim, the court concluded that the district court did not err in granting summary judgment in favor of Long Branch.¹³¹ Lighthouse could not present evidence that being barred from the downtown area in Long Branch is a restriction on its religious exercise, as opposed to a "simple economic inconvenience."¹³² In addition, the court reasoned, "even if Lighthouse had [shown a] burden on its religious exercise, the Plan is a neutral regulation of general applicability subject only to rational basis review, which it survives."¹³³

C. Scottish Rite Cathedral Ass'n of Los Angeles v. City of Los Angeles¹³⁴

The Scottish Rite Cathedral Association of Los Angeles (SRCALA) is a nonprofit mutual benefit corporation that built and owns the Scottish Rite Cathedral¹³⁵ and is part of the Freemasonry organization.¹³⁶ The Los Angeles Scottish Rite Center (LASRC) is a private entity that operated the Cathedral under a lease with SRCALA.¹³⁷

In 1959, SRCALA received a zoning variance to build and use a four-story Masonic temple and parking lot in a residential neighborhood.¹³⁸

126. *Id.* at 270.

127. *Lighthouse Inst.*, 510 F.3d at 271–72.

128. *Id.* at 272.

129. *Id.* at 273.

130. *Id.* at 272–73.

131. *Id.* at 273.

132. *Lighthouse Inst.*, 510 F.3d at 273.

133. *Id.*

134. 156 Cal. App. 4th 108 (2007).

135. *Id.* at 110.

136. *Id.*

137. *Id.*

138. *Id.* at 111.

Based on SRCALA's pledge that the building would not be used for commercial purposes, the City approved the variance along with a parking lot that would be inadequate for commercial purposes.¹³⁹

In the 1970s, for financial reasons, SRCALA began to rent the building to commercial organizations.¹⁴⁰ In 1993, the City imposed additional constraints on the use of the property after receiving numerous complaints.¹⁴¹ The restrictions forced SRCALA to shutter the Cathedral until 2003, when SRCALA entered into a lease with LASRC.¹⁴² LASRC hosted entertainment and commercial events at the building despite continuing complaints and restrictions.¹⁴³ Finally, after finding that the Cathedral operated in violation of conditions imposed, the zoning administrator revoked the Masonic lodge use at the site.¹⁴⁴

In July 2004, SRCALA and LASRC filed their first petition of writ of administrative mandate in the superior court.¹⁴⁵ In October 2005, SRCALA and LASRC filed a second petition challenging the City's revocation of the Cathedral's certificate of occupancy.¹⁴⁶ The trial court, in finding that "RLUIPA did not protect either entity because 'the Freemason organization is not a religion,'" denied both petitions.¹⁴⁷

The central question on appeal was whether the Cathedral was being used for the purpose of religious exercise.¹⁴⁸ Contrary to the superior court's opinion and in light of Masonic principles and practices, the California Court of Appeals could not distinguish between Freemasonry and other more widely acknowledged modes of religious exercise.¹⁴⁹

Nevertheless, the Court disagreed with SRCALA's contention that RLUIPA extends its protection to even those nonreligious activities necessary to financially support the Cathedral's continued operation.¹⁵⁰ "Specifically, a burden on commercial enterprise used to fund a religious organization does not constitute a substantial burden on 'religious exercise' within the meaning of RLUIPA."¹⁵¹

139. *Scottish Rite*, 156 Cal. App. 4th at 111.

140. *Id.*

141. *Id.* at 112.

142. *Id.*

143. *Id.* at 112–13.

144. *Scottish Rite*, 156 Cal. App. 4th at 114.

145. *Id.*

146. *Id.*

147. *Id.* at 115 (internal quotations omitted).

148. *Id.*

149. *Scottish Rite*, 156 Cal. App. 4th at 116–18.

150. *Id.* at 119.

