ASSESSING RLUIPA'S APPLICATION TO BUILDING CODES AND AESTHETIC LAND USE REGULATION

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INTRODUCTION

When Congress enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA) in 2000, it intended to protect the religious exercise of churches and synagogues against government discrimination in zoning codes and from "the highly individualized and discretionary processes of land use regulation."[1] Protection was intended not only for "small and unfamiliar" denominations, but for established religions as well.[2] RLUIPA was also intended to be construed broadly to protect religious exercise "to the maximum extent permitted by the terms of this chapter and the Constitution." [3] This broad construction is one of the basis upon which I will argue in this article that building codes and aesthetic or historic regulations should be subject to RLUIPA scrutiny. This will protect the religious exercise of religious institutions burdened by such land use regulation.

The statutory language of RLUIPA provides, in part, that:

> 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

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[1] 146 CONG. REC. S7774 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy). *See also* Cathedral Church of the Intercessor v. Inc. Vill. of Malverne, 353 F. Supp. 2d 375, 390 (E.D.N.Y. 2005):

> The right to assemble for worship is at the very core of the free exercise of religion. Churches and synagogues cannot function without physical space adequate to their needs and consistent with their theological requirements. The right to build, buy, or rent such a space is an indispensable adjunct of the core First Amendment right to assemble for religious purposes. The hearing record compiled massive evidence that this right is frequently violated. Churches, in general, and new small, or unfamiliar churches in particular, are frequently discriminated against in the fact of zoning codes and also in highly individualized and discretionary processes of land use regulation.

Id.

[2] Mintz v. Roman Catholic Bishop of Springfield, 424 F. Supp. 2d 309, 321 (D. Mass. 2006).

[3] Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 347 (2d Cir. 2007) (quoting Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-3(g) (2000)).

means of furthering that compelling governmental interest.[4]

However, RLUIPA only protects against governmental action that substantially burdens religious exercise when the activity receives federal financial assistance,[5] when the burden affects commerce,[6] or when the action results from an individualized assessment of the land use proposed by the religious institution.[7] Courts have generally held that local government decisions regarding the grant or denial of a special permit or exception are individualized assessments.[8] Nevertheless, some courts have applied RLUIPA to any local land use regulation impacting religious exercise. Other courts, however, have applied RLUIPA only if there appears to be actual discrimination occurring in the land use regulation scheme.

In *Vision Church, United Methodist v. Village of Long Grove*, the Seventh Circuit indicated that it would apply RLUIPA to a neutral annexation regulation and appeared to adopt a broad view of RLUIPA jurisdiction by stating that it would apply strict scrutiny to any regulation that imposed a substantial burden on religious exercise.[9] The court later determined that annexation is

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[4] Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc(a)(1).

[5] 42 U.S.C. § 2000cc(a)(2)(A).

[6] 42 U.S.C. § 2000cc(a)(2)(B).

[7] 42 U.S.C. § 2000cc(a)(2)(C).

[T]he substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which the government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses of the property involved.

Id.

[8] *See* Lighthouse Cmty. Church of God v. City of Southfield, No. 05-40220, 2007 WL 30280, at *7 (E.D. Mich. Jan. 3, 2007) (holding that the Zoning Board of Appeals' (ZBA) denial of parking variance was an individualized assessment since the ZBA had discretion to grant a variance to the parking ordinance); Episcopal Student Found. v. City of Ann Arbor, 341 F. Supp. 2d 691, 699 (E.D. Mich. 2004) (holding that the Historic Commission's denial of application to demolish historic building to build a newer and larger facility "constitutes an individualized assessment regarding the property's proposed use."); Korean Buddhist Dae Won Sa Temple of Haw. v. Sullivan, 953 P.2d 1315, 1345 n.31 (Haw. 1998) (holding that based on a First Amendment challenge, the individualized exemption rule from *Smith* applies since the "variance law clearly creates a 'system of individualized exemptions' from the general zoning law."); First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174, 181 (Wash. 1992) (holding that, based on a First Amendment challenge, landmark ordinances are not generally applicable laws under *Smith* "because they invite individualized assessments of the subject property and the owner's use of such property, and contain mechanisms for individualized exceptions").

[9] Vision Church, United Methodist v. Vill. of Long Grove, 468 F.3d 975, 996 (7th Cir. 2006), *cert. denied*, 128 S. Ct. 77 (2007) ("Simply put, both the Free

not a land use regulation and, therefore, not subject to RLUIPA scrutiny.[10] It also indirectly repudiated its broader view of RLUIPA jurisdiction in a conflicting statement saying "'no Free Exercise Clause violation results where a burden on religious exercise is the incidental effect of a neutral, generally applicable, and otherwise valid regulation, in which case such regulation need not be justified by a compelling governmental interest.'"[11]

It is unclear from the Seventh Circuit's opinion in *Vision Church* whether a burdensome regulation of equal application, such as a requirement that all building facades in a particular zone be constructed of granite, would violate RLUIPA if it substantially burdened the religious exercise of a church, but also similarly burdened the operation of a Kiwanis club or local bakery in the same zone. This article does not address whether neutral standards of universal application, which do not require individualized assessments, are subject to RLUIPA. However, given the statement in RLUIPA's legislative history by sponsors, Senators Orrin Hatch and Ted Kennedy, that "[t]his Act does not provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations, where available without discrimination or unfair delay,"[12] the focus of this article will be on individualized assessments connected with neutral regulations that substantially burden religious exercise. However, while individualized assessments may allow government discrimination against religious institutions, the enactment of RLUIPA would be seemingly superfluous if it merely allows for examination of discrimination claims, which could be similarly litigated as equal protection violations.[13]

The Connecticut Supreme Court in *Cambodian Buddhist Society of Connecticut, Inc. v. Planning & Zoning Commission of the Town of Newtown* took a much narrower view of RLUIPA jurisdiction over local government regulation by holding that RLUIPA's substantial burden provision did not apply to a special

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Exercise Clause and RLUIPA provide that, if a facially-neutral law or land use regulation imposes a substantial burden on religion, it is subject to strict scrutiny.").

[10] *Id.* at 998.

[11] *Id.* (quoting Civil Liberties for Urban Believers v. City of Chi., 342 F.3d 752, 763 (7th Cir. 2003)).

[12] 146 CONG. REC. S7776 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy).

[13] *See, e.g., infra* notes 22-29 and accompanying text.

exception determination where no discriminatory intent or animus was found.[14] After reviewing the trial court's reasons for supporting the denial of the special exception, it decided that the town's zoning regulations did not allow for an individualized assessment, even though the planning commission had some discretion to determine if a special exception should be allowed.[15] The court concluded that the use of the property as a temple would not be "in harmony with the general character of the neighborhood[,]" would substantially impair property values, and would create a health or safety hazard and, therefore, should not be allowed.[16] However, the court's determination that the denial was not motivated by religious bigotry and instead by neutral considerations seems to indicate that the court will only consider the grant or denial of a special exception to be an individualized assessment subject to RLUIPA if there appears to be discriminatory intent or animus in the local government's decision.[17]

RLUIPA review generally will apply to facially-neutral local government action if the action requires an individualized assessment. Such individualized decisions may open the door to discrimination by local officials, which may be difficult to detect.[18] If such an individualized decision constitutes a land use regulation that substantially burdens religious exercise, the government action should be strictly scrutinized under RLUIPA to ensure that it is necessary to achieve a compelling state interest that cannot otherwise be achieved through less restrictive means.

