

# Zoning for Religious Institutions

by Eric Damian Kelly, Esq., FAICP

Many communities have long allowed "churches" in most or all zoning districts. Such an approach worked well when many people walked to services and when many religious institutions were built to accommodate residents of a neighborhood, not those of a whole community.

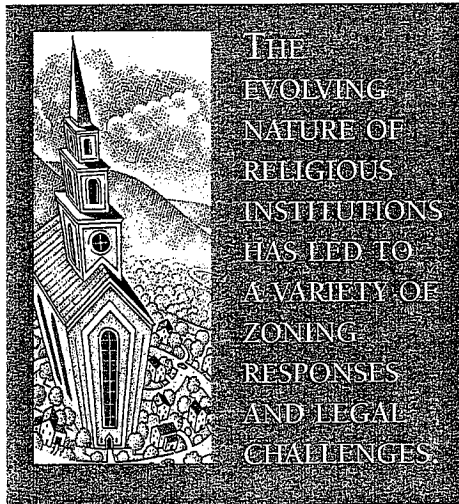
Today, a reference to "churches" is not adequate to conform with the U.S. Constitution. Moreover, there are a number of religious institutions that bear little resemblance to the typical "neighborhood church." With facilities that can seat 2,000 or 3,000 people and include bookstores, coffee shops, movie theaters, gymnasiums, and broadcasting facilities, a number of communities have prohibited religious institutions in some zoning districts and/or have imposed new restrictions on them.

The evolving nature of religious institutions has also led to a variety of zoning responses and legal challenges, including:

- limitations on the expansion or remodeling of religious institutions under local historic preservation ordinances.<sup>1</sup>
- prohibitions against the use of houses of worship for such social service activities as soup kitchens and temporary sleeping space for the homeless.<sup>2</sup>
- limitations on such religious practices as animal sacrifices<sup>3</sup> or the activities of a particular religious facility because of cultural and language differences between members of the group and the dominant population in the community.<sup>4</sup>

## THE LAW

Religious freedom is, of course, one of the core values on which the United States was founded. The first words of the First Amendment to the Constitution read: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ..."



Those words also limit states and local governments, through the effect of the Fourteenth Amendment in extending the basic freedoms of the Bill of Rights to address all government action. It has long been clear that the First Amendment prohibits a local government from granting a preference to one religion over another. The "free exercise" clause has also consistently been interpreted to provide relatively broad protection for the establishment of facilities in which to worship.

Beginning in the 1980s, however, a series of (largely unrelated) federal court decisions upheld local zoning regulations that excluded churches and other religious institutions from one or more zoning districts in particular communities. Reacting in part to those decisions and in particular to a peripherally related decision of the U.S. Supreme Court, Congress intervened in the field. Its first attempt, the Religious Freedom Restoration Act, was struck down by the Supreme Court as unconstitutional.<sup>5</sup>

Congress subsequently adopted the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. 2000cc. To date, all courts that have considered the constitutionality of RLUIPA have upheld it.

There are two relevant parts of the law. The first part establishes a very heavy burden of proof for a "substantial burden" imposed on the practice of religion by requiring that such a burden be justified by a "compelling governmental interest." Part of the definition of "substantial burden," however, specifies that the "substantial burden" test applies only to a land-use regulation "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."

The second part of RLUIPA contains provisions prohibiting governments from discriminating in their land use

1 *City of Boerne, Petitioner v. P.F. Flores, Archbishop of San Antonio, and United States*, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997). The Supreme Court held the Religious Freedom Restoration Act (RFRA) unconstitutional and upheld the city's denial (under its historic preservation ordinance) of a church's plans for expansion. Congress then replaced RFRA with RLUIPA, as discussed in this article.

2 *Stuart Circle Parish v. Board of Zoning*

*Appeals of the City of Richmond*, 946 F. Supp. 1225 (E.D. Va. 1996). The court granted an injunction against the zoning board, thus allowing the church to expand a meal program for the homeless beyond what was apparently allowed by the zoning ordinance.

3 *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993). The Court found that an ordinance prohibit-

ing animal sacrifices was targeted at the Santeria religious group and struck it down as unconstitutional. This was a complex decision dealing with a complex subject, and it is difficult to draw major conclusions from the holding.

