RELIGIOUS FREEDOM STATUTES IMPACT ON GOVERNMENTAL REGULATIONS

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RELIGIOUS FREEDOM STATUTES IMPACT ON GOVERNMENTAL REGULATIONS

Apart from the Constitutional protections for religious freedom and exercise, there are two significant statutes that set forth parameters for governmental regulation in these areas. They are the federal law commonly referred to as "Religious Land Use Institutionalized Persons Act of 2000", known as "RLUIPA"[1] and in Texas "The Religious Freedom Act", "TRFA".[2] There is some overlap to the protections offered persons and religious institutions, however, the remedies and procedures differ between the state and federal law. Several excellent treatises have been written on this topic that delve into the various elements of the law in greater detail and potential defenses.[3] This paper is meant to summarize the key points of each law with a few suggestions for identifying and responding to potential claims.

RLUIPA is limited to land use regulations and regulations affecting institutionalized persons. For purposes of this paper, only this statute's impact on land use regulations will be covered. TRFA applies to any ordinance, rule, order, decision, practice or other exercise of governmental authority. Both laws prohibit a regulation that substantially burdens a person's religious exercise or otherwise discriminates against religious institutions unless there is a compelling interest that narrowly serves that purpose.

More specifically, RLUIPA prohibits government from imposing or implementing a *land use regulation* under which the government makes an *individualized assessment* of the proposed uses, and that regulation imposes a *substantial burden* on the *religious exercise* of *a person, or a religious assembly or institution* unless the regulation is in furtherance of a *compelling governmental interest* and is the least restrictive means for furthering that interest.

The federal law also forbids government from imposing a land use regulation that treats religious assembly/institution *on less equal terms* than a non-religious institution, *nor may it discriminate* against an institution on the basis of its religion or religious denomination.

Why sue under RLUIPA? If you are the plaintiff, you have the potential for the greatest financial recovery. In addition to injunctive relief, a claimant may seek a civil rights violation, attorney fees, and declaratory relief.

RLUIPA Dissected

There are essentially three claims that can be made under RLUIPA regarding land regulations. One is a facial challenge if the regulation treats religious institutions less favorably than other comparable non secular users; two, a regulation which discriminates against any assembly or institution on the basis of religion or denomination; and three, a regulation that is applied through an individualized assessment that substantially burdens a person's religious exercise.[4]

In order to understand the application of these laws, you need to be well versed on their elements. The starting point for this analysis is knowing what constitutes a *"land use regulation"* since it is a common element to each claim. Under RLUIPA, it is the "use, building, or conversion of real property for the purpose of religious exercise" and is limited to land use and land marking laws.[5] It does **not** include processes such as annexation or condemnation.[6]

Evaluating the *non-discrimination or equal terms* requirement under RLUIPA

If your zoning code treats religious institutions less favorably to similar non secular uses, the real potential for an equal terms or discrimination claim exists. An example of an equal terms claim may arise if the entity prohibits a worship facility in a zoning district but allows an assembly hall. An equal terms claim will subject the regulation to strict scrutiny if it treats religious uses unfavorably over similar secular uses; however, it is subject to debate whether an aggrieved party is required to show any substantial burden to advance their case.[7]

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[1] 42 U.S.C.A § 2000cc, et seq (West 2010).

[2] Chapter 110 of the Texas Civil Practice and Rem. Code, et seq.(West 2010).

[3] There are excellent articles on this topic including "*Avoiding Substantial Burdens on Religious Land Use Applicants*" by Lora Locero, published in The Municipal Lawyer Magazine, Vol. 50 No. 6 September/October 2009 and Vol. 51 No.1 January/February 2010; "*Six Fact Patterns of Substantial Burden in RLUIPA: Lessons for Potential Litigants*"; Chaffe & Merriman-Sax; "*Patterns of Substantial Burden in RLUIPA*", Vol. 2 Albany Government Law Rev. 437 (2009)

[4] Id.

[5] 42 U.S.C.A. § 2000cc(a)(1)(West 2010).