Building codes appear to be facially neutral in contemplation because they are intended to establish building standards that apply to construction, regardless of the dedicated use of the building. The court in *City of Albany v. Trinity Church* treated "Building Code and Zoning laws of the City of Albany [as] not

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[14] Cambodian Buddhist Soc'y of Conn. Inc. v. Planning & Zoning Comm'n of the Town of Newtown, 941 A.2d 868, 882 (Conn. 2008).

[15] *Id*. at 892-94.

[16] *Id*. at 904, 906, 907.

[17] *See id*. at 893 ("[W]e are satisfied that the commission's concerns [about the temple's Asian design and the Buddhist festivals to be celebrated on the property] were motivated not by religious bigotry but by neutral considerations that it would apply equally to any proposed use of the property.").

[18] *See* 146 CONG. REC. S7774, S7775 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy); H.R. REP. NO. 106-219, at 17-24 (1999) (Congress determined that individualized assessments tend to discriminate against religious institutions, but recognized that it is difficult to prove such discrimination).

specifically directed at defendant's religious practices, but [as] valid, content neutral laws of general applicability, adopted to promote the public health, safety and general welfare of the public."[19] The challenge to local government action in the *Trinity Church* case was brought under the First Amendment, not under RLUIPA,[20] but the individualized assessment determination is generally handled the same under the First Amendment *Smith* standard as it is under RLUIPA. Similarly, aesthetic regulation, including historical preservation, is intended to establish an overall design and environment, without regard to a specific property.

Nevertheless, implementing building codes and aesthetic regulations may require individualized determinations which are subject to discriminatory action based on the use or ownership of the buildings to which they are applied. In *Homelife Communities of Henry, Inc. v. City of McDonough,* plaintiff homebuilder alleged that its projects, a majority of which were purchased by African-Americans, were experiencing difficulty in receiving building permits and certificates of occupancy.[21] It claimed that this alleged discrimination in the administration of a neutral building code violated the Equal Protection and Due Process clauses of the Constitution.[22] Homelife alleged it was deprived of a property interest without due process because the city refused to perform final inspections and issue certificates of occupancy, even though all of the building code requirements had been met.[23] It also alleged an equal protection violation because it claimed that it was treated differently than other similarly situated subdivisions which were granted variances despite code violations.[24] Although the court found that there was not sufficient evidence of an equal protection violation, only a showing "that some of the City's employees exhibited racial animus[,]" this decision illustrates that even neutral building code regulations can be applied discriminatorily against disfavored people or entities.[25]

The landmark U.S. Supreme Court decision of *Yick Wo v. Hopkins* similarly involved a claim of racial animus in the

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[19] City of Albany v. Trinity Church, No. 06-184 & 185, 2006 WL 3740345, at *2 (N.Y. City Ct. Dec. 20, 2006).

[20] *Id.*

[21] Homelife Communities of Henry, Inc. v. City of McDonough, No. 05-CV-2085-TWT, 2006 WL 2539492, at *1 (N.D. Ga. Aug. 1, 2006).

[22] *Id.*

[23] *Id.* at *2.

[24] *Id.* at *3.

[25] *Id.* at *4.

administration of a facially-neutral local ordinance allegedly enacted to protect the health and safety of the community.[26] In *Yick Wo*, the city and county of San Francisco enacted an ordinance, which required laundry businesses located in wooden buildings to obtain permission from local officials in order to operate.[27] Ostensibly, this ordinance was designed to protect the public against fire danger, but in application, it gave the government the means to discriminate against Chinese business owners. The court expressed the principle that:

> Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.[28]

Thus, it is well-established that neutral building and safety codes may well be applied discriminatorily, and when protected classifications, such as race, or fundamental rights, such as free exercise, are unfairly impacted by neutral laws, the justification for these codes must be closely scrutinized.

The court in *Cambodian Buddhist Society of Connecticut, Inc. v. Planning & Zoning Commission of the Town of Newtown* recognized this concern with individualized discriminations and, even without applying RLUIPA, it agreed with the trial court that design (aesthetic) concerns should not be a basis for denying the temple permission to build.[29] The court noted that the special exception was denied, in part, because the temple's design violated design regulations in that "it was not in harmony with the design of other buildings in the vicinity."[30] The Supreme Court of Connecticut agreed with the trial court that this was not a valid reason for the denial, nor was the conclusion that the proposed use would cause traffic problems.[31] Thus, these individualized reasons for denying permission to build were scrutinized by the court, even though they were facially-neutral regulations and were not considered to be individualized assessments subject to RLUIPA scrutiny.

Building codes and, to a lesser degree, aesthetic or historic

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[26] Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886).

[27] *Id.* at 368.

[28] *Id.* at 373-74.

[29] Cambodian Buddhist Soc'y of Conn., Inc. v. Planning & Zoning Comm'n of the Town of Newtown, 941 A.2d 868, 897 (Conn. 2008).

[30] *Id.*

[31] *Id.* at 897-98, 902-03.

regulations, may not only be established at the local level, but may also be identified under uniform state and even international laws designed to ensure that buildings are safe, habitable, and appropriate for the community environment. Such laws, while neutral on their face and allegedly enacted for public health, safety, and welfare, should nonetheless be closely scrutinized under constitutional principles or RLUIPA guidelines when they are individually applied to burden the fundamental right of free exercise of religion. Arbitrary or discriminatory decision-making cannot be allowed by hiding behind the facial neutrality of public health, safety, and aesthetic or historic regulation.

I. LAND USE REGULATIONS

To be subject to review under RLUIPA, the government action must be a *land use regulation* which is defined as "a zoning or landmarking 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 regulated land . . . ."[32] The question then is whether building codes, aesthetic regulation, or historic regulation are considered to be "a zoning or landmarking law, or the application of such a law."[33] While building codes tend to define construction specifications for the safety and welfare of occupants, they do not generally regulate the specific *use* that is made of the property.

There is a strong argument that building codes are not *land use* regulations because they do not control the purpose for which the property is to be *used*, only how it is constructed. Court decisions have been mixed, and there are not yet definitive guidelines as to which types of regulation should be considered *land use regulations* subject to RLUIPA.[34] This issue will be litigated by the Becket Fund for Religious Liberty of Washington, D.C., which alleges that the town of Morristown, New York, and its code enforcement officer are violating the religious beliefs of Amish families in the community by forcing them "to install smoke detectors in their homes, submit engineering plans and

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[32] 42 U.S.C. § 2000cc-5(5).

[33] *Id.*

[34] *See, e.g.*, Scottish Rite Cathedral Ass'n of L.A. v. City of L.A., 67 Cal. Rptr. 3d 207, 216 (Cal. Ct. App. 2007) (examining whether city's revocation of Cathedral's certificate of occupancy for failure to comply with code restrictions violated RLUIPA, but finding that use of property as a Masonic lodge was not religious exercise).

allow home inspections."[35] Nevertheless, if RLUIPA is to be broadly construed, there is also a strong argument that these generally neutral controls over how the property is used should be subject to RLUIPA scrutiny as government regulation over property use.[36] Concerns that building codes should not be treated as *land use* regulations because they impact fundamental health and safety issues, can more readily be addressed by subjecting them to a compelling interest inquiry, rather than by completely exempting them from RLUIPA scrutiny.

Some courts have refused to apply RLUIPA to local regulations and actions not specifically designated as zoning activity.[37] In *Vision Church, United Methodist v. Village of Long Grove*, the Seventh Circuit determined that the process of either voluntary or involuntary annexation was not a land use regulation, even though it "may indeed make possible the subsequent zoning or marking of the land…"[38] The Village's initial refusal to annex the

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[35] *See* David Winters, *Law Firm Will Sue on Behalf of Amish*, WATERTOWN DAILY TIMES, Nov. 8, 2008, *available at* http://www.watertowndailytimes.com/article/20081108/NEWS05/311089939/.

