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LAND USE MID-YEAR UPDATE
RLUIPA UPDATE
March 16, 2007

I. RLUIPA BACKGROUND

The Religious Land Use and Institutionalized Persons Act (RLUIPA) is a federal civil rights statute protecting free exercise of religion. RLUIPA 42 U.S.C. 2000cc –4(c) provides for attorney fees under 42 U.S.C. 1983 and 42 U.S.C. 1988(b). RLUIPA Section 8(4)(A) expressly states it applies to "a state, county, municipality, or other governmental entity created under the authority of a State; and any branch, department, agency, instrumentality, or official of an entity [previously] listed."

RLUIPA protects religion in the context of land use regulation and land marking regulations, in two broadly different ways: protecting against substantial burdens on religious exercise as well as against discrimination within, and against exclusion from, a community

Section 2(a) of the Act protects against the imposition of substantial burdens on free exercise in the context of land marking laws and land use regulations.[1] Under Section 2(a), if a substantial burden on the religious exercise[2] is established, the government is required to establish that it has a compelling interest supported by the least restrictive means available to justify the substantial burden. RLUIPA's substantial burden provision applies where the burden is imposed: (1) in connection with a

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[1] RLUIPA, 42 U.S.C. Section 20000cc-5(5), "land use regulation" is defined as:

> "[A] zoning or landmarking law * * * that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant haws an ownership, leasehold, easement, servitude or other property interest in the regulated land or a contract or option to acquire such an interest."

This is distinguished from a decision to construct a roadway which has been interpreted as not the implementation of a land use regulation (*i.e.* not a zoning or a landmarking law) as defined in RLUIPA. *Prater v. City of Burnside*, 289 F3.d 417 (6th Cir. 2002).

[2] The terms "religious exercise" are defined in RLUIPA as: "The 'term religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief. * * * 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."

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federally-funded activity; (2) where the burden affects interstate commerce; or (3) for the implementation or imposition of a land use regulation, where the burden is imposed in the context of a scheme whereby the state makes "individualized assessments" regarding the property involved. *See* 42 U.S.C. 2000cc(a)(2), 2000cc-1(b).

Under Section 2(b), government may not "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." Further, government is forbidden from imposing or implementing "a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination." Moreover, government is forbidden from imposing or implementing a land use regulation that either "totally excludes religious assemblies from a jurisdiction" or "unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." These RLUIPA discrimination and exclusion proscriptions in 42 U.S.C. 2000cc(2)(b) do not require a showing of a substantial burden on the free exercise of religion. Rather, these proscriptions are expressed as elements that operate independently of the substantial burden elements of RLUIPA in 42 U.S.C. 2000cc(2)(a). Similarly, a governmental compelling interest, furthered through the least restrictive means, are not expressly stated as defenses to RLUIPA's discrimination and exclusion prohibitions of 42 U.S.C. 2000cc(2)(b). The Joint Statement supporting RLUIPA provides:

> "The state may eliminate the discrimination or burden in any way it chooses, so long as the discrimination or substantial burden is actually eliminated." (Emphasis supplied.) Joint Statement 146, Cong. Rec. 7776-01.

The Joint Statement supports that the substantial burden provisions and the exclusions and limits clauses operate independently of one another:

> "[RLUIPA] applies the standard of the Religious Freedom Restoration Act, 42 U.S.C. s2000bb-1 (1994): if government substantially burdens the exercise of religion, it must demonstrate that imposing that burden on the claimant serves a compelling interest by the least restrictive means. *In addition*, with respect to land use regulation, the bill specifically prohibits various forms of religious discrimination and exclusion." (Emphasis supplied.) Joint Statement 146 Cong. Rec. 7774-01.