151. *Id.*

D. St. John's United Church of Christ v. City of Chicago¹⁵²

In May 2003, the Illinois General Assembly enacted the O'Hare Modernization Program (OMA).¹⁵³ Section 15 of the OMA grants the City the power to acquire, by condemnation or otherwise, any property used for cemetery purposes within or outside the city, and to require that the cemetery be removed to a different location.¹⁵⁴ In addition, the OMA modified the Illinois Religious Freedom Restoration Act (IRFRA)—which provides strict scrutiny to substantial burdens on a person's religious exercise similar to section 2(a) of RLUIPA—to state that nothing in the IRFRA "limit[s] the authority of the City of Chicago to exercise its powers under the [OMA] for the purposes of relocation of cemeteries or graves located therein."¹⁵⁵

St. Johannes Cemetery, owned and operated by St. John's United Church of Christ (St. John's), is located on the outskirts of O'Hare Airport.¹⁵⁶ St. John's asserts that both the City's attempt to acquire the land and the amendment to the IRFRA violate its rights under the Free Exercise Clause of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment and RLUIPA.¹⁵⁷

The district court dismissed St. John's complaint for failure to state a claim.¹⁵⁸ The district court concluded that the OMA was a neutral law of general applicability; therefore, it is subject only to rational basis scrutiny, which it survives.¹⁵⁹ The Seventh Circuit Court of Appeals agreed.¹⁶⁰ It found that "nothing is inherently religious about cemeteries or graves, and [thus,] the act of relocating them . . . does not on its face infringe upon a religious practice."¹⁶¹ The court went on to determine that the OMA does not embody a more subtle or masked hostility to religion; its purpose is "to insure that legal impediments to the completion of the O'Hare project are removed," no matter what their source.¹⁶²

152. 502 F.3d 616 (7th Cir. 2007).

153. *Id.* at 619.

154. *Id.* at 621.

155. *Id.* at 632 (internal quotations omitted).

156. *Id.* at 621.

157. *St. John's United Church of Christ*, 502 F.3d at 622.

158. *Id.* at 624.

159. *Id.* at 631.

160. *Id.* at 634.

161. *Id.* at 632.

162. *St. John's United Church of Christ*, 502 F.3d at 633.

The court found RLUIPA inapplicable,¹⁶³ reasoning that the OMA is an exercise of the state's eminent domain power rather than a land use regulation.¹⁶⁴

E. *Petra Presbyterian Church v. Village of Northbrook*¹⁶⁵

In 2000, Petra wished to purchase a warehouse in the Village of Northbrook to convert to a church.¹⁶⁶ Under Northbrook's then 1988 zoning ordinance, the property was zoned industrial.¹⁶⁷ Nevertheless, many membership organizations, such as community centers, political clubs, and fraternal associations were permitted in the zone.¹⁶⁸ Of the eleven applications for a permit under the 1988 ordinance made by churches, only Petra's was not granted.¹⁶⁹

Despite being unable to obtain a permit, Petra bought the property and began to operate it as a church.¹⁷⁰ The Village, fearful that the 1988 ordinance violated the recently passed RLUIPA's "less than equal terms" provision, adopted a revised 2003 ordinance that banned all membership organizations.¹⁷¹

Following the new ordinance, the Village obtained an injunction against Petra.¹⁷² The district court interpreted the injunction as preventing Petra from conducting worship services.¹⁷³ "The following year the state court issued a permanent injunction to the same effect."¹⁷⁴ Petra appealed, "claiming that when it bought the property it was reasonably relying on the invalidity of the 1988 ordinance, which arbitrarily treated religious membership organizations worse than other membership organizations, thus violating . . . RLUIPA."¹⁷⁵ As a result of that reliance, Petra contended that it obtained an "indefeasible right to use the warehouse for a church even if the 2003 ordinance, which would forbid such use, is valid."¹⁷⁶

163. *Id.* at 642.

164. *Id.*

165. 489 F.3d 846 (7th Cir. 2007).

166. *Id.* at 847.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Petra Presbyterian Church*, 489 F.3d at 848.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Petra Presbyterian Church*, 489 F.3d at 848–49.

176. *Id.* at 849.