[36] *See, e.g.*, Guatay Christian Fellowship v. County of San Diego, No. 08-1406, 2008 WL 4949895, at *3, *4 (S.D. Cal. Nov. 18, 2008) (concluding that the religious congregation has shown substantial hardship to its First Amendment free exercise rights sufficient to obtain a preliminary injunction against enforcement of code violations, but finding that the RLUIPA claim was not ripe).

[37] *See* Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1222 n.9 (C.D. Cal. 2002) (stating that eminent domain actions are subject to RLUIPA scrutiny). *But see* St. John's United Church of Christ v. City of Chi., 502 F.3d 616, 641 (7th Cir. 2007) (holding that *Cottonwood* does not stand for the proposition that all exercises of eminent domain authority are subject to RLUIPA; *Cottonwood* can be read to suggest RLUIPA is applicable to the specific eminent domain actions where the condemnation proceeding is intertwined with other actions by the city involving zoning regulations); Faith Temple Church v. Town of Brighton, 405 F. Supp. 2d 250, 256-57 (W.D.N.Y. 2005) (declining to apply RLUIPA to eminent domain actions and calling the reasoning in *Cottonwood* unpersuasive); City of Honolulu v. Sherman, 129 P.3d 542, 547 (Haw. 2006) (holding that the exercise of eminent domain did not constitute a "land use regulation"). Commentators have also split on the question of whether RLUIPA applies to eminent domain actions. *See* G. David Mathues, Note, *Shadow of a Bulldozer?: RLUIPA and Eminent Domain After Kelo*, 81 NOTRE DAME L. REV. 1653, 1668 (2006) (noting that "[n]o reason exists why eminent domain should be uniquely excluded from RLUIPA's orbit."); Shelley Ross Saxer, *Eminent Domain Actions Targeting First Amendment Land Uses*, 69 MO. L. REV. 653, 670 (2004) ("[A]ny eminent domain action can likely be traced to a local government's comprehensive plan or zoning system and thus can be considered the government's application of a zoning law or landmarking law, subject to RLUIPA."). *But see* Daniel N. Lerman, Note, *Taking the Temple: Eminent Domain and the Limits of RLUIPA*, 96 GEO. L.J. 2057, 2059 (2008) (arguing that eminent domain actions are distinctly different from landmarking laws and outside the scope of RLUIPA).

[38] 468 F.3d 975, 998 (7th Cir. 2007).

church's property and its subsequent action to force the annexation were not considered government actions subject to RLUIPA.[39] Although the government act of annexation is not a building code, it is similar in nature to a building code in that it is neutral and ministerial and it is not related to any specific use of the property. Therefore, it is probable that the Seventh Circuit would find that building code regulations, like annexations, are not land use regulations subject to RLUIPA scrutiny.

So how then are we to distinguish between a law enacted pursuant to a zoning or landmarking law and a law that is enacted purely to address public health and safety concerns? In a case involving an ordinance designed to directly address building requirements for health purposes, the Third Circuit held in *Second Baptist Church of Leechburg v. Gilpin Township,* that a mandatory sewer tap-in ordinance was not a *land use regulation* subject to RLUIPA.[40] The sewer ordinance, which required any buildings located within 150 feet of a sewer to be connected to the sewer, did not fall within the definition of a *land use regulation* under RLUIPA since it was "not enacted pursuant to a zoning or landmarking law."[41] However, courts have disagreed as to whether these types of building restrictions should be classified as land use regulation.[42]

A law that requires certain facilities, infrastructure, and construction to support public health and safety needs is typically expressed as a land use regulation that restricts a landowner from using his or her property, unless it conforms to certain government specifications. For example, in *Lighthouse Community Church of God v. City of Southfield*, the court held that a "parking ordinance is a 'land use regulation' which 'limits or restricts' a claimant's use of its land."[43] Yet, in *Liberty Road Christian School v. Todd County Health Department*, a similar ordinance limiting the use of land in the event it did not have appropriate sanitation facilities was determined not to be a land

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[39] *Id.*

[40] Second Baptist Church of Leechburg v. Gilpin Twp., No. 04-1434, 2004 WL 2958291, at *2 (3d Cir. Dec. 22, 2004) (not precedential).

[41] *Id.*

[42] *See, e.g.*, Lighthouse Cmty. Church of God v. City of Southfield, No. 05-40220, 2007 WL 756647, at *2 (E.D. Mich. Mar. 7, 2007); Liberty Rd. Christian Sch. v. Todd County Health Dep't, No. 2004-CA-001583-MR, 2005 WL 2240482, at *5 (Ky. Ct. App. Sept. 16, 2005) (not precedential); cases cited *infra* notes 44-46.

[43] Lighthouse Cmty. Church of God v. City of Southfield, No. 05-40220, 2007 WL 30280, at *7 (E.D. Mich. Jan. 3, 2007) (order granting Plaintiff's partial motion for summary judgment).

use regulation.[44] In *Liberty Road Christian School v. Todd County Health Department*, the health department sought injunctive relief against a private parochial school for sanitation violations because it did not have the proper water system for drinking and hand washing, nor did it have an approved toilet and septic system.[45] The court held that a "school sanitation law is not a land use regulation," and even if it were, such laws are neutral and generally applicable and need not be justified by a compelling government interest.[46]

It is unclear from the RLUIPA statutory language or related cases how it is to be determined whether an ordinance governing health and safety should be considered a *land use regulation*, subject to RLUIPA scrutiny, or a health and safety regulation that is *not* enacted pursuant to a zoning or landmarking law. Such health and safety restrictions can be found in local and state laws, and may be contained within a building code, a housing code, a plumbing code, or other legislative structures. Therefore, the broad interpretation required by RLUIPA should encourage courts to examine regulations restricting the use of property for purposes of health and safety to be considered *land use* regulations. Similar to other zoning laws enacted pursuant to the police power to protect the health, safety, and welfare or our communities, such regulations should be subject to RLUIPA scrutiny if they substantially burden free exercise. The concern, that building codes should be exempt because they are so closely bound to health and safety requirements, can be addressed by applying the compelling state interest test to see if they survive strict scrutiny under RLUIPA.

Aesthetic regulations also restrict the use of property for the benefit of the community welfare. If such regulations substantially burden free exercise in order to keep a community beautiful, they should be scrutinized under RLUIPA as a *land use* regulation. Although the aesthetic sign regulation at issue in *Metromedia, Inc. v. City of San Diego*, did not involve religious exercise, it did require scrutiny under the First Amendment protection of speech.[47] Subjecting the aesthetic regulation to

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[44] *Liberty Rd. Christian Sch.*, 2005 WL 2240482, at *5.