The Joint Statement further explains:

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> "The General Rules in 2(a)(1), requiring that substantial burdens on religious exercise be justified by a compelling interest, applies only to cases within the spending power or the commerce power, or to cases where government has authority to make individualized assessments of the proposed uses to which the property will be put. Where government makes such individualized assessments, permitting some uses and excluding others, it cannot exclude religious uses without compelling justification. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 537-38 (1993); *Employment Division v. Smith,* 494 U.S. 872, 884 (1990).
>
> "Sections 2(b)(1) and (2) prohibit various forms of discrimination against or among religious land uses. These sections enforce the Free Exercise Clause rule against laws that burden religion and are not neutral and generally applicable.
>
> "Section 2(b)(3), on exclusion or unreasonable limitation of religious uses, enforces the Free Speech Clause as interpreted in *Schad v. Borough of Mount Ephraim,* 425 U.S. 61 (1981), which held that a municipality cannot entirely exclude a category of first amendment activity. Moreover, the Court distinguished zoning laws that burden 'a protected liberty' from those that burden only property rights; the former require far more constitutional justification. *Id.* at 68-69. Section 2(b)(3) enforces the right to assemble for worship or other religious exercise under the Free Exercise Clause, and the hybrid free speech and free exercise right to assemble for worship or other religious exercise under *Schad* and *Smith*." Joint Statement 146 Cong. Rec. 7775-76-01.

Under 42 U.S.C. 2000cc4(b), the religious claimant has the burden to show a prima facia substantial burden. Once the religious claimant satisfies this burden, the government bears the burden of persuasion to establish the defenses that a compelling governmental interest supports the burden thus imposed and that any such interest is advanced using the least restrictive means available to the government.

II. INTERPRETING RLUIPA

RLUIPA is to be interpreted broadly to protect religious freedom. 42 U.S.C. 2000cc-5(g). RLUIPA expressly states that it must thus be construed to broadly protect religious exercise "to the maximum extent permitted by the terms of this Act and the Constitution."

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II. SELECTED RECENT RLUIPA DECISIONS

A. Interpreting RLUIPA

1. "As an initial matter, we are mindful of the general proscription that federal courts should not become super zoning boards of appeal to review land use determinations. *See Zahra v. Town of Southold,* 48 F.3d 674, 679-80 (2d Cir.1995) (quoting *Sullivan v. Town of Salem,* 805 F.2d 81, 82 (2d Cir.1986)). However, 'federal courts may exercise jurisdiction in zoning matters when local zoning decisions infringe national interests protected by statute or the constitution.' *Innovative Health Sys., Inc. v. City of White Plains,* 931 F.Supp. 222, 234 (S.D.N.Y.1996)." *Westchester Day School v. Village of Mamaroneck* 417 F.Supp.2d 477, 540 (S.D.N.Y., 2006).

2. "Section 2000cc-3(g) makes clear that RLUIPA is to be 'construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of th[e] Act and the Constitution.' 42 U.S.C. § 2000cc-3(g). To that end, RLUIPA broadly defines 'religious exercise' as 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief,' including '[t]he use, building, or conversion of real property for the purpose of religious exercise.' 42 U.S.C. § 2000cc-5(7)(A). Accordingly, 'under RLUIPA, courts no longer need to analyze whether a claimed religious activity is an integral part of one's faith.' *Living Water,* 384 F.Supp.2d at 1129 (citing *Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214, 1225 (11th Cir.2004), *cert. denied,* 543 U.S. 1146, 125 S. Ct. 1295, 161 L.Ed.2d 106 (2005))." *Westchester Day School v. Village of Mamaronec*k 417 F.Supp.2d 477, 542 -43 (S.D.N.Y. 2006).

B. Pleading RLUIPA

1. "[C]ounsel for the plaintiffs t[ake] the position that [the] second cause of action is no longer a § 1983 claim but is rather an independent claim under RLUIPA. [Counsel] has not filed a motion to amend his pleadings, nor have the defendants indicated consent to such an amendment. Clearly, [counsel] pled the second cause of action as a § 1983 claim. RLUIPA allows for remedial relief for a violation. 'A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.' 42 U.S.C. § 2000cc-2(a). 'A plaintiff may not use Section 1983 where the underlying statute has its own comprehensive enforcement scheme.' *Chase v. City of Portsmouth,* 2005 WL 3079065 at 5 (E.D.Va.2005) (unpublished) (dismissing § 1983 claim

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asserting violation of RLUIPA), *citing City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005). Therefore, the plaintiffs' second cause of action is DISMISSED, since a § 1983 action does not lie under RLUIPA." *Christian Methodist Episcopal Church v. Montgomery*, 2007 WL 172496, 6 (D.S.C.) (D.S.C. 2007).