The Seventh Circuit Court of Appeals affirmed the state court's injunction against Petra in an opinion by Judge Posner.¹⁷⁷ The court could find no cases or sources of law to support "the proposition that the federal Constitution forbids a state that has prevented a use of property" by invalid means to continue to do so by valid means.¹⁷⁸ The court found that the 2003 ordinance does not violate RLUIPA's "less than equal terms" provision, as all membership organizations are banned.¹⁷⁹ Neither does the 2003 ordinance constitute a substantial burden on churches, "because then every zoning ordinance that [did not] permit churches everywhere would be a prima facie violation of RLUIPA."¹⁸⁰ The court went on to explain that "[r]eligious organizations would be better off if they could build churches anywhere, but denying them so unusual a privilege could not reasonably be thought to impose a substantial burden on them."¹⁸¹

F. *City of Woodinville v. Northshore*

*United Church of Christ*¹⁸²

In 2004, The Northshore United Church of Christ (the Church) and Seattle Housing and Resource Effort/Women's Housing Equality and Enhancement Project (Share/Wheel) agreed to host Tent City 4.¹⁸³ Tent City 4 is an encampment of homeless people that moves to a new location every ninety days.¹⁸⁴ The Church hosted Tent City 4 on the Lumpkin property after negotiating with the City.¹⁸⁵

In 2006, Tent City 4 again asked the Church to host the encampment.¹⁸⁶ The City, though, had passed Ordinance 419 to temporarily prevent development on property in the R-1 zone.¹⁸⁷ The Church is located in the R-1 zone; however, the Lumpkin property is not.¹⁸⁸ The Church and Share/Wheel submitted temporary use permits for both the Church and Lumpkin property.¹⁸⁹ Both applications were eventually denied.¹⁹⁰

177. *Id.* at 852.

178. *Id.* at 849.

179. *Id.*

180. *Petra Presbyterian Church*, 489 F.3d at 851.

181. *Id.*

182. 162 P.3d 427 (Wash. Ct. App. 2007).

183. *Id.* at 430.

184. *Id.*

185. *Id.* at 431.

186. *Id.*

187. *City of Woodinville*, 162 P.3d at 430.

188. *Id.*

189. *Id.* at 431.

190. *Id.*

The City, concerned the Church would still host Tent City 4, sought a temporary restraining order prohibiting the Church from hosting Tent City 4 on its property without the requisite permit.¹⁹¹ A superior judge sua sponte issued a TRO *allowing* the Church to host Tent City 4 pending a full hearing.¹⁹² The City moved to consolidate the hearing on preliminary injunctive relief with the trial on the merits of its claims.¹⁹³ A different superior judge, upon hearing the consolidated hearing, ruled that the Church and Share/Wheel breached the 2004 agreement and ordered permanent injunctive relief against the Church and Share/Wheel.¹⁹⁴

The Washington Court of Appeals settled numerous procedural and contractual issues before addressing the Free Exercise and RLUIPA issues.¹⁹⁵ In regard to the First Amendment, the court found “no evidence . . . that the City’s zoning laws . . . had a purpose to restrict religious practices.”¹⁹⁶ Although the temporary restriction on development did contain categorical exceptions, it did not embody “a system of individualized exceptions.”¹⁹⁷ Therefore, “it is a neutral law of general applicability and not subject to strict scrutiny.”¹⁹⁸

Because the City did not dispute that providing shelter to the homeless is one of the Church’s religious activities, the question became whether the City’s actions in this case—requiring the Church to obtain a permit before hosting Tent City 4 and refusing to accept the application based on the moratorium—substantially burdened this activity.¹⁹⁹ The court ruled that the Church in this regard failed to satisfy even the most lenient substantial burden test of the Ninth Circuit: “Because the Church had alternative ways to minister to the homeless on its property, and there is no showing that other property was unavailable for this purpose, there is a failure to show the existence of a substantial burden on its free exercise of religion.”²⁰⁰

G. Taylor v. City of Gary, Indiana²⁰¹

The City of Gary, Indiana owned the former City of Methodist Church property.²⁰² Carlton Taylor, a minister of the not-for-profit corporation

191. *Id.*

192. *City of Woodinville*, 162 P.3d at 431.

193. *Id.*

194. *Id.*

195. *Id.* at 431–34.

196. *Id.* at 435.

197. *City of Woodinville*, 162 P.3d at 435.

198. *Id.*

199. *Id.*

200. *Id.* at 437.

201. 233 F. App’x 561 (7th Cir. 2007).

202. *Id.* at 562.