[45] *Id.*

[46] *Id.*

[47] Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 502 (1981) (seeking a First Amendment review of a sign, the Court stated that they cannot escape balancing First Amendment interests with the interests of government regulation).

constitutional scrutiny, the U.S. Supreme Court determined that sign regulation by the local government is justified by traffic safety and aesthetics, and aesthetics is a substantial government interest, which may justify restrictions on speech protected by the First Amendment.[48] Nevertheless, the court in *Omnipoint Communications, Inc. v. City of White Plains* refused to extend the same degree of First Amendment protection for religious exercise by holding that a religious congregation was not allowed to intervene in a challenge brought by a telephone company against the city for its denial of a permit to construct a transmission tower on a golf course.[49] The court refused to apply RLUIPA to protect free exercise by finding that the congregation did not have a right to retain a view, a purely aesthetic concern, because a permit issuance in this case would not constitute a "land use regulation" under RLUIPA.[50]

RLUIPA was applied in *Trinity Assembly of God of Baltimore City, Inc. v. People's Counsel for Baltimore County* to Baltimore County's sign regulations, which were considered by the court to be land use regulations.[51] The County's sign law required the church to obtain a variance if it wished to replace an old sign identifying the church with a larger and taller sign, and incorporate digital copy operated electronically by the church.[52] The court held that the County Board of Appeals did not substantially burden the church under RLUIPA when it denied the variance for the proposed new sign.[53] However, the court did acknowledge that the aesthetic sign regulation was a *land use* regulation and that the church's use of the sign "would constitute religious exercise as defined by the RLUIPA."[54]

Historic designation has fared much better than building codes, at least in terms of whether it is a land use regulation covered by RLUIPA. Since a historic designation is more closely associated with the terminology of "landmarking," it should be considered as enacted pursuant to a zoning or landmarking law. Thus, it is not surprising that the court in *Episcopal Student Foundation v. City*

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[48] *Id*. at 508-12.

[49] Omnipoint Commc'ns, Inc. v. City of White Plains, 202 F.R.D. 402-403 (S.D.N.Y. 2001).

[50] *Id*. at 404.

[51] Trinity Assembly of God of Balt. City, Inc. v. People's Counsel for Balt. County, 962 A.2d 404, 427 (Md. 2008) ("Obviously, the Sign Law and the provision for variances from its standards are land use regulations.").

[52] *Id*. at 409-10.

[53] *Id*. at 430.

[54] *Id*. at 427.

of Ann Arbor found that the City's historic preservation ordinance "certainly qualifies as a 'land use regulation'" under RLUIPA.[55] Restrictions on land use, whether enacted as aesthetic regulation or historic designation to promote the general welfare of the community, or enacted as a building or safety code to promote the health and safety of the community's land and building use, should be considered *land use* regulation. Such a broad interpretation of restrictions on property is demanded by the RLUIPA legislation, which was designed to protect religious exercise in the use of land against substantial governmental burdens.

II. RELIGIOUS EXERCISE

Land use activity adversely impacted by burdensome government regulation must be considered religious exercise before it can be protected under RLUIPA. The RLUIPA statute states:

> (A) The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.
>
> (B) 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.[56]

An example of using and converting real property for religious exercise is found in *Westchester Day School v. Village of Mamaroneck*, where the Second Circuit considered the expansion of a hall used for religious education and practice to be religious exercise, subject to RLUIPA.[57] Similarly, in *Mintz v. Roman Catholic Bishop of Springfield*, parish center activities were considered to be religious exercise because the parish center property was used for religious education offices and small meetings related to church services.[58]

While some courts have applied RLUIPA to government regulation of a religious institution's building changes or

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[55] Episcopal Student Found. v. City of Ann Arbor, 341 F. Supp. 2d 691, 699 (E.D. Mich. 2004).

[56] 42 U.S.C. § 2000cc-5(7)(A)-(B) (2000).

[57] Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 348 (2d Cir. 2007).

[58] Mintz v. Roman Catholic Bishop of Springfield, 424 F. Supp. 2d 309, 318-19 (D. Mass. 2006).

expansion, other courts have more closely examined the percentage of building use devoted to religious exercise as compared to its use for secular purposes. For example, in *Cathedral Church of the Intercessor v. Incorporated Village of Malverne*, the federal district court determined that the building permit denial for the Church's proposed expansion did not fall within RLUIPA's protection since it did not constitute religious exercise.[59] In viewing the percentage of secular building use, the court determined that the majority of the proposed building was to be used for administrative offices, not for the sanctuary area, and thus did not constitute religious exercise.[60]

Nontraditional religious uses of a building have been considered religious exercise under a more expansive view of RLUIPA protection. In *Episcopal Student Foundation v. City of Ann Arbor*, an organization designed to serve University of Michigan students used its property for activities such as "providing a spiritual community for its members, creating a progressive and creative worship experience for its members, offering meditation, prayer and study groups for its members, and continually working to welcome new members into the congregation."[61] The court determined that these services, provided for University of Michigan students, which were beyond traditional worship, nevertheless constituted religious exercise.[62] Similarly, the nontraditional use of church property to feed the homeless has been considered religious exercise under the Religious Freedom Restoration Act (RFRA)[63] because it constitutes a ministry motivated by religious belief.[64]

Determining whether particular targeted land uses constitute religious exercise becomes more problematic when building code regulations, such as those requiring health and safety features before property can be used for its designated religious purpose or aesthetic regulations, are challenged. In *Beechy v. Central Michigan District Health Department*, Amish landowners argued

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[59] Cathedral Church of the Intercessor v. Inc. Vill. of Malverne, 353 F. Supp. 2d 375, 390-91 (E.D.N.Y. 2005).

[60] *Id.* at 390.

[61] Episcopal Student Found. v. City of Ann Arbor, 341 F. Supp. 2d 691, 700 (E.D. Mich. 2004).

[62] *Id.* at 701.

[63] Religious Freedom Restoration Act, 42. U.S.C. § 2000bb (1993), *invalidated by* City of Boerne v. Flores, 521 U.S. 507, 511 (1997).

[64] *See, e.g.,* Stuart Circle Parish v. Bd. of Zoning Appeals of the City of Richmond, 946 F. Supp. 1225, 1228-29, 1239 (E.D. Va. 1996) (finding that the parish's practice of providing meals to the homeless was essential to their worship and considered religious exercise under the RFRA).

that they should not be required under the septic tank ordinance to use a larger 750 gallon tank because their Amish beliefs of "minimalism and frugality" precluded such a use.[65] The court agreed to examine whether the religion's objections to government regulation were based upon religious beliefs, but it did not agree to determine, pursuant to RLUIPA, whether the beliefs were sincerely-held.[66] The Amish landowners did not declare that this ordinance violated the tenets of their faith and, instead, the facts indicated that their sole reason for objection was based on "cost and convenience."[67] Under RLUIPA, the court found that the septic tank ordinance did not substantially burden their religious practices since the objection was based upon cost and convenience, not religious belief.[68] Thus, by deciding the case based upon the RLUIPA *substantial burden* test, it appears that the court viewed the septic tank ordinance as a *land use* regulation and the Amish landowners' refusal to abide by the 750 gallon septic tank requirement as *religious exercise*.

Aesthetic regulations, such as those restricting signage for purposes of controlling visual blight, have also been challenged under RLUIPA for interfering with religious exercise. In *Trinity Assembly of God of Baltimore City, Inc. v. People's Counsel for Baltimore County*, the court determined that the church's use of a sign "to inspire its congregants and passers-by and to recruit eastbound travelers on I-695 – is a form of 'religious exercise' protected by RLUIPA."[69] In contrast to challenging government regulations restricting free exercise for the purpose of aesthetics, a First Amendment free exercise challenge was brought by a church alleging that certain government regulations *created* an aesthetic burden on religious exercise. In *Peace Lutheran Church & Academy v. Village of Sussex,* the church alleged that a government regulation requiring it to have a sprinkler system in the worship area substantially burdened its religious exercise because the sprinklers were not aesthetically acceptable.[70] The court found that the church did not present sufficient evidence of

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[65] Beechy v. Cent. Mich. Dist. Health Dep't, 475 F. Supp. 2d 671, 673 (E.D. Mich. 2007), *aff'd*, 274 F. App'x 481 (6th Cir. 2008).