[6] Vision Church v. Village of Long Grove, 468 F.3d 975 (7th Cir. 2006); St. John's United Church of Christ v. City of Chicago, 502 F.3d. 616 (7th Cir. 2007).

[7] Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1230-32 (11th Cir. 2004) Worship facilities were excluded from a district where private clubs were permitted. The court found that there were sufficient similarities between the two to sustain an equal terms violation; Petra Presbyterian Church v. Village of

A regulation that is facially neutral is not immune from challenge if there is evidence that it originated with religious animus or the exceptions are based upon religious categorization or discrimination.[8] This was the result in the City of Hialeah when it enacted regulations that were ostensibly aimed at public health, safety and to prevent cruelty to animals.[9] Hialeah passed several laws that did not mention religion but included conduct that was based on "sacrificing" animals. The genesis of the local laws was to suppress the religious animal sacrifices conducted by Santeria adherents. The Supreme Court acknowledged that neutral laws of general application are not subject to the compelling interest test even if they have an incidental impact on religious practice. However, the record in the case "compelled" the conclusion that the restrictions were to outlaw only religious sacrifices of animals, not other types of slaughter, such as hunting, euthanasia and other eradication, and were invalid.

RLUIPA is not a free pass or guarantee for religious institutions to locate anywhere in your community, and the fact that certain districts may be unavailable to religious institutions does not result in a RLUIPA violation.[10] However, the statute expressly prohibits government from totally excluding religious assemblies nor may it unreasonably limit them.[11]

The last type of RLUIPA claim is when the government makes *an individualized assessment* when implementing a land use regulation. What level of government review rises to the level of an individualized assessment is one that is subject to dispute. The following is a brief summary of the analysis that is applied when determining whether an individualized assessment exists in a land use decision.

Most of us would agree that zoning laws impact all similarly classified users equally, therefore, they are rules of general application. The rationale to support that zoning is not an individualized assessment is premised on the fact that zoning is not given to a specific "user", it applies to all users that fall within that zoning classification as well as future users of the subject property.[12] Thus, rezoning requests should also be treated as a rule of general application, particularly if the governing body treats religious applicants the same as secular applicants and the same criteria is applied to all applicants in a rezoning decision.[13]

Zoning regulations often contain exceptions with a need to make some level of inquiry to determine if the applicant meets the exception. A limited objective inquiry to determine if an applicant is eligible for an exemption does not rise to the level of an individualized assessment. Courts are influenced by a few factors to support that even special exceptions and variances are not individualized assessments particularly if the exemptions sought are not routine; the exemptions are motivated by secular purposes; and a denial was not based upon religious animus.[14]

However, the above opinions are not universally held. Zoning exceptions that are decided on a case by case basis have been held to be individualized assessments in other jurisdictions. A conditional use permit for a specific duration constituted an individualized assessment. The court's analysis was a straight forward approach of the term "individualized assessment" because the permit process required a case by case review to approve or deny an applicant a certain use of land.[15] Further, other cases have supported that a special exception or variance process

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Northbrook, 489 F.3d 846,851 (7th Cir. 2007) court found equal terms claim does not require substantial burden element.

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

[9] Id. at 540.

[10] Grace United Methodist Church v. City of Cheyenne, 451 F.3d. 643, 655 (10th Cir. 2006).

[11] 42 U.S.C.A. § 2000cc(b)(3) (West 2010).

[12] Elijah Group, Inc. v. City of Leon Valley, Texas (W.D.Tex). 2009 WL 3247966.

[13] Grace United Methodist Church at 651; Cambodian Buddhist Soc'y of Conn., Inc. v. Planning and Zoning Commission of Newton, 941 A.2nd 868, 893 (Conn. 2008) No individualized assessment exists if the zoning board has no discretion to apply standards differently to religious applicants over secular applicants. Commission's role is to consider the impact of the special exception on the neighboring community and public health and welfare; Greater Bible Way Temple of Jackson v. City of Jackson, 733 N.W.2d 734 744 (Mich. 2007); Elijah, page 5. Decision on rezoning is not an individualized assessment because it is not to a specific user, it is a new rule of general applicability.