4 *Ira Iglesia de la Biblia Abierta v. City of Chicago and Banks*, 949 F. Supp. 637 (N.D. Ill. 1996), reversed 129 F.3d 899 (3rd Cir. 1997), reh'g denied. Here the City of Chicago, led by a district alder-

man, changed the zoning ordinance to prohibit the use of specific property for religious purposes after the church had acquired it. The zoning was ultimately upheld, after much litigation. For later proceedings, see *C.L.U.B. v. City of Chicago*, 2001 U.S. Dist. LEXIS 17213 (N.D. Ill. Oct. 17, 2001), motions denied, at 2001 U.S. Dist. LEXIS 17213 (N.D. Ill. Oct. 17, 2001).

5 *City of Boerne* (see footnote 1).

regulations against religious institutions. The law's non-discrimination provisions read (in full):

"(b) Discrimination and Exclusion. (1) Equal terms. 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. (2) Nondiscrimination. No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination. (3) Exclusions and limits. No government shall impose or implement a land use regulation that – (A) totally excludes religious assemblies from a jurisdiction; or (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction."

## IMPLICATIONS AND RECOMMENDATIONS

### 1. Basic Terminology

"Church" is a term generally applied to institutions of the Christian religion. Thus, a provision in an ordinance allowing churches but not allowing other types of religious institutions on its face could be construed to violate both the First Amendment and the non-discrimination provisions of RLUIPA.

As a practical matter, most zoning administrators seem to have allowed mosques, temples, and other institutions in the same locations where churches are allowed. Some local governments have adopted new definitions of "church" that include other types of religious institutions.

The safer course is to use a phrase like "house of worship," "place of worship," or "religious institution," and to define it as follows: "Any building used for non-profit purposes by an established religious organization holding either tax exempt status under Section 501(c)(3) of the Internal Revenue Code or under the state property tax law, where such building is primarily intended to be used as a place of worship. The term includes, but is not necessarily limited to, church, temple, synagogue, and mosque."

### 2. Excluding Religious Institutions from Zoning Districts in General

As the case law under RLUIPA is evolving, it is clear that a local government can exclude religious institutions from some zoning districts, but not from the entire community. In regulating uses that have Constitutional protection, it is always wise to document the governmental interest involved in a particular regulation, even if that governmental interest does not rise to the level of "compelling."

Thus, one can imagine excluding religious institutions from:

- an industrial park zone (to protect the availability of land for uses that will build the economic base),
- an exclusive agricultural zone (to protect farming and limit sprawl),
- a densely populated residential area with narrow streets (to prevent parking and congestion problems), or
- a downtown district (to prevent storefront churches that are used only a day or two a week from creating large dead spaces along major downtown sidewalks).

It seems more difficult to make the case to exclude religious institutions from multi-family residential districts and from most commercial districts, although a few communities have done so.

### 3. Distinctions Based on a Religious Institution's Size

Some local governments may want to recognize the land-use differences between the traditional neighborhood place of worship and some of today's mega-institutions by continuing to allow only the smaller, more neighborhood-scale institutions in residential districts. There are three different ways that a local government might make such a distinction without violating RLUIPA or the Constitution:

1. By distinguishing between the types of institutions based on the seating capacity of the principal worship space. Traditional neighborhood institutions seat between 100 and 250 people in that space; so institutions with seating capacity in that range could be allowed

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## "Storefront" Religious Institutions

Some communities have dealt with concerns about "storefront" religious institutions. Start-up and other small congregations often seek under-used spaces that are available for relatively low rents; such spaces can range from vacant downtown retail buildings to closed supermarkets.

The reuse of closed supermarkets or "big box" stores as places of assembly typically causes few public concerns. Such facilities are usually found along arterial or collector roads with good access and lots of parking. Use of such a building for worship space one day and a couple of nights a week generally has less impact on the neighborhood than the former retail use.

Storefront facilities in downtown or other older retail areas, however, raise a different set of issues. Communities that adopt revitalization plans for such areas typically try to encourage a streetscape that is lively and interesting for pedestrians. If a religious institution takes over a 150-foot storefront and uses it only on Saturdays or Sundays and just one or two evenings a week, that storefront becomes a relatively long dead space along the sidewalk during the prime hours for downtown shopping, dining, and entertainment.

This concern can be addressed without violating RLUIPA's provisions against discrimination. Along a specific street corridor designated for redevelopment, a local government could legitimately prohibit any place of public assembly – including religious ones – from occupying more than 25 (or 30 or 35) feet of first-floor space fronting on the street.