[66] *Id.* at 679.

[67] *Id.* at 683.

[68] *Id.* at 684.

[69] Trinity Assembly of God of Balt. City, Inc. v. People's Counsel for Balt. County, 941 A.2d 560, 574 (Md. Ct. Spec. App. 2008), *aff'd*, 962 A.3d 404 (Md. 2008).

[70] Peace Lutheran Church & Acad. v. Vill. of Sussex, 631 N.W.2d 229, 234 (Wis. Ct. App. 2001).

a sincerely held religious belief that could be burdened by the aesthetic detriment created by the required sprinklers.[71] Nonetheless, it appears that aesthetic considerations either restricting religious exercise for purposes of achieving aesthetic public benefit or creating aesthetic burdens on free exercise by certain government regulations could be subject to RLUIPA. Such aesthetic considerations could be seen as valid religious exercise if the regulation involves *"[t]he use . . . of real property for the purpose of religious exercise."*[72]

III. SUBSTANTIAL BURDEN

Once the court determines that a *land use* regulation has impacted *religious exercise* and is subject to RLUIPA scrutiny, the government action must *substantially burden* religious exercise or treat a religious institution on less than equal terms with a nonreligious institution in order to constitute an RLUIPA violation. Although several federal circuits have defined "substantial burden" in a similar vein, there is not yet an agreed upon national standard by which to judge a RLUIPA violation. The Second Circuit in *Westchester Day School v. Village of Mamaroneck* explained that "[t]here must exist a close nexus between the coerced or impeded conduct and the institution's religious exercise for such conduct to be a substantial burden"[73] and the Fourth Circuit in *Lovelace v. Lee* similarly defined a substantial burden as one that "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs."[74] The Ninth Circuit in *Guru Nanak Sikh Society of Yuba City v. County of Sutter* has declared that "[f]or a land use regulation to impose a 'substantial burden,' it must be 'oppressive' to a 'significantly great' extent. That is, a 'substantial burden' on 'religious exercise' must impose a significantly great restriction or onus upon such exercise."[75] The Eleventh Circuit requires a more coercive type of government action by holding in *Midrash Sephardi, Inc. v. Town of Surfside* that a substantial burden is one that "place[s] more than an inconvenience on religious exercise" and is "akin to significant pressure which directly

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[71] *Id.* at 236.

[72] 42 U.S.C. § 2000cc-5(7)(B) (2000) (emphasis added).

[73] Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 349 (2d Cir. 2007).

[74] Lovelace v. Lee, 472 F.3d 174, 187 (4th Cir. 2006).

[75] Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter, 456 F.3d 978, 988 (9th Cir. 2006).

coerces the religious adherent to conform his or her behavior accordingly."[76] Finally, in *Civil Liberties for Urban Believers v. City of Chicago*, the Seventh Circuit offered that "a land – use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise – including the use of real property for the purpose thereof within the regulated jurisdiction generally-effectively impracticable."[77]

Applying these substantial burden tests to building code restrictions, aesthetic regulations and historic preservation have yielded very different results in both state and federal courts. Neutral regulations such as parking, intensity of use, set-back, and coverage requirements have been found to substantially burden religious exercise when applied against religious institutions to restrict them from expanding their land use in a particular location. In *Westchester Day School,* the Second Circuit held that a religious school's religious exercise was substantially burdened by the arbitrary denial of its permit application to expand its classrooms based on traffic, parking, and intensity of use concerns.[78] A district court in *Lighthouse Community Church of God v. City of Southfield* also found that applying a parking ordinance to the church substantially burdens religious exercise because the church could not use its building for worship purposes and "[w]orship services are fundamental to the practice and exercise of one's religious beliefs."[79] Similarly, in *Mintz v. Roman Catholic Bishop of Springfield*, the district court found that the Zoning Board of Appeals was justified in granting a permit to build a parish, which violated regulations concerning building coverage and setbacks, parking, and frontage and lot width, because a permit denial would have substantially burdened religious exercise.[80] Requiring the church to build its parish center at another location would not avoid the substantial burden imposed by the building codes on the religious exercise at the church's current location.[81]

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[76] Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004).

[77] Civil Liberties for Urban Believers v. City of Chi., 342 F.3d 752, 761 (7th Cir. 2003).

[78] *Westchester Day Sch.*, 504 F.3d at 352-53.

[79] Lighthouse Cmty. Church of God v. City of Southfield, No. 05-40220, 2007 WL 30280, at *9 (E.D. Mich. Jan. 3, 2007).

[80] Mintz v. Roman Catholic Bishop of Springfield, 424 F. Supp. 2d 309, 322 (D. Mass. 2006).

[81] *Id.*

In contrast, neutral building restrictions have also been held *not* to substantially burden free exercise. In *Vision Church, United Methodist v. Village of Long Grove,* the Seventh Circuit determined that a facially-neutral ordinance, which established maximum size and capacity requirements, did not substantially burden the church's free exercise because there was no evidence that the church was targeted by the ordinance based on religion.[82] Limiting the church to a three building, 55,000-square foot facility did not impose a substantial burden on free exercise, and the church had the opportunity to submit modified plans.[83] The Seventh Circuit also determined in *Petra Presbyterian Church v. Village of Northbrook* that a substantial burden was not shown based upon a church's attempt to locate in an industrial zone.[84] Other courts have similarly held that denying a church the right to expand did not substantially burden their religious exercise. In *Cathedral Church of the Intercessor v. The Incorporated Village of Malverne*, a New York district court held that the Village did not substantially burden the Church's religious exercise by denying an expansion proposal since the Church had the opportunity to re-submit their proposal.[85] In *Episcopal Student Foundation v. City of Ann Arbor*, a Michigan district court determined that denying an application to demolish a building in order to build a larger facility did not substantially burden religious exercise.[86] Because the religious institution was leasing space to commercial tenants, which it could reclaim, the court held that any financial burden imposed by having to find alternative space was not a severe enough burden to require RLUIPA protection.[87]

First Amendment free exercise challenges, not based upon RLUIPA, have experienced similar mixed results in the courts under the substantial burden analysis. In *Open Door Baptist*

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[82] Vision Church, United Methodist v. Vill. of Long Grove, 468 F.3d 975, 999 (7th Cir. 2006), *cert. denied*, 128 S. Ct. 77 (2007).

[83] *Id.* at 999-1000 (noting that the church membership was currently 120 members and the permitted size would meet the needs of a congregation of 800-1,000 members).

[84] Petra Presbyterian Church v. Vill. of Northbrook, 489 F.3d 846, 850-51 (7th Cir. 2007) (observing that the Village's unpersuasive claim of compelling interest to keep churches out of industrial zones was not needed because no substantial burden was found), *cert. denied*, 128 S. Ct. 914 (2008).

[85] Cathedral Church of the Intercessor v. Inc. Vill. of Malverne, 353 F. Supp. 2d 375, 390 (E.D.N.Y. 2005).

[86] Episcopal Student Found. v. City of Ann Arbor, 341 F. Supp. 2d 691, 709 (E.D. Mich. 2004).

