MICHIGAN STATE UNIVERSITY EXTENSION

Land Use Series

Bringing Knowledge to Life

November 20, 2000

PUBLIC POLICY BRIEF

Congress Passes, President Signs the Religious Land Use and Institutionalized Persons Act of 2000.[1]

"Thirty seven million acres is all the Michigan we will ever have."
Former Governor William G. Milliken

Introduction

On September 22, 2000 President Clinton signed into law the "Religious Land Use and Institutionalized Persons Act of 2000" (RLUIPA). One of RLUIPA's stated purposes is to "protect the exercise of religion …where State and local governments seek to impose or implement a zoning or landmark law in a manner that imposes a substantial burden on religious exercise…."[2] Its passage may affect the application of local ordinances to houses of worship, meetings, festivals or other events held with a stated religious purpose, and other "religious land uses," but most certainly leaves local regulation of religious activities in a state of flux. This paper provides some important historical background on RLUIPA and attempts to summarize its implications for local governments. It is an attempt to provide local officials a few pages of policy guidance on a topic to which legal and planning scholars have devoted hundreds of pages over the past decade. It does not attempt to substitute for consultation with corporate counsel on specific ordinance language or on specific circumstances that a jurisdiction may be facing.

Author:
Gary D. Taylor, J.D., EXTENSION SPECIALIST, STATE & LOCAL GOVERNMENT PROGRAMS
Phone: (517)353-9460
Fax: (517)432-1048
Email: taylorg@msue.msu.edu
Overland mail:
11 Agriculture Hall
Michigan State University

Background

RLUIPA was introduced by Senator Hatch (R-Utah) in response to a series of actions taken by Congress and the U.S. Supreme Court during the past decade.

Michigan State University Extension Land Use Area of Expertise Team

http://www.msue.msu.edu/aoe/landuse/landindex.html

[1] S. 2869 of 2000 (106th Congress)

[2] Office of the White House Press Secretary. September 22, 2000. Statement by the President: S. 2869 – The Religious Land Use and Institutionalized Persons Act of 2000.

Prior to 1990, the U.S. Supreme Court applied a two-part test to determine whether a governmental regulation violated the Federal Constitution's First Amendment "free exercise of religion" clause. The Court asked (1) whether the regulation *substantially burdened a religious practice*, and (2) if so, whether the burden was justified by a *compelling governmental interest*.[3] In practical terms, this meant that if a local regulation, such as a zoning ordinance or site plan review ordinance, was being applied to a religious use or activity the local government did not automatically enjoy the presumption of validity that is afforded most local regulations. Local governments did not necessarily violate the free exercise clause of the U.S. Constitution by placing "incidental" restrictions on a religious use or activity, but if the restriction was challenged in court the local government had to present evidence of the "compelling governmental interest" in such regulation.

For example, local zoning ordinances exclude various commercial and industrial uses from residential districts based on traffic impacts, parking problems and/or noise at unusual hours. The ordinance is presumed to be valid as applied to the vast majority of commercial and industrial uses. However, prior to 1990, if the ordinance operated to exclude religious uses (houses of worship, religious schools, etc.) the First Amendment to the U.S. Constitution demanded that any party challenging the regulation show that the regulation placed a *substantial burden* on the practice of religion. If the challenging party could meet that test, it was then up to the local government to defend the regulation with evidence that the restrictions satisfied a *compelling governmental interest*. Generally speaking, prohibiting religious uses in residential districts was not considered to be placing a substantial burden on the practice of religion because such uses were allowed in other zoning districts within the municipality. Neither was placing restrictions on parking, signage or outdoor lighting because these matters were "incidental" to the *practice* of religion. However, if a zoning ordinance *completely* excluded religious uses from any location within the municipality this was considered to be a substantial burden. The law would be struck down because the local government could not articulate a compelling interest for such exclusionary regulation.

In 1990, the U.S. Supreme Court articulated a new test in the case of *Employment Div. v Smith.*[4] In that case, two employees of a drug rehabilitation organization were fired and subsequently denied unemployment compensation because they ingested peyote for sacramental purposes as members of a Native American Church. In a split decision, the Court held that the state could deny unemployment compensation to the fired employees since their ingestion of peyote was contrary to state law. Justice Scalia, writing for the majority, articulated a new analytical framework for First Amendment free exercise claims: "[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice ...."[5] In practical terms this now meant that a local regulation was *presumed to be valid* even if it affected religious practices, so long as the law was not directed specifically at religious practices or at a specific religion. In local land use cases, religious organizations seeking to challenge permit denials now had to show that the local government was singling out religious land uses or practices before the presumption of validity was questioned.