Many small-town downtown theaters once had similar frontage on main streets, with only a lobby and a hallway fronting on the sidewalk, and the main part of the theater at the back of the building, tucked behind retail stores. Many fraternal organizations occupy the upper floors of downtown buildings, with only a main entrance sharing space with retail on the first floor. Those provide good models for integrating places of assembly into lively pedestrian streets.

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in all residential zoning districts, while taking a more restrictive approach to the larger ones.

2. By basing the distinction on the total floor area of buildings located on the site (probably excluding the residence of the principal worship leader).

3. By significantly limiting the accessory uses to a house of worship in less intensive residential districts (see separate discussion in Section 6).

An ordinance making distinctions like those suggested here should allow the larger institutions either in commercial and multi-family districts or where they have direct access to an arterial road, or direct access to a major collector, adjoining an arterial. Most of the modern mega-institutions recognize the marketing value of such locations and actively seek them out. It would be very unusual for a congregation to propose to build a major institution in a quiet residential neighborhood.

Conflicts sometimes arise, however, when an existing neighborhood religious institution grows, gradually buying and tearing down nearby homes to build new facilities. A local government that attempts to limit such growth may face a backlash from the institution's members, but allowing such an institution to grow without restraint can lead to significant neighborhood protests.

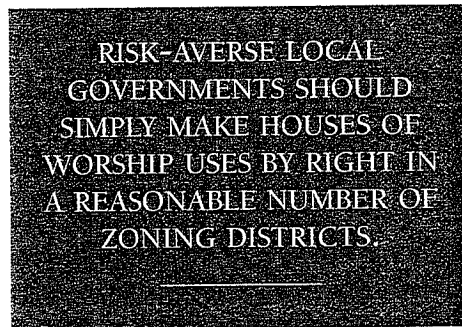
#### 4. Non-Discrimination Regulating Religious Institutions & "Places of Assembly"

In our work consulting with local governments, we often find commercial districts that allow theaters but do not allow places of worship. We also sometimes find residential zoning districts that allow community centers but do not allow places of worship. Theaters, arenas, auditoriums, community centers, civic centers, fraternal lodges, and many types of clubs fall under a general category of use considered "places of assembly."

Regardless of whether a local ordinance uses that phrase, the concept is familiar to the courts. A community with an ordinance that allows a theater, civic center, or fraternal lodge

in a location where it does not allow a house of worship is likely to face a major problem defending the limitation on religious institutions under the non-discrimination provisions of RLUIPA.

A New Jersey community, however, raised an interesting issue and succeeded in prohibiting religious institutions in a downtown district where it allowed theaters and nightclubs.<sup>6</sup> The City of Long Branch had adopted a redevelopment plan that called for making its downtown "Broadway corridor" an entertainment center. The concern was that if a religious institution were to locate within this corridor, it would trigger a state law limiting the issuance of liquor licenses



within specified distances of churches and other religious institutions – in effect, undermining the city's goals in creating the district.

To avoid this outcome, the City prohibited religious institutions in the corridor district. The city persuaded a federal court of appeals that it was not discriminating between *similar types* of places of public assembly – it was allowing only those places of assembly that would not trigger the provision of state law limiting the issuance of liquor licenses.

This issue has not arisen frequently, and local governments should not assume that other courts will reach the same conclusion. There are, however, two important lessons that can be drawn from the court's *City of Long Branch* ruling. First, the city's decision was based on a carefully considered plan. Second, both the plan and the ordinance showed

the rationale for the city's unique treatment of houses of worship under the ordinance. Any local government considering such an unusual distinction should include in the ordinance clear statements of purpose, ideally with references back to a planning or policy document.

#### 5. Regulating Religious Institutions as Special or Conditional Uses

The "substantial burden" test of RLUIPA expressly applies to local regulations that involve an "individualized assessment." A requirement that a religious use obtain a special use permit, conditional use approval, or special exception is clearly an "individualized assessment." Thus, risk-averse local governments should simply make houses of worship uses by right in a reasonable number of zoning districts. A local government that fails to do so will find its ordinance tested under the "compelling governmental interest" test imposed by the "substantial burden" clause of the act.

It would seem to be a fair reading of the law that if a local government does allow such uses by right in a number of districts, it could allow them as uses by review (special uses) in one or more other districts – particularly if there are clear guidelines for when the special use will be approved.

#### 6. Accessory Uses & Religious Institutions

Religious institutions in all zoning districts should certainly be allowed to include such traditional accessory uses as: reasonable signage; housing for a principal worship leader; classrooms for accessory religious education; and a separate assembly hall for social and educational gatherings. But local governments may want to consider limitations on other types of accessory uses in certain residential zoning districts.