C. Constitutionality of RLUIPA

1. The Ninth Circuit reversed a district court (*Elsinore Christian Center v. City of Lake Elsinore*, 270 F.Supp.2d 1163 (C.D.Cal.2003)) that had famously determined RLUIPA's substantial burden provisions violated the Commerce and Enforcement Clauses of the United States Constitution. Citing *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, 456 F.3d 978, 981 (9th Cir.2006), the Ninth Circuit in reversing the district court explained: "The district court decided, and the City does not contest on appeal, that the decision by the City to deny the Church's CUP means that the City violated RLUIPA. The City's argument that RLUIPA is unconstitutional was rejected by (*Guru*)". *Elsinore Christian Center v. City of Lake Elsinore*, 197 Fed App 718 (2006) (unpublished), *pet. cert. filed*, 75 USLW 3440 (Feb 06, 2007) (No. 06-1126).

2. "All circuit courts and almost all district courts which have considered RLUIPA's constitutionality have found that RLUIPA is a constitutional use of congressional power under Section V of the Fourteenth Amendment. *See Guru Nanak Sikh Soc'y v. County of Sutter*, 456 F.3d 978, 995 (9th Cir.2006); *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 898 (7th Cir.2005); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1239-40 (11th Cir.2004); *United States v. Maui County*, 298 F.Supp.2d 1010, 1016 (D.Haw.2003); *Freedom Baptist Church v. Twp. of Middletown*, 204 F.Supp.2d 857, 874 (E.D.Pa.2002)." *Lighthouse Community Church of God v. City of Southfield*, 2007 WL 30280, 10 (E.D. Mich.) (E.D. Mich. 2007).

D. Land Use Regulation/Land Marking Law:

1. Eminent domain proceedings are not a land use regulation or a land marking law to which RLUIPA applies. *Faith Temple Church v. Town of Brighton*, 405 F Supp2d 250 (2005).

E. Free Exercise of Religion:

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1. A religious institution's proposal for an assisted living center for the elderly and disabled constitutes religious exercise. Therefore, refusal to approve rezone from single family residential zone to multiple family residential use zone in order to accommodate an assisted living facility triggered RLUIPA. *Greater Bible Way Temple of Jackson v. City of Jackson*, 268 Mich. App 673 (2006).

2. To be protected under RLUIPA, use of a building need not be solely devoted to religious uses. Mixed religious and secular uses can warrant protection under RLUIPA:

> "We do not read the Second Circuit's expressed concerns to bar a finding of religious exercise where facilities are used for both religious and secular purposes. *See id.* at 189. Rather, courts must ensure that the facts warrant protection under RLUIPA, rather than simply granting blanket immunity from zoning laws. Where a building is to be used for the purpose of "religious exercise," the building is not denied protection under RLUIPA merely because it includes certain facilities that are not at all times themselves devoted to, but are inextricably integrated with and reasonably necessary to facilitate, such 'religious exercise.' *See, e.g.*, *Living Water*, 384 F.Supp.2d at 1133 (denial of special use permit to construct facility including classrooms, sanctuary, gymnasium, offices and meeting rooms constitutes RLUIPA violation where locating church and school in separate locations found not feasible); *Cottonwood*, 218 F.Supp.2d at 1213, 1224, 1232 (finding 'unquestionable religious' application for 300,000 square foot complex including worship center, multiple classrooms, study rooms, multi-purpose room, youth activity center, gymnasium, child daycare facility and space for community service programs). Consistent with RLUIPA's broad definition of 'religious exercise,' '[t]he use of the land does not have to be a 'core religious practice.'" *Guru Nanak*, 326 F. Supp.2d at 1151." *Westchester Day School v. Village of Mamaroneck* 417 F.Supp.2d 477, 544-45 (S.D.N.Y. 2006). (Footnotes omitted).

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F. Substantial Burden

1. Found a Substantial burden: *Guru Nanak Sikh Soc. of Yuba City v. County of Sutter*, 456 F.3d 978 (C.A.9 2006). In this case, the defendant county code does not authorize religious institutions as uses permitted outright in any zoning district; rather in six out of the county's twenty-two zoning districts CUPs are required. Of those six zoning districts where religious institutions are uses are conditionally allowed, four are residential, and two are agricultural. The Guru Nanak Sikh Society first acquired a small – approximately 2 acre -- parcel of land zoned for residential use in order to build a religious facility. The county planning staff recommended approval, but after a public hearing, the planning commission denied the proposal on the basis of neighborhood objections that alleged potential noise and traffic impacts.