[87] *Id.*

Church v. Clark County, the Washington Supreme Court held that requiring a church to comply with the conditional use application process does not unconstitutionally burden its religious free exercise, but closure of a church for this reason "would require a compelling state interest."[88] Also finding no substantial burden in *Christ College, Inc. v. Board of Supervisors, Fairfax County*, the Fourth Circuit, in an unpublished opinion, determined that the religious entity did not prove that zoning laws or fire codes burdened their religious exercise, nor that conformance with these regulations would impair their free exercise.[89] But, in a Religious Freedom Restoration Act (RFRA)[90] decision which used essentially the same First Amendment analysis found under RLUIPA, the court in *Stuart Circle Parish v. Board of Zoning Appeals of the City of Richmond* determined that a zoning regulation, which governs how many and how often the homeless can be served and makes this ministry more inconvenient and expensive, may not substantially burden religious exercise.[91] However, the court continued on to find that the fact that "it was central to their faith to invite the homeless into the church in order to establish a climate of worship" is what substantially burdens the parish since the regulation would prohibit the church from practicing this form of religious activity.[92] Thus, not only have courts subjected building codes and other neutrally applicable regulatory controls over building usage to RLUIPA scrutiny, but opinions in other first amendment and RFRA cases have found that such codes may substantially burden religious exercise in certain situations.

Aesthetic regulations have not generally been found to substantially burden a religious institution's free exercise. In *Trinity Assembly of God v. People's Counsel for Baltimore County*, a Maryland state appellate court determined that the county's denial of a variance for a religious sign did not substantially burden church's religious exercise because "the Church has

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[88] Open Door Baptist Church v. Clark County, 995 P.2d 33, 48 n.16 (Wash. 2000). *See also* Sumner v. First Baptist Church, 639 P.2d 1358, 1363 (Wash. 1982).

[89] Christ College, Inc. v. Bd. of Supervisors, Fairfax County, No. 90-2406, 1991 U.S. Dist. App. LEXIS 21680, at *11 (4th Cir. Sept. 13, 1991).

[90] Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

[91] Stuart Circle Parish v. Bd. of Zoning Appeals of the City of Richmond, 946 F. Supp. 1225, 1238-39 (E.D. Va. 1996).

[92] *Id.* at 1239.

multiple alternative means to preach to and inspire sought-after-members other than by use of a sign that is significantly larger than what the zoning regulations allow" such as using commercial billboards or other signs that conform to the regulations.[93] A Missouri state appellate court in *St. John's Evangelical Lutheran Church v. City of Ellisville*, while not directly addressing the RLUIPA claims, similarly held that the church was subject to the City's sign regulations and that the trial court did not have the authority to enjoin the City from denying the Church's request to construct a monument sign which exceeded the size limits.[94]

In a First Amendment challenge to an architectural restriction imposed on a Buddhist temple, the Hawaii Supreme Court in *Korean Buddhist Dae Won Sa Temple v. Sullivan* held that a height restriction on Buddhist temple does not burden free exercise by interfering with the "balance and harmony" of the buildings.[95] The court found it relevant that the difficulty with height was "self-inflicted" because it was built higher than originally approved.[96] Because the burdens experienced by the Buddhist temple were related to expense and inconvenience, the height restrictions were found not to substantially burden free exercise.[97]

While aesthetic regulations have been successfully applied to restrict religious institutions under RLUIPA and First Amendment challenges, historic and landmark preservation has been found by some courts to be a substantial burden on free exercise. Prior to the enactment of RLUIPA, the Washington Supreme Court reacted favorably to religious institutions alleging First Amendment challenges to historic preservation ordinances. In *First United Methodist Church of Seattle v. Hearing Examiner for Seattle Landmarks Preservation Board*, the court found that the landmark preservation ordinance "severely burdens free exercise of religion because it impedes United Methodist from selling its property and using the proceeds to advance its religious mission."[98] Earlier, in *First Covenant Church of Seattle*

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[93] Trinity Assembly of God v. People's Counsel for Balt. County, 941 A.2d 560, 574, 575 (Md. Ct. Spec. App. 2008).

[94] St. John's Evangelical Lutheran Church v. City of Ellisville, 122 S.W.3d 635, 644 (Mo. Ct. App. 2003).

[95] Korean Buddhist Dae Won Sa Temple v. Sullivan, 953 P.2d 1315, 1346 (Haw. 1998).

[96] *Id.*

[97] *Id.*

[98] First United Methodist Church of Seattle v. Hearing Exam'r for Seattle

v. City of Seattle, the court determined that the City's historical landmarking ordinances substantially burdened the church's free exercise by requiring the church to seek approval before altering its exterior and by reducing the value of the church's property by almost one half.[99]

Building codes and other neutrally-directed land use restrictions for public health and safety purposes, along with historic preservation and landmarking ordinances, have been subject to RLUIPA and First Amendment scrutiny and have sometimes been found to substantially burden the free exercise of religious institutions. Court decisions have shown that it is less likely that aesthetic regulations will be sufficiently burdensome to constitute such a substantial burden. However, once a local regulation is determined to constitute a substantial burden, the government must show that it has a compelling state interest in restricting the property rights of a religious institution that cannot be achieved by less restrictive means.

IV. COMPELLING STATE INTEREST

The RLUIPA statutory language does not define what constitutes a "compelling government interest," but legislative history indicates it was intended to encompass the traditional "compelling interest" test.[100] Building and safety codes are typically enacted to address public health and safety concerns and, at first blush, will be considered compelling state interests. In *People v. Miller,* the New York Justice Court decided that Amish landowners were required to have a building permit since "[t]here is no more compelling interest than attempting to provide a minimal threshold of safety via the local law than to inspect and approve the construction methods for a building used as public gathering places as the potential for substantial loss of life is greatly increased with such use."[101] In an earlier Amish case based on a First Amendment challenge, the Ohio appellate court had a similar view of building codes. In *State of Ohio v.*

Landmarks Pres. Bd., 916 P.2d 374, 380, 381 (Wash. 1996) (city conceded that it did not have any compelling interest to justify the burden).

[99] First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174, 183, 191 (Wash. 1992).

[100] *See* Mintz v. Roman Catholic Bishop, 424 F. Supp. 2d 309, 322 (D. Mass. 2006).

[101] People v. Miller, at 7 (N.Y. Jus. Ct. July 25, 2008), *available at* http://www.esnips.com/doc/86be251c-341e-437b-bda4-6e9e210f8943/Amish_motion_decision.

Hershberger, the court stated that "there is a compelling interest in enforcing the building code by requiring residential housing to meet minimum construction standards."[102] The court observed that requiring an inspection was the least restrictive means to ensure that proper building materials have been used and that the house was sanitary and safely constructed.[103]

Undeniably, most building codes enacted for public safety should generally constitute a compelling state interest, which may not be achievable by less restrictive means. However, not all building codes in all situations should be automatically classified as compelling, and some RLUIPA decisions have reflected the view that each challenge should be examined based upon the particular facts of each case.[104] In fact, the United States Supreme Court in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* made it clear that in a First Amendment challenge the government has the burden of demonstrating a compelling interest within the context of the challenged ordinance.[105] Thus, as declared by the district court in *Reaching Hearts International, Inc. v. Prince George's County*, a compelling state interest should not be treated as "a general interest but must be particular to a specific case; namely, the interest requires the infringement of a particular right in this case due to an interest of the highest order."[106]

Courts have looked to context to determine compelling state interests in various religious exercise decisions. In *Westchester Day School v. Village of Mamaroneck,* the Second Circuit determined that safety concerns, achieved through traffic and parking regulations, must be shown to be compelling interests in the particular case, not just in general.[107] The court concluded

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[102] State of Ohio v. Hershberger, C.A. Nos. 1904, 1905, 1984 WL 6199, at *2 (Ohio Ct. App. May 30, 1984) (not precedential).

