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RLUIPA AND LAND USE: AN OVERVIEW AND A CLOSER LOOK AT THE "EQUAL TERMS" PROVISION AND THE SOUTHERN DISTRICT'S *THIRD CHURCH* DECISION

(Part 1 of 2)

Paul Selver, Elizabeth Larsen and Adam Taubman

IN THIS ISSUE

I. Background: RLUIPA's Enactment

The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) was the end result of a legislative process that was begun to, in effect, reverse the U.S. Supreme Court's 1990 decision in *Employment Division v. Smith*.[1] *Smith* held, first, that the right of free exercise of religion does not excuse compliance with a valid and neutral law of general applicability and, second, that any burden on free exercise arising out of such compliance need only have a rational basis.[2] The decision was seen by many as a step back from the protections given to religious exercise in *Sherbert v. Verner* and *Wisconsin v. Yoder*, both of which held that a law that placed a burden on religious exercise was subject to strict scrutiny, *i.e.*, that such a law had to be justified by a compelling governmental interest.[3]

Congress's first response to *Smith* was the Religious Freedom Restoration Act of 1993 (RFRA).[4] RFRA sought to require a compelling governmental interest in all cases in which a governmental action caused a substantial burden on religious exercise.[5] In enacting RFRA, Congress relied solely on its authority to

[1] *Employment Divison v. Smith*, 494 U.S. 872 (1990). For a comprehensive and informative discussion of RLUIPA, *see* Patricia E. Salkin & Amy Lavine, *The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and its Impact on Local Government*, 40 URB. LAW. 195 (2008).

[2] 494 U.S. at 879, 885–86.

[3] *Sherbert v. Verner*, 374 U.S. 398, 406 (1963); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

[4] 42 U.S.C. § 2000bb *et seq.* (2006).

[5] 42 U.S.C. § 2000bb-1.

enact laws enforcing the Fourteenth Amendment, and not on either the Spending Clause or Commerce Clause.[6] Using such a limited basis for the exercise of federal authority was a fatal flaw. The Supreme Court held RFRA unconstitutional in *City of Bourne v. Flores*, finding that the evidence of discrimination against religion in the legislative record was not sufficient to justify the Congressional exercise of power under the Enforcement Clause of the Fourteenth Amendment.[7]

RLUIPA addressed RFRA's fatal flaw by explicitly strengthening the legislative record so that Congressional authority could be invoked under the Commerce Clause, the Spending Clause, and the Fourteenth Amendment.[8] Notwithstanding these stronger jurisdictional hooks, Congress drafted RLUIPA to be less sweeping than RFRA. The statute, though adopting and, in some respects, providing greater protection than RFRA's strict scrutiny standard, is self-limited in application to land use regulations and government actions affecting institutionalized persons.[9]

RLUIPA's constitutionality was initially upheld by the Supreme Court in *Cutter v. Wilkinson*,[10] in the institutionalized persons context. In *Cutter*, the Court rejected the argument, embraced by the Sixth Circuit, that RLUIPA had the effect of improperly advancing religion by giving religious prisoners rights superior to those of nonreligious prisoners—that RLUIPA encouraged prisoners to "get religion" so as to gain accommodations afforded under RLUIPA.[11] According to the Court, RLUIPA instead qualified as a permissible legislative accommodation of religion, one that fell "in the joints between" the prohibitions of the Free Exercise Clause and Establishment Clause.[12] Since *Cutter*, RLUIPA has consistently withstood constitutional challenges to its enforcement in the lower courts.[13]

II. RLUIPA's Land Use Provisions

RLUIPA prohibits two distinct kinds of governmental action in the land use context. First, the government cannot adopt or implement a land use regulation which imposes a "substantial burden" on religious exercise, unless the regulation is in furtherance of a compelling governmental interest and is the least restrictive way of furthering that interest.[14] Second, the government cannot treat a religious assembly or institution "on less than equal terms" with a non-religious assembly or institution (the "equal terms" provision), cannot discriminate on the basis of religion or denomination, and cannot exclude or unreasonably limit the ability of a religious institution to locate within its jurisdiction.[15] RLUIPA's provisions expressly limit the types of land use regulations addressed by the statute to zoning and landmarks laws; other forms of land use controls are not within the scope of the statute.[16]

A. The "Substantial Burden" Provision

Section 2(a)(1) of RLUIPA provides:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—
> (A) is in furtherance of a compelling governmental interest; and
> (B) is the least restrictive means of furthering that compelling governmental interest.[17]

The intent behind and bounds of this "substantial burden" provision, as compared to those of the "equal terms" provision and its anti-discriminatory brethren, are relatively clear. For example, the statutory definition of "religious exercise" indicates that, in enacting RLUIPA, Congress intended to codify and expand the Supreme Court's definition in *Smith* of "religious exercise."[18] Thus, the term includes any exercise of a religion, whether or not compelled by or central to a system of religious belief, as well as the use and development of land for religious exercise.[19] The term does not include secular or commercial uses, even if they are intended to generate revenue that supports a religious institution, unless they are somehow integrated with the mission of the

[6] *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997).
[7] *Id.* at 534–35.
[8] *See, e.g.*, 146 Cong. Rec. E1564 (2000).
[9] 42 U.S.C. §§ 2000bb, 2000cc.
[10] 544 U.S. 709 (2005).
[11] *Id.* at 721.
[12] *Id.* at 713–24.
[13] *See, e.g., Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004).
[14] 42 U.S.C. § 2000cc(a). RLUIPA sets forth a similar "substantial burden" provision for government actions affecting the religious exercise of persons residing in or confined to an institution. § 2000cc-1(a).
[15] 42 U.S.C. § 2000cc(b).
[16] 42 U.S.C. § 2000cc-5(5).
[17] 42 U.S.C. § 2000cc(a)(1).
[18] *Employment Division v. Smith*, 494 U.S. 872.
[19] 42 U.S.C. § 2000cc-5(7