Guru Nanak then purchased a larger parcel (more than 20 acres) in an agricultural zone and this permit was also denied on similar bases as well as complaints about interference with agriculture. After the second denial, Guru Nanak filed their RLUIPA claim. The district court found the denials constituted a substantial burden on religious exercise without a compelling interest to do so. The county appealed. The Ninth Circuit affirmed.

The Ninth Circuit expressly rejected the Seventh Circuit's formulation of the substantial burden test that religious exercise must be "effectively impracticable" to be a substantial burden. The court further explained:

> "[T]his court has held: '[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.' *San Jose Christian,* 360 F.3d at 1034(quoting Merriam-Webster's Collegiate Dictionary 1170 (10th ed.2002)). Applying *San Jose Christian's* definition of a substantial burden to the particular facts here, we find the district court correctly granted summary judgment for Guru Nanak. Most important to us the history behind Guru Nanak's two CUP application processes, and the reasons given for ultimately denying these applications, to a significantly great extent lessened the possibility that future CUP applications would be successful. *See Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 899-900 (7th Cir.2005) ('*Saint Constantine*') (finding that, to prove a substantial burden under RLUIPA, a religious group need not "show that there was no other parcel of land on which it could build its church"). We need not and do not decide that

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> failing to provide a religious institution with a land use entitlement for a new facility for worship necessarily constitutes a substantial burden pursuant to RLUIPA. At the same time, we do decide the County imposed a substantial burden here based on two considerations: (1) that the County's broad reasons given for its tandem denials could easily apply to all future applications by Guru Nanak; and (2) that Guru Nanak readily agreed to every mitigation measure suggested by the Planning Division, but the County, without explanation, found such cooperation insufficient." *Guru Nanak Sikh Soc. of Yuba City v. County of Sutter*, 456 F.3d 978, 988-89 (C.A.9 2006). (Footnote omitted).

The court went on to hold as follows:

> "The net effect of the County's two denials-including their underlying rationales and disregard for Guru Nanak's accepted mitigation conditions-is to shrink the large amount of land theoretically available to Guru Nanak under the Zoning Code to several scattered parcels that the County may or may not ultimately approve. Because the County's actions have to a significantly great extent lessened the prospect of Guru Nanak being able to construct a temple in the future, the County has imposed a substantial burden on Guru Nanak's religious exercise." *Guru Nanak Sikh Soc. of Yuba City v. County of Sutter*, 456 F.3d 978, 992 (C.A.9 (Cal.) 2006) (Footnote omitted).

Parking Ordinance as Substantial Burden: A partial summary judgment was granted for a church on determination that a local parking ordinance and a local denial of a variance to that parking ordinance prevented a church from obtaining a certificate of occupancy and, as such, violated RLUIPA. *Lighthouse Community Church of God v. City of Southfield*, 2007 WL 30280, 11 (E.D.Mich., 2007). The court explained:

> "The Court finds that based on the language of RLUIPA, the land use regulation need not specifically target religious exercise. A land use regulation that is specifically blind to religious use of land can still substantially burden religious exercise. In *Living Water Church of God v. Charter Township of Meridian*, a special use permit was denied in violation of RLUIPA not because of the religious nature of the school, but rather because of density and land to building ratios. *Living Water Church of God*, 384 F.Supp.2d at 1129. In a recent and very similar case from the Colorado Court of Appeals, *Town of Foxfield v. Archdiocese of Denver*, the RLUIPA violation involved a parking ordinance which limited the

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number of parked vehicles permitted in a neighborhood with no relation to the actual uses occurring on the property. *Town of Foxfield v. Archdiocese of Denver,* 2006 Colo. App. LEXIS 1282 (Colo. Ct. App.2006). Thus, land use regulations may substantially burden religious exercise without specifically targeting religion.

"It is undisputed that the parking ordinance currently prohibits Plaintiff from using its building, and that Plaintiff wants to use its building for religious exercise. The ZBA had the power to grant a variance to the parking requirement currently barring Plaintiff from use of the building, but it did not do so. Therefore, there is an application of a land use regulation which prevents or burdens Plaintiff from using its building for religious exercise." *Lighthouse Community Church of God v. City of Southfield* 2007 WL 30280, 8 (E.D. Mich. 2007).