For example, some religious institutions today run fleets of buses, and both store and repair the buses at the main worship centers. Large religious institutions may also include bookstores, gyms, movie theaters, and recreational and activity centers. The full range of such

<sup>6</sup> *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253 (3d Cir. N.J. 2007)

uses are certainly appropriate at religious institutions located in business zoning districts, but because of their traffic, noise, or other impacts, may not fit within single-family and, possibly, some other residential districts.

As a result, accessory uses that local governments might want to prohibit in some residential districts might include: storage of more than one or two buses; bus maintenance and repair; bookstores; coffee shops; digital electronic signs; broadcasting studios; television and radio broadcast towers; movie theaters; gymnasiums; and bowling alleys or other kinds of recreation facilities typically offered by commercial establishments.

Accessory uses that ought to be considered carefully are soup kitchens and homeless shelters. Many religious institutions have a theological commitment to helping others, and some want to do it on their home turf. Although neighbors are unlikely to object to a church or synagogue opening its doors to the homeless on the very coldest nights of the year or offering an occasional food give-away or dinner, establishing permanent facilities that attract large numbers of those in need day after day and week after week is likely to lead to conflicts, particularly in exclusively residential areas.

The law on limiting accessory uses at religious institutions is not entirely settled, but at this time it appears that two rules would explain many of the decisions:

First, if the local ordinance says nothing about accessory uses, a court is likely to accept an argument from a religious institution that any sort of accessory use is a part of its normal pattern of worship and thus should be allowed.

Second, if, on the other hand, the local ordinance clearly allows religious institutions with only limited accessory uses in some locations, while allowing those institutions with a full range of uses in others, the courts appear willing to enforce the ordinance as written.

Thus, any effort to update a zoning ordinance dealing with religious institutions should include a serious discussion of what accessory uses are appropriate

and acceptable for them – in each zoning district. The fleet of buses and maintenance garage will hardly be noticed in a highway-oriented business district, but may lead to many complaints in a single-family residential district.

### 7. Parking, Landscaping, and Signs

Remember that the “substantial burden” rule under RLUIPA imposes the “compelling governmental interest” test only on local regulations that involve an “individualized assessment.” The corollary of that principle is that laws of general applicability will not be considered substantial burdens.

Requirements for off-street parking, landscaping, buffering, site lighting, and other amenities are, in almost all communities, rules of general applicability. Limitations on flashing signs and on building heights are also rules of general application and thus are not subject to the “substantial burden” test.

There has been some litigation over the theological significance of steeples and similar vertical extensions of religious buildings. The law is not clear on that, but some zoning ordinances allow a religious institution to exceed height limits otherwise applicable to the zoning district with “non-habitable” space or something similar.

The fact that it is probably both lawful and Constitutional to impose a full-range of site development restrictions on religious institutions does not necessarily mean that it is appropriate to do so, however.

For a small, neighborhood institution with no significant accessory uses, it may make more sense to allow most people to park on the streets than to add an acre or two of paved parking to the neighborhood. Where off-street parking is necessary, a community should consider requiring that only a portion of it be paved, allowing people to park on grass or other porous surfaces during the four or five busiest hours a week.

Most residential districts include significant restrictions on signs. Those rules make perfect sense for residences, but it is unreasonable to expect a church or school to operate without

signs. The ordinance, however, should not provide for “church” signs – it should provide for “accessory signs at institutional uses permitted in residential districts.”

Many local ordinances have some sort of provision for at least one freestanding sign, but they often miss other important issues. For example, if a religious institution or school does not have some changeable copy space on its sign, it will probably make extensive use of banners and temporary signs to promote vacation religious schools, pot luck dinners, and other events; and religious institutions need wall signs, as well as freestanding signs, to provide information on worship schedules and contact information.

### SUMMING UP:

Churches, synagogues, temples, and mosques are all subject to reasonable local zoning regulations. A community updating its regulations or facing a potential controversy over such an institution, however, should check its ordinance to be sure that:

- the ordinance on its face and local practice treat religious institutions in the same way, regardless of denomination or name of the building,
- houses of worship are allowed in all zoning districts that allow other places of assembly, unless there are very unusual and well-documented circumstances justifying a particular distinction,
- religious institutions are allowed in many districts by right and do not require special use permits or other discretionary reviews, and
- site development requirements – which are generally enforceable against religious institutions – are reasonable and practical for those institutions. ♦

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