The House of the Lord Our God,²⁰³ expressed interest in taking over the former Church so that he could restore it as a place of worship.²⁰⁴ The City, however, refused to give him the property.²⁰⁵ In January 2006, the City announced that it planned to demolish part of the church building and turn it into a ruins garden.²⁰⁶ Taylor brought suit against the City, claiming it violated his rights under RLUIPA and the Free Exercise Clause of the First Amendment.²⁰⁷ The district court found Taylor lacked standing to sue because he had no property interest in the Church and dismissed the claims.²⁰⁸

The Seventh Circuit Court of Appeals affirmed.²⁰⁹ Even if Taylor had standing, the Court reasoned, his complaint failed under RLUIPA.²¹⁰ RLUIPA deals with land use regulations, “but land use regulation is defined as a regulation that restricts a claimant’s ability to use land in which he holds a property interest.”²¹¹ Taylor had no property interest in the church.²¹²

Similarly, the court held that Taylor failed to state a claim under the Free Exercise Clause.²¹³ Taylor did not claim that the City confiscated property that he owned or used, but that he was unable to build a place of worship in his preferred location because the City owned that location. “Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.”²¹⁴

H. Ridley Park United Methodist Church v. Zoning

Hearing Board Ridley Park Borough²¹⁵

The Ridley Park United Methodist Church (the Church) owns a church in a residential district of Ridley Park Borough (the Borough).²¹⁶ The Church had agreed to allow a private, for-profit institution use the

203. *Id.*

204. *Id.*

205. *Id.*

206. *Taylor*, 233 F. App’x at 562.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Taylor*, 233 F. App’x at 562.

212. *Id.*

213. *Id.*

214. *Id.* (internal quotations omitted).

215. 920 A.2d 953 (Pa. Commw. Ct. 2007).

216. *Id.* at 954.

Church's property as a daycare.²¹⁷ The Church obtained a special exception to the Ridley Park Zoning Ordinance which allowed for parochial educational institutions and religious uses.²¹⁸ The Borough, despite finding that the for-profit daycare did not qualify as a religious use, granted the exception because the educational component was sufficient to satisfy the educational requirements in the Ordinance.²¹⁹ Nearby residents, however, appealed the grant and the trial court reversed.²²⁰ The Church appealed, but the Commonwealth Court of Pennsylvania affirmed, finding the daycare was not a parochial institution.²²¹

The Church then reorganized the daycare under the Church itself, adding religious activities and schooling, and applied for a special exception.²²² The Zoning Board denied the application.²²³ The Church appealed, and the trial court remanded the matter to the Zoning Board to receive testimony on whether Pennsylvania's Religious Freedom Protection Act was applicable.²²⁴ The Zoning Board granted the exception on remand, reasoning that to prohibit the daycare would substantially burden the Church's exercise of its religion.²²⁵

The Pennsylvania Commonwealth Court disagreed.²²⁶ The main issue in the case was whether the Church would be substantially burdened if it was precluded from operating a daycare center.²²⁷ The court found that "the Church failed to meet its burden of proving that it was substantially denied a reasonable opportunity to engage in activities that were fundamental to its religion."²²⁸ Key to its analysis, the court found a daycare not to be a fundamental religious activity of a church.²²⁹ Therefore, the Church was not substantially burdened.²³⁰

III. RLUIPA Issues on the Horizon

There will be more RLUIPA appellate activity as courts continue to define "substantial burden," and determine what type of "religious

217. *Id.*

218. *Id.*

219. *Id.* at 955.

220. *Ridley Park United Methodist Church*, 920 A.2d 953 at 955.

221. *Id.*

222. *Id.* at 955–56.

223. *Id.* at 956.

224. *Id.*

225. *Ridley Park United Methodist Church*, 920 A.2d 953 at 957.

226. *Id.*

227. *Id.* at 960.

228. *Id.* at 960–61.

229. *Id.* at 960.

230. *Ridley Park United Methodist Church*, 920 A.2d 953 at 960.

activity” is protected. The United States Supreme Court recently denied certiorari in two RLUIPA cases *The Greater Bible Way Temple of Jackson v. City of Jackson*²³¹ and *Living Water Church of God v. Charter Township of Meridian*²³² in which the Supreme Court could have added some clarity to the difficult question of what is a “substantial burden” under RLUIPA.

231. 733 N.W.2d 734 (Mich. 2007), *cert. denied*, 128 S. Ct. 1894 (2008).

232. 258 Fed. App'x 729 (6th Cir. 2007), *cert. denied*, 2008 WL 672525 (U.S. June 9, 2008).