[14] Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 764-5 (7th Cir. 2003) found no individual assessment when seeking a special use approval; Grace United Methodist Church at 654.

[15] Grace Church of North County v. City of San Diego, 555 F.Supp.2nd 1126 (S.D.Cal. 2008); Guru Nanak Sikh Society of Yuba City v. County of Sutter, 456 F.3d 978, 987 (9th Cir.2006) County required churches to obtain a CUP for any district where they were allowed.

is an individualized assessment.[16] A planned unit development "PUD" process was treated as an individualized assessment and the court based such reasoning that although under the state enabling law the PUD is accomplished by a contract with the developer, the fact was once approved, it was binding on future users of the property it had the same impact as zoning.[17]

Thus, the difference in the decisions on what constitutes an individualized assessment seems to focus on whether a court will take a superficial review that in any instance where a case is decided on an individual basis, the individualized assessment element is met. Contrast that to the holdings that no individualized assessment occurs if the criteria for granting the exemption focuses on the impact of the request on surrounding areas and makes no distinction between secular and non-secular applicants. In other words, there is not a review of the religious conduct when making the decision, instead, the scope of the review is on the impact of the exemption as it affects the surrounding area.

Religious Exercise – Punt to Plaintiff

The claimant's burden is to show they are engaged in *religious exercise*. Government is ill prepared, lacks the expertise, and frankly, is legally limited in evaluating whether a person is engaged in religious exercise. By definition, religious exercise under RLUIPA includes any exercise even if not compelled or central to a system of religious belief.[18] Thus, while a claimant may easily demonstrate this element because of the definition elements, their more difficult step is showing the regulation creates a substantial burden.

Meeting the test for *substantial burden*

According to the Fifth Circuit, a *substantial burden* occurs if the requirement pressures an adherent to significantly modify his religious behavior or significantly violate his religious beliefs.[19] If the government's regulations influence the adherent to violate his beliefs or forces the adherent to forego a non-trivial benefit in order to follow the religious belief, a substantial burden exists.[20] Importantly, in this same case, the court opined that no substantial burden exists if the benefit sought is not readily available to others.

No government should accept at face value that its regulations create a substantial burden on religious exercise. Regulations are often inconvenient and add additional expense; however, those concerns do not result in a substantial burden.[21] One unpublished case found no substantial burden occurred when a church was granted its request to expand its church to meet its existing building needs but was denied the full expansion to accommodate *future* needs of the church.[22] In another holding, the failure to allow churches in a particular zoning district did not create a substantial burden, thus standing for the proposition, not all districts must be made to accommodate religious uses *as long as all other similar uses are barred from that district, and there are other alternative locations in the community*.[23]

Further, the burden must be more than de minimis. Cost of compliance, requirements to follow permitting procedures or other discretionary review processes, alone, do not result in a substantial burden of religious exercise.[24] The fact that you own the property you are restricted from using for, ostensibly,

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[16] Calvary Temple Assembly of God v. City of Marinette, 2008 WL 2837774 (E.D.Wis.) parties did not dispute that enforcement of zoning ordinance is an individualized assessment; Elsinore Christian Center v. City of Lake Elsinore, 270 F.Supp.2d 1163 (C.D.Cal 2003) court found that CUP was a process that precisely embraced an individualized assessment; Vineyard Christian Fellowship of Evanston v. City of Evanston, 250 F.Supp.2d 961 (N.D.Ill 2003) parties conceded that rezoning is an individualized assessment.

[17] Sts. Constantine and Helen Greek Orthodox Church v. City of New Berlin, 396 F.3d 895, 898 (7th Cir. 2005)

[18] 42.U.S.C.A. § 2000cc-5(7) (West 2010).

[19] Adkins v. Kaspar, 393 F.3d 559 (5th Cir. 2004). Adkins, a prisoner, was denied the opportunity to pray with other members of his faith on a recurring weekly basis due to the lack of qualified volunteers to accompany the prisoner to the location where his fellow followers prayed; however, he was permitted to attend services when sufficient security was available. Department of Justice provided him tapes and other means for which he could practice his faith.