Supporters of the *Smith* decision believed that it signaled an end to the "super" rights of religious

[3] See, e.g. *Wisconsin v. Yoder,* 406 U.S. 205, (1972)

[4] 494 U.S. 872 (1990)

[5] 494 U.S. at 879.

organizations to conduct activities that would not otherwise be afforded to other organizations. Critics of the *Smith* decision, however, pointed out that it eliminated the pure religious liberty defense to generally applicable laws and, in effect, subjected religious liberty to majoritarian rule; that is, to prohibit or limit a specific religious practice, the government would now need only a legislative majority to pass a carefully crafted law.

In direct response to the *Smith* case, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA). One of its stated purposes was to restore the compelling governmental interest standard as it existed prior to *Smith*. RFRA prohibited a government – federal, state, or local – from substantially burdening a person's exercise of religion, even if the burden resulted from a rule of general applicability, unless the government could demonstrate that the burden was in furtherance of a compelling governmental interest and was the least restrictive means of furthering that interest.

In 1997, RFRA came before the U.S. Supreme Court in a challenge to a zoning ordinance regulating historic landmarks in Boerne, Texas.[6] St. Peter's Catholic Church in Boerne applied for a building permit with a plan to completely gut the church building, save for the distinctive mission-style façade, in order to expand its facilities. The City's Landmark Commission denied the church's building permit on the grounds that such action was not permitted in the City's Historic Preservation District. Citing RFRA, the church brought suit against the City. Upon the case reaching the Supreme Court, the Court held that RFRA exceeded Congress' power, under Section 5 of the Fourteenth Amendment (the enforcement clause), to enact legislation enforcing the First Amendment's free exercise clause because RFRA appeared to attempt a substantive change in constitutional standards. In other words, it is the role of the Supreme Court, not Congress, to *interpret* the Constitution. Any attempt by Congress to establish a test for the constitutionality of an ordinance different than one prescribed by the Court (in this case, by the *Smith* decision) is, in effect, an attempt to apply its own interpretation of the Constitution, and beyond the scope of Congress' authority. RFRA was found to be unconstitutional, and the church's challenge was denied.

RLUIPA is Enacted

It is this history that brought Congress to the enactment of RLUIPA. In simple terms, RLUIPA again attempts to reestablish the pre-*Smith* standard for determining whether a local land use ordinance places an unconstitutional burden on the exercise of religion. RLUIPA provides that:

> "(1) 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 governmental interest.[7]

The term "land use regulation" is defined as "a zoning or landmark law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the

[6] *City of Boerne v. Flores*, 521 U.S. 507 (1997)

[7] Religious Land Use and Institutionalized Persons Act of 2000 S. 2869, § 2.

regulated land or a contract or option to acquire such an interest."[8]

An important element of RLUIPA is its definition of "religious exercise":

> "(7) RELIGIOUS EXERCISE –
> (A) IN GENERAL – The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.
> (B) RULE – The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose."[9]

RLUIPA prohibits a government from implementing a land use regulation that totally excludes from, or "unreasonably limits" religious assemblies, institutions, or structures within a jurisdiction. It also prohibits local governments from placing religious assemblies or institutions on "less than equal terms" with a nonreligious assembly or institution, or from discriminating against any assembly or institution on the bases of religion or religious denomination.[10]

In an attempt to avoid the same fate as RFRA Congress took a substantially different approach in drafting RLUIPA to reach the same desired result as RFRA. Congress did not use the enforcement clause of the Fourteenth Amendment as the basis for the law or explicitly state its intent to restore the compelling governmental interest standard that existed prior to *Smith*. Instead, RLUIPA is to apply in any case where the burden (1) is imposed "in a program or activity that receives Federal financial assistance," (2) affects "commerce with foreign nations [or between the] states," or (3) 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". Congress routinely ties policy strings to federal funding (for example, the recent mandate for 0.08 blood alcohol content drunk-driving standards tied to highway funds), and Congressional powers under the Commerce Clause of the Constitution[11] have been interpreted very broadly.

Implications for Local Governments Analyzed

Constitutionality of RLUIPA.