Found Substantial burden: A local government refusal to approve rezone of a parcel from single family residential to multiple family residential use zone for an assisted living facility, constituted a substantial burden on the free exercise of religion for the religious organization that proposed the assisted care facility. The denial did not further a compelling state interest. *Greater Bible Way Temple of Jackson v. City of Jackson*, 268 Mich. App 673 (2006).

No substantial burden where local government determined that campground and hiking trails are not accessory uses to church use and refused to allow such uses. The court determined that the denial of hiking trails and campground does not cause a substantial burden because: "neither the Church nor its visitors will be required to forego or modify the exercise of their religion" as a consequence of these elements of a religious center being denied. *City of Hope v. Sadsbury Township Zoning Hearing Board,* 890 A 2d 1137, 1149 (2006)

G. Substantial Burden Affects Interstate Commerce:

1. City sought to enforce ordinance restriction on parking in residential zone against church. The court determined that the structure to which the parking enforcement was applied was a rectory having elements that are residential in nature but it also was religious in nature and that "[r]eligion and, in particular religious buildings actively used as the site and dynamic for a full range of activities, easily qualifies as an entity that affects commerce * * *" *Town of Foxfield v. Archdiocese of Denver,* 148 P3d 339, 344 (2006).

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2. Commerce Clause basis for applying RLUIPA is established by out of state children attending church school and that the school hires out of state teachers, among other reasons:

> "The evidence establishes that WDS satisfies the interstate commerce criterion of 42 U.S.C. § 2000cc(a)(2)(B). Not only does WDS employ at least one out-of-state teacher, but it also educates out-of-state children, all of whom must necessarily travel into and out of New York State each school day. (*See supra* ¶ 36 & n. 13.) Such travel clearly affects interstate commerce. *See Camps Newfound/Owatonna v. Town of Harrison,* 520 U.S. 564, 573, 117 S.Ct. 1590, 137 L.Ed.2d 852 (1997) ('The attendance of these [out-of-state] campers necessarily generates the transportation of persons across state lines that has long been recognized as a form of 'commerce.'' (citation omitted)); *Reich v. Mashantucket Sand & Gravel,* 95 F.3d 174, 181 (2d Cir.1996) (finding "bingo hall and casino ... designed to attract tourists from surrounding states undeniably affects interstate commerce.' (quotation omitted)); *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency,* 218 F.Supp.2d 1203, 1221-22 (C.D.Cal.2002) ('Churches ... are major participants in interstate markets for goods and services, use of interstate communications and transportation, raising and distributing revenues (including voluntary revenues) interstate, and so on.' (internal quotations omitted)).
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> "The construction of Gordon Hall will also affect interstate commerce. *See, e.g., Cottonwood,* 218 F.Supp.2d at 1221-22 ('[C]onstruction of the church will affect a large quantity of construction workers, construction materials, transportation vehicles and commercial financial transactions, all of which affect commerce.'); *Reich,* 95 F.3d at 181 ('[C]onstruction efforts ... have a direct effect on interstate commerce.'); *see also* 146 CONG. REC. S7774-01, S7775 (July 27, 2000) (impact on interstate commerce 'will most commonly be proved by showing that the burden prevents a specific transaction in commerce, such as a construction project.')." *Westchester Day School v. Village of Mamaroneck,* 417 F.Supp.2d 477, 541 (S.D.N.Y. 2006).

H. Unequal Treatment:

1. *New Life Ministries v. Charter Township of Mt. Morris,*(ED MI, Sept. 7, 2006), a federal district court in Michigan granted summary judgment to New Life

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Ministries in its suit charging a Michigan township with violating the Religious Land Use and Institutionalized Persons Act. The township's zoning ordinance does not permit buildings used for religious services in areas zoned C-2, even though it permits theaters, schools and various kinds of organizations in those areas. The court found that this violates 42 U.S.C. §2000cc(b)(1) that prohibits land use regulations that treat religious organizations unequally with secular institutions. The court held that the jurisdictional requirements imposed by RLUIPA for claims that land use regulations impose a substantial burden on free exercise do not apply to unequal treatment claims under the statute.