[20] Id. at 570.

[21] Vineyard Christian Fellowship of Evanston v. City of Evanston, 250 F.Supp.2d 961, 991, (N.D. Ill. 2003); Civil Liberties for Urban Believers at 755-56.

[22] Living Water Church of God v. Charter Township of Meridian, 258 Fed.Appx.729 (6th Cir. 2007).

[23] Petra Presbyterian Church at 851.

[24] Vineyard Christian Fellowship of Evanston at 987; Calvary Temple Assembly of God at 5; Civil Liberties of Urban Believers at 761-requirement to get an SUP is not an individualized assessment; hence implying it is also not a substantial burden; Midrash Shepardi, Inc. at 1227 application process for CUP not a substantial burden.

religious purposes is not a substantial burden in itself.[25]

Payment of fees is not a substantial burden even if it redirects monies away from religious purposes. However, when costs are also associated with unreasonable delays and the unlikelihood of success, the court will look at these factors together to determine if there is a substantial burden.[26] In other words, a cumulative list of wrongs may have an "unholy trinity effect" and the court will look at the entire record and find a substantial burden.

Finally, the determination of substantial burden is a fact intensive analysis. The claimant bears the burden of persuasion on this issue.[27]

What is sufficient to show a *compelling interest?*

Assuming the substantial burden on religious exercise is met, the government must rebut it by showing a compelling interest for the regulation - a very high burden. Public health, safety, welfare, property preservation are examples of compelling interests. It is beneficial to be able to explain the reasons for the rules and what is achieved by having them. The concerns cited should exist or be reasonably likely to occur, and not be of a generalized nature. Not only must it show a compelling interest, the remedy must be one that is the least restrictive means for accomplishing that interest.

Rules of general application-how are those reconciled under RLUIPA or TRFA?

It is important to determine if the complaint is based on a neutral rule of general application. A rule is considered neutral if its objective is something other than the infringement of religion.[28] Often, these claims are made under a free exercise of religion violation of the constitution. For a claim stemming from a neutral rule of general application, the government is only required to show it advances a substantial interest and is narrowly tailored to meet that interest.[29] The same principle exists under TRFA. This is due in part to the statute's reference that municipal authority is the same for land use, planning, traffic management, urban nuisance or historic preservation that existed and as interpreted by federal courts before April 17, 1990. [30] This cryptic reference means that in land matters, regulations must be exercised within constitutional limits and where they result in a substantial religious burden, the regulation must further a substantial governmental interest with regulations narrowly tailored to accomplish the result. "Precision of regulation must be the touchstone."[31]

RLUIPA gives government a limited chance for a "do over"

It is not uncommon for the government to be made aware of potential religious claims well before a lawsuit is filed. Intuition will serve your community well if you can identify that the matter at hand is one that could ripen into a viable RLUIPA claim, then strategize an appropriate response or remedy. RLUIPA claims are easier to discern because your main focus will be on your land use regulations. RLUIPA allows for self correcting; it provides that government can avoid the law's preemptive effect by keeping its practice but providing a specific exemption for the burdened party.[32] The difficulty for entities is deciding how to implement relief without running afoul of its prior historical practices.

Overview of Texas Religious Freedom Act TRFA- Chapter 110 of the Texas Civil Practice and Remedies Code

TRFA is much more encompassing than RLUIPA; it extends beyond land use and institutionalized persons regulations and is applicable to any ordinance, rule, order, decision or practice of the government.[33] Like RLUIPA, TRFA does not require a claimant to show that their religious exercise that is substantially burdened is motivated by a central part or requirement of a person's faith.[34] Government's burden of demonstrating compelling interest must comply with federal case law under the First Amendment. It also must be the least restrictive means for achieving that interest.[35]

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[25] Grace United Methodist Church at 655. Church denied right to operate daycare on its site.