[103] *Id.*

[104] *See, e.g.,* Petra Presbyterian Church v. Vill. of Northbrook, 489 F.3d 846, 847, 852 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 914 (2008); Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 352-53 (2d Cir. 2007); Reaching Hearts Int'l, Inc. v. Prince George's County, 584 F. Supp. 2d 766, 781-82 (D. Md. 2008); Lighthouse Cmty. Church of God v. City of Southfield, No. 05-40220, 2007 WL 30280, at *5, *7, *9 (E.D. Mich. Jan. 3, 2007); *Mintz*, 424 F. Supp. 2d at 317-18, 319; Stuart Circle Parish v. City of Richmond, 946 F. Supp. 1225, 1240 (E.D. Va. 1996); First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174, 218 (Wash. 1992).

[105] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546-47 (1993).

[106] *Reaching Hearts Int'l, Inc.*, 584 F. Supp. 2d at 788 (citing *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 546).

[107] *Westchester Day Sch.*, 504 F.3d at 353.

that here, "the application was denied not because of a compelling governmental interest that would adversely impact public health, safety, or welfare, but was denied because of undue deference to the opposition of a small group of neighbors."[108] In addition, it found that the Village could have achieved these compelling interests by less restrictive means if it had, instead, approved the permit subject to conditions.[109] In an earlier RFRA case, the district court in *Stuart Circle Parish v. City of Richmond* looked at the facts of the case to determine whether restricting the number of homeless served or the hours of operation of a homeless ministry were necessary given the impact on the surrounding neighborhood.[110] The court determined that limits on the number of homeless being fed and the hours of operation could not be justified as required by a compelling state interest in restricting this ministry.[111] There was no showing that this ministry jeopardized public safety or created a nuisance so the court could not determine whether the zoning code constituted the least restrictive means of achieving a compelling state interest.[112]

Another example of a court looking at the facts of the case to determine whether a particular regulation was compelling under the circumstances can be found in *Petra Presbyterian Church v. Village of Northbrook.*[113] Although the Seventh Circuit found that the compelling governmental interest argument was not relevant because the church had not shown it was substantially burdened, the court did evaluate the Village's argument that it had a compelling interest to keep churches out of the industrial zone.[114] It determined that the Village's argument was unpersuasive because "until RLUIPA was enacted, and indeed for years afterward, the Village was content to allow membership organizations other than churches to buy land and build freely in the zone, no permit required."[115] Again, a court has looked beyond the basic understanding of safety ordinances as serving a

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[108] *Id.*

[109] *Id.*

[110] *Stuart Circle Parish* v. City of Richmond, 946 F. Supp. 1225, 1239 (E.D. Va. 1996).

[111] *Id.*

[112] *Id.* at 1239-40.

[113] Petra Presbyterian Church v. Vill. of Northbrook, 489 F.3d 846, 850-51 (7th Cir. 2007), *cert. denied,* 128 S. Ct. 914 (2008).

[114] *Id.* at 851-852 (Village argued "that it has a compelling interest in keeping religious organizations, along with other membership organizations, out of the industrial zone, even if a substantial burden on religious observances results.").

[115] *Id.* at 852.

compelling state interest, to a fact-specific analysis of whether such restrictions actually achieve a compelling state interest under the circumstances being evaluated.

More problematic for local governments is justifying aesthetic or historic regulations as compelling state interests. A First Amendment challenge to Seattle's historic regulation failed when the Washington Supreme Court in *First Covenant Church of Seattle v. City of Seattle* held that the "City's interest in preservation of aesthetic and historic structures is not compelling and it does not justify the infringement of First Covenant's right to freely exercise religion."[116] Recognizing the importance of free exercise above the City's interest in historical restrictions, the court declared that "[t]he possible loss of significant architectural elements is a price we must accept to guarantee the paramount right of religious freedom."[117] While safety and building codes may readily be considered necessary to address a compelling state interest under certain circumstances, aesthetic and historic restrictions may not be sufficiently compelling to justify limits on free exercise.

Once a substantially burdensome land use restriction is determined to support a compelling state interest, the government must show that it is the least restrictive means of achieving that interest. In *Lighthouse Community Church of God v. City of Southfield*, the court did not decide whether a parking ordinance was supported by a compelling government interest because, even if parking and traffic concerns were determined to be compelling, the city had "not shown that the parking ordinance prohibiting use of the church is the least restrictive means to achieve the stated interest."[118] Similarly, the court in *Mintz v. Roman Catholic Bishop of Springfield* emphasized the importance of requiring the government to use the least restrictive means of achieving their compelling interest by recognizing that while parking and traffic congestion might arguably be compelling state interests, the city in this case used the least restrictive means to achieve these interests by imposing a condition "that the parish center and church not operate at the same time."[119] Finally, set-back, occupancy, and coverage

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[116] First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174, 185 (Wash. 1992).

[117] *Id.*

[118] Lighthouse Cmty. Church of God v. City of Southfield, No. 05-40220, 2007 WL 30280, at *9 (E.D. Mich. Jan. 3, 2007).

[119] Mintz v. Roman Catholic Bishop of Springfield, 424 F. Supp. 2d 309, 324

requirements have also been found not to constitute compelling state interests, particularly if the restrictions are more stringent in areas allowing religious institutions versus those applied in other areas of the town, including residential, commercial and industrial areas.[120]

V. EQUAL TERMS, NONDISCRIMINATION, AND NONEXCLUSION

In addition to protecting religious institutions against substantially burdensome land use regulation, RLUIPA requires that religious assemblies and institutions be treated on equal terms with nonreligious assemblies and institutions, that governments do not discriminate on the basis of religion, and that governments do not exclude such religious entities when imposing or implementing land use regulations.[121] Although case law on the nondiscrimination provision, section 2000cc(b)(2),[122] is lacking,[123] some courts have found that a claim under this section requires that there be a substantial burden on religious exercise.[124] However, other courts have treated section 2000cc(a) and section 2000cc(b) as independent of one another and have allowed claims of discrimination without a finding of substantial burden.[125] For example, in *United States v. Village of Airmont*,

(D. Mass. 2006).

[120] *See, e.g.*, *id.* at 323 (finding the 200-foot setback requirement and the four percent building lot coverage requirement did not constitute a compelling state interest, particularly since these restrictions were more stringent than those applied in other areas of the town).

[121] 42 U.S.C. § 2000cc(b)(1) (2000) (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.").

[122] 42 U.S.C. § 2000cc(b)(2).

[123] *See* United States v. Village of Airmont, 05 Civ. 5520, at *15 (S.D.N.Y. Nov. 12, 2008), *available at* http://www.usdoj.gov/crt/religdisc/airmont_order.pdf; *see also Petra Presbyterian Church*, 489 F.3d at 848-49 (not accepting a federal "vested rights" doctrine but noting that city most likely violated RLUIPA's "less than equal terms" provision by discriminating in favor of secular membership organizations in an industrial zone).

[124] *See* Vineyard Christina Fellowship of Evanston, Inc. v. City of Evanston, 250 F. Supp. 2d 961, 993 (N.D. Ill. 2003) (treating section (B) as a subset of section (A) "[t]o avoid potential constitutional problems" and holding that there was no RLUIPA violation because no substantial burden could be shown).