It is far from certain that RLUIPA will withstand the inevitable challenges to its constitutionality. Defenders will maintain that by not tying the legislation to the Fourteenth Amendment Congress has removed the threat of unconstitutionality that doomed RFRA. Challengers will argue that the law still attempts to apply standards outside the scope of Congress's authority, whether or not RLUIPA explicitly implicates Constitutional provisions. It ultimately will be up to the courts to decide RLUIPA's fate. A local government wishing to take a cautious approach to the subject should act under the assumption that RLUIPA will survive as good law. If RLUIPA is struck down, then the presumption of validity (the *Smith* standard) will attach to local government decisions, and local officials can act with some confidence that their actions will be upheld as long as

[8] Religious Land Use and Institutionalized Persons Act of 2000 S. 2869, § 8.
[9] Religious Land Use and Institutionalized Persons Act of 2000, S. 2869 § 8.
[10] Religious Land Use and Institutionalized Persons Act of 2000 S. 2869, § 2.
[11] United States Consitution Article 1, Section 8.

they are not treating religious uses, or specific religious organizations, differently because of their status as religious groups. If RLUIPA survives, however, local governments will need to carry a higher burden to sustain decisions impacting religious activities. The following paragraphs will suggest local government actions consistent with the need to carry that higher burden.

What can local governments do?

First and foremost, it is important to realize that, under any circumstance, RLUIPA prohibits the imposition of land use regulation that puts a religious assembly or institution on less than equal footing with other assemblies or institutions. In Michigan, this immediately calls into question the ability of local governments to exercise site plan approval authority over religious schools, since public schools are exempt by state statute from such requirements. Any local ordinances that give social, fraternal, or other non-denominational organizations special consideration also should be closely examined to determine whether religious organizations are treated in a similar fashion.

RLUIPA also prohibits local ordinances that (1) totally exclude religious assemblies from a jurisdiction or (2) "unreasonably limit" religious assemblies, institutions, or structures within a jurisdiction. The first part of this provision is self-evident, and local actions to totally exclude religious assemblies would not likely withstand challenge under any test. The second part of the provision, however, is far from self-explanatory. Whether a limit on religious activities or uses is "unreasonable" is a question of fact that will likely only be resolved through the judicial process.

RLUIPA's definition of "religious exercise" also requires closer analysis. Congress's inclusion of "the use, building, or conversion of real property for the purpose of religious exercise" as a protected religious exercise marks a change in some previous interpretations of the Free Exercise clause. Some courts, with varying degrees of confusion, have interpreted the constitutional protections of the First Amendment as inapplicable to buildings (churches, mosques, synagogues, schools, etc.) because the building itself is not "central to the free exercise of religion." Therefore, zoning and other land use controls on religious buildings have been upheld in some states on those grounds, without resort to a discussion of the First Amendment. With RLUIPA it is clearly Congress's intent to give protection to the buildings and any other structures related to religious activities.

RLUIPA applies in any case where the burden on religious practice 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.*" This provision brings the pre-*Smith* substantial burden standard to bear on most areas of local land use activity. Site-specific rezoning requests, special use permits, variances, subdivision and site plan review, sign permits and building permits are all processes that review proposed uses on a case-by-case basis. In fact, this provision could even subject the local jurisdiction to a higher standard of review on any local actions that involve application and permit, including such activities as festival permits and parade permits, if the term "land use regulation" is interpreted to include these activities (for example, does a parade permit grant the permit holder a "property interest in land"?) If it is a local authority's desire to avoid some of this tangle it may wish to take a close look at its ordinances and current land use patterns to determine if, and in which zones it may be appropriate to at least allow religious uses as uses as-of-right (i.e. without special use permit) and without site plan review if zoning district standards

are met. A reasonable rule-of-thumb to follow is the greater the degree of case-by-case discretion retained by the local jurisdiction, the greater the degree of scrutiny to which they will be subjected.

Conclusion

With the enactment of RLUIPA, Congress and the President have acted on their belief that "religious liberty is a constitutional value of the highest order."[12] Local officials and administrators responsible for land use decisions now must give careful consideration to any actions they take that impact religious assemblies or institutions, or any uses of land for religious purposes. Local governments cannot zone religious uses out of their communities, and any decisions on religious land uses will be subject to close scrutiny by applicants and possibly the courts. Only time, and the court system, will hammer out more specific legal guidance within these broad parameters.

[April 9, 2001: MSUE 11AgrHall GDT: C;\MSUEbullitens\MSUE BULLETIN Religious Land Use Public Policy Brief.doc]

[12] Office of the White House Press Secretary. September 22, 2000. Statement by the President: S. 2869 – The Religious Land Use and Institutionalized Persons Act of 2000.