[26] Sts. Constantine and Helen Greek Orthodox Church. In this case, the court found there was a substantial burden because the Church was amendable to imposing the city's conditions on the use of its property but when the city later rejected the solution (that the city proposed), it acted in bad faith.

[27] 42 U.S.C.A. § 2000cc-2(b) (West 2010).

[28] Grace United Methodist Church at 650.

[29] Civil Liberties for Urban Believers at 765.

[30] Tex.Civ.Prac.&Rem.Code § 110.010.

[31] Barr v. City of Sinton, 295 S.W.3d 287, 298 (Tex. 2009)

[32] 42 U.S.C.A. § 2000cc-3(e) (West 2010).

[33] Id. at 110.002.

[34] Tex.Civ.Prac.&Rem.Code § 110.001.

[35] Id at 110.003

Right to Notice Under TRFA

The benefit to government under TRFA is that it gets a "heads up" on claims. The law requires that claims must be preceded by written notice sent certified mail to the government at least sixty days before filing suit specifying the regulation that burdens their religious exercise; however, there are exceptions to this notice provision. If the burden is cured, no action may be brought under this law.[36]

Escape valve under TRFA

Importantly, the government can implement a remedy within the notice period that reasonably removes the substantial burden. This remedy does **not** have to be the least restrictive means of furthering the government's interest. As long as it is narrowly tailored to remove the burden of the applicant-game over! In other words, government can choose a nuanced result for that particular situation and remove its liability and still keep its regulations in place.[37]

TRFA remedies

Persons who sue under TRFA may receive declaratory and injunctive relief, compensatory damages, reasonable attorney fees and costs. Compensatory damages may not exceed $10,000 for each controversy notwithstanding the number of claimants. Actions must be commenced in district court, and if brought against an individual, it must be done in the individual's official capacity. No exemplary damages are allowed. There is a one year statute of limitations.[38]

Texas Jurisprudence

There are two recent Texas cases that have not been favorable to cities on religious issue matters. Both point to the standards for which a court will limit a government from evaluating the method of religious exercise. What can be gleaned from these cases is there is no safe haven for a city to substitute its judgment for how a religious activity can be exercised. Below is a summary of the Sinton and Merced cases that explored these issues.

Merced[39] used his home to slaughter animals as part of his Santeria religious practice and duties as a priest "Orisha". The City of Euless' ordinance prohibited keeping of animals for slaughter and slaughtering four legged animals. A violation was a criminal offense. The case describes in detail the origination and practices of Santeria, including animal slaughter which serves several purposes in this religion, and the likely location for slaughter most commonly occurs in the Orisha's home. The slaughtering conduct had transpired over a sixteen year period without incident and was performed inside Merced's home/garage.

Euless had a number of other ordinances that permitted killing of animals, including using rodent control materials or euthanasia by a veterinarian. Euless defended its ordinances for keeping animals for slaughter due to the secondary effects such as animal waste, flies, and possible disease. For defense of the slaughter aspect of the ordinance, the testimony was carcasses attract insects and vermin. This was despite the fact that persons could bring other large animal carcasses to the city, such as deer, for butchering and disposal. The court found this latter argument baseless because of the distinction for hunted animals versus sacrificed animals.

The court disposed of this case under TRFA. It set out an analysis that "free exercise of religion" as defined in this law does not require the act to be a core or central element of a person's religious belief; it is whether the person's **religious beliefs motivated his conduct**. In this matter, there was little dispute that Merced's activity as an Orisha to perform the sacrifices was motivated by his religious beliefs.

The court challenged Euless's claim that there was a question as to whether the Orishas divined Merced to perform the slaughter ritual. The court refused to accept this contention as it impermissibly and, likely for very practical reasons, would require the court to evaluate the execution of those religious practices. It very clearly stated the judiciary is ill suited to decide theological matters, and the court must not weigh in on the plausibility of a religious practice or claim. Courts will not try to be religious experts.

Finally, the court decided it was a substantial burden because the choice left to Merced was to not practice his religion or leave the city.