[125] *See* Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d

the federal district court, without finding a substantial burden, upheld against dismissal the government's RLUIPA discrimination claims against the Village's zoning code.[126] The Village's zoning prohibition against boarding schools was neutral on its face, but allegedly was enacted to prevent Hasidic boarding schools from operating in the community.[127]

In *Chabad of Nova, Inc. v. City of Cooper City*, the federal district court allowed a Jewish Orthodox Chabad Outreach Center to challenge city ordinances under RLUIPA section 2000cc(b) without first finding a substantial burden under section 2000cc(a).[128] In *Chabad*, city ordinances did not allow religious worship as a permitted use in the city's business, office park, and park and recreational districts, even though other non-religious assembly uses were allowed.[129] Additionally, in the other use districts where religious assembly was allowed, the use was required to maintain a 300 foot main road frontage, even though the other uses in the residential districts required only a 200 foot frontage.[130] The city later amended these ordinances to permit religious worship in the office park and park and recreational districts, but not the business districts, and insured that the frontage requirements in residential districts were the same as those imposed on non-religious assemblies.[131] Chabad challenged the restrictions, even as amended, as violating RLUIPA by placing religious assemblies on unequal terms with non-religious assemblies under section 2000cc(b)(1), discriminating against an assembly on the basis of religion under section 2000cc(b)(2), and unreasonably limiting religious assemblies in violation of section

253, 262 (3d Cir. 2007) ("the[T]he structure of the statute and its legislative history clearly reveal that the substantial burden requirement does not apply to claims under 2(b)(1), the Equal Terms provision"), *rev'g in part* 406 F. Supp. 2d 507, 510 (D.N.J. 2005); Konikov v. Orange County, 410 F.3d 1317, 1323-24, 1329 (11th Cir. 2005); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d at 1228, 1232-35 (11th Cir. 2004); *Airmont*, 05 Civ. 5520, at *16 n.11 (citing Civil Liberties for Urban Believers v. City of Chi., 342 F.3d 752, 762 (7th Cir. 2003)); Hollywood Cmty. Synagogue, Inc. v. City of Hollywood, 430 F. Supp. 2d 1296, 1320 (S.D. Fla. 2006).

[126] *Airmont*, 05 Civ. 5520, at *14-19.

[127] *Id.* at 17-19 (allowing the Government to "proceed with its claim that one religious denomination – Hasidic Judaism – is singled out for discriminatory treatment by the Code, which bans all boarding schools, and thus all yeshivas.").

[128] Chabad of Nova, Inc. v. City of Cooper City, 575 F. Supp. 2d 1280, 1284-85 (S.D. Fla. 2008).

[129] *Id.* at 1283.

[130] *Id.* (noting that ordinances also required 1,000 feet of separation between buildings, which unfairly impacted religious assemblies).

[131] *Id.* at 1284.

2000cc(b)(3).[132]

The *Chabad* court, in deciding whether or not RLUIPA was violated, evaluated whether there was a reasonable opportunity for religious expression by examining the number of properties available under zoning for religious assemblies using the "method employed in the context of free expression challenges to zoning ordinances."[133] The court determined that, based on the factual record, the city ordinances imposed unreasonable limitations on religious assemblies in violation of RLUIPA section (b)(3)(B) because limited properties were available, the costs were inflated, and the religious assemblies were subject to stricter requirements than those imposed on similar uses.[134] In addition to finding a RLUIPA violation based upon unreasonable limitations on religious exercise, the court found that prohibiting religious assemblies in business districts violated the Equal Protection Clause.[135] The court also denied the city's summary judgment motion against Chabad's claims of free speech[136] and free exercise violations.[137]

Chabad's successful claim under RLUIPA's unreasonable limitation provision did not require a showing of substantial burden on religious exercise under section 2000cc(a), thus treating these sections as independent claims. The court's willingness to evaluate the RLUIPA claim using the First Amendment freedom of speech doctrinal framework indicates that such an analysis is plausible as a way to protect religious activity by treating it as a constitutionally preferred fundamental right.[138] Instead of requiring a showing that the government restriction substantially burdens religious exercise in order to protect the religious activity, discriminatory, exclusionary, and limiting government regulation can be evaluated by subjecting it to constitutional scrutiny under section 2000cc(b) as impacting a preferred constitutional right.[139]

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[132] *Id.* at 1285; 42 U.S.C. §§ 2000cc(b)(1)-(b)(3).

[133] *Chabad*, 575 F. Supp. 2d at 1289 (S.D. Fla. 2008). *See also* Frederick Mark Gedicks, *Towards a Defensible Free Exercise Doctrine*, 68 GEO. WASH. L. REV. 925, 927-28 (2000) ("[R]eligious practices should receive the same kind of constitutional protection afforded to expression and association under the Speech and Equal Protection Clauses.").

[134] Chabad, of Nova, Inc. v. City of Cooper City, 575 F. Supp. 2d 1280, 1290 (S.D. Fla. 2008).

[135] *Id.* at 1294.

[136] *Id.* at 1294-96.

[137] *Id.* at 1296-97.

[138] Gedicks, *supra* note 133, at 934.

[139] *Id.*

CONCLUSION

Until the Supreme Court provides more guidance, courts will continue to be fractured in their interpretation of RLUIPA. However, courts should heed Congress's mandate that RLUIPA be construed so as to provide religious protection to the "maximum extent permitted by the terms of this chapter and the Constitution." Accordingly, building codes, aesthetic regulations, and historic regulations should be categorized as "zoning or landmarking law[s], or the application of such law[s]" which would place these regulations within the reach of RLUIPA's protection. While such laws may often appear facially neutral, they will often provide governments with the opportunity to make individualized assessments. These individualized assessments may result in governments discriminating against religious exercise. Courts should not allow facial neutrality to provide cover for religious discrimination in land use decisions involving individualized assessments.

Once a land use regulation is found to be applied to a religious institution, the court must determine whether it impacts religious exercise. By its own terms, RLUIPA provides that "[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise."[140] Courts should consider not only traditional worship services to be religious, but also uses which further the general mission of the religion. Such an interpretation is faithful to Congress's goal in ensuring religious protection. The regulation then must not merely impact, but substantially burden the religious exercise. No national standard for the determination of a substantial burden exists yet, but the substantial burden test for RLUIPA should be treated the same as a free exercise claim. Aesthetic regulations are much less likely to create a substantial burden than building code regulations or historic preservation regulations. Nevertheless, all of these regulations should be subject to RLUIPA's substantial burden provisions.

If a substantial burden is found, the regulation cannot stand unless it is justified by a compelling government interest and the least restrictive means of achieving it. Building codes are typically passed for public health and safety interests, which will generally be considered compelling. However, courts should not accept these generalized interests as necessarily compelling.

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[140] 42 U.S.C. § 2000cc-5(7)(B) (2000).

Rather, courts need to look at the underlying circumstances in each particular case to determine whether there is a compelling interest in that specific situation. Courts should not generally find aesthetic regulations and historic preservation to be compelling interests. While a government certainly has an interest in these matters, such an interest cannot be classified as compelling. Furthermore, even if a compelling interest is found, courts must scrutinize the regulation to insure that the least restrictive means is used to achieve that compelling interest.

Building codes, aesthetic regulation, and historic preservation programs should also be evaluated under RLUIPA's equal terms, nondiscrimination, and nonexclusion provisions. Rather than requiring religious institutions to prove a substantial burden on religious exercise before asserting claims of discrimination or exclusion, courts should construe RLUIPA to include two distinct and independent causes of action. Courts should not graft the "substantial burden test" onto these separate provisions of RLUIPA, but should, instead, treat religious exercise as a preferred fundamental right. Only through the broad construction of RLUIPA, subjecting burdensome, discriminatory, or exclusionary government action to strict scrutiny, can courts provide the maximum religious protection commanded by RLUIPA and the First Amendment.