I. Total Exclusion/Unreasonable Limits[3]

1. RLUIPA's total exclusion provisions are not violated where churches are allowed in a town only under a special use permit and are not allowed in any zone as a use permitted outright:

> "This case therefore is distinguishable from *Schad*, where the zoning code excluded all live entertainment as a permissible use in the Borough's business district and did not set forth a method by which to obtain a special use permit for this activity. *See Schad*, 452 U.S. at 64-66, 101 S.Ct. 2176. Here, by contrast, if the conditions set forth in the Village's zoning code are fulfilled, a church may be built on property zoned for residential use. *Cf. R.V.S., L.L.C. v. City of Rockford*, 361 F.3d 402, 409 (7th Cir.2004) (holding that an ordinance permitting nude dancing only as a special use did not "amount[ ] to a total ban on protected activity," because it placed restrictions only on the *location* of such businesses). Thus, we conclude that the Village Zoning Regulations do not violate the First Amendment protections recognized in *Schad* or RLUIPA § 2(b)(3)(A)." *Vision Church v. Village of Long Grove*, 468 F.3d 975, 990 (C.A.7 (Ill.),2006).

2. RLUIPA's unreasonable limits provisions are not violated where local ordinance assigns religious institutions as conditionally permitted uses rather than uses permitted outright in city zoning districts:

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[3] Section 2(b)(3) prohibits a "government" from: "impos[ing] or implement[ing] 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."

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"As the legislative history evidences, "[w]hat is reasonable must be determined in light of all the facts, including the actual availability of land and the economics of religious organizations." 146 Cong. Rec. E1563 (daily ed. Sept. 22, 2000) (statement of Rep. Canady). In this case, we cannot conclude that requiring Vision to obtain a special use permit to build and operate its church in a residential district "unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." 42 U.S.C. § 2000cc(b)(3)(B). Vision's primary argument on appeal is that the Board's discretion in granting a special use permit is unbridled and therefore its consideration of Vision's application was unreasonable. We disagree. This is not a case where the 'state [has] delegate[d] essentially standardless discretion to nonprofessionals operating without procedural safeguards.' *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 900 (7th Cir.2005). The Board's discretion is narrowly circumscribed by the Village's Zoning Regulations, which set forth the various factors to be considered by the Board in addressing an application for a special use permit. *See* Zoning Regulations § 5-11-6(D), R.99, Ex.2; *id.* § 5-11-6.1."

"Even if the Zoning Regulations were to grant the Board undue discretion, this does not demonstrate the violation of RLUIPA § 2(b)(3)(B). The requirement that churches obtain a special use permit is neutral on its face and is justified by legitimate, non-discriminatory municipal planning goals. As a general matter, special use designations are instruments of municipal planning that allow city officials to retain review power over land uses that, although presumptively allowed, may pose special problems. In this case in particular, the special use designation is substantially related to the municipal planning goals of limiting development, traffic and noise, and preserving open space; these goals, in turn, are reflected in the Village's Comprehensive Plan, 'which seeks to ensure that the semi-rural atmosphere of the community is maintained while simultaneously permitting a wide variety of quality development in character with the existing motif of the community.' Comprehensive Plan, R.99, Ex.3 at 01-1. To carry out this goal, the Village also has required many secular institutions, including '[s]chools, elementary and high, including playgrounds and athletic fields,' '[u]tility and public service uses,' and '[n]ursing homes,' to be approved as a special use in a residential district. Zoning Regulations § 5-4-2-2, R.99, Ex.2. Like these institutions, religious assemblies have a reasonable opportunity to build

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within the Village, provided that the requirements for a special use permit have been fulfilled." *Vision Church v. Village of Long Grove*, 468 F.3d 975, 990 -91 (C.A.7 (Ill.) 2006).

J. Attorney Fees

1. On appeal. trial court order to municipality pay attorney fees to church was reversed on grounds that RLUIPA claim was not ripe. *House of Fire Christian Church v. Zoning Bd. Of Adjustment of City of Clifton*, 379 N.J. Super. 526, 879 A.2d 1212 (2005).

2. Where religious organization prevails in a zoning dispute on state law basis, regardless of whether they may have also been able to prevail under RLUIPA, they are not the "prevailing party" under RLUIPA and attorney fees will not be awarded. *Town of Mt. Pleasant v. Legion of Christ. Inc.*, 850 N.E.2d 1147 (2006).

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