What this suggests is delving into the credibility of a religious practice is an untenable position to take, and goes against the clear language of the statue. Once it is clear that the regulation causes a substantial burden, the government should focus on defending its regulation under the compelling interest standard and showing it is the least restrictive means for accomplishing that interest.

Finally, Euless was also unable to meet the difficult hurdle of proving compelling interest and least restrictive means. The court reiterated that the

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[36] Id.110.006.

[37] Id.

[38] Id. at 110.00 & 007.

[39] Merced v. Kasson and City of Euless, 577 F.3d 578 (5th Cir. 2009).

interests must be tailored to the specific concerns at issue. Euless' claim of public health and animal treatment failed because there was no evidence that the prior slaughter practices harmed any person or animal health, or safety of a person, any illegal or unsanitary disposal of carcasses occurred; no distinction that the religious slaughter caused greater suffering than commercial slaughter. In sum, Euless could not point to any facts that undermined these critical governmental interests in light of the sixteen years Merced did this activity without incident.

Minister Barr[40] operated a halfway house ministry through a non-profit religious ministry out of two halfway houses he owned that were adjacent to his church. They were used for Christian men recently released from prison in order to transition them to civic life through biblical support, and attendees committed to daily prayer and bible study. There was an application process and a requirement that the applicants sign a commitment of faith and abide by certain Christian rules. The City of Sinton deemed these homes "correctional rehabilitation facilities" and adopted regulations which prohibited them at their current location and there were few, if any, other locations where they could exist in the City. In fact, the City passed this restriction after the halfway house activity had begun.[41] After passage of the ordinance, no citations were issued but the Chief of Police complained to the Board of Pardon and Paroles that the parolees were in violation of a city ordinance and that deterred the Board from approving this location for parolees.

TRFA claims were made by Barr. The trial and appellate court did not find a TRFA violation because there were other locations in and outside the city where Barr's religious counseling could be provided. The City urged that zoning laws are not subject to strict scrutiny, based in part, because the law references the pre-Smith case law.[42] The court disagreed, finding zoning regulations must recognize religious exercise and a restriction must be in accordance with the constitution.

Sinton urged that this was not religious exercise because it did not require the halfway house to be secular. The court was clear that it would not inquire into the centrality or tenets of that belief, but whether this burden is substantial. Since there were few, if any, locations where the city allowed these facilities, secular or otherwise, the court found that Barr met his burden. In sum, the court will see if the conduct is meaningfully curtailed or pressured to forego the conduct. Each review is a fact specific inquiry.

Summary

Government needs to be able to readily identify viable religious freedom claims including whether a substantial burden exists. If it does and you are concerned about meeting the compelling interest standard, it is time to figure out what you may offer under the "relief valve" that is offered under either statute.

For land use issues, it may require that a city have a process to enable the entity to review requests and provide the relief valve, although that may raise a question that it creates more of a legal quandary because it gives fodder to there is an "individualized assessment". For other requests, the use of an appeal process within government, along with adequate knowledge of the standards required to consider by those who are conducting the appeal is critical.

Not to be underestimated is the public tone regarding religious institutions. Officials may be reluctant to force religious institutions into compliance or may be more apt to provide a variance even when not necessarily warranted. This may be an ideological perspective or due to concerns of litigation resources and the uncertainty of an outcome. This is only one of the many factors that go into your decision making on these matters.

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[40] Barr v. City of Sinton, 295 S.W.3d 297 (Tex.2009).

[41] Unclear as to why there was no vested right or non conforming use claims raised.

[42] In this case, the court examines the early decision "Employment Div. Department of Human Resources v. Smith"; the Supreme Court in a 5-4 decision found that a neutral generally applicable regulation may be applied to religious practices even without a compelling interest. (This was the peyote case where Oregon criminalized the use and was upheld even though it burdened the religious practices of the Native American Church whose members consumed peyote for sacramental purposes). At that point, the court declined to apply a balancing test and/or apply the compelling interest test. 110 S.Ct. 1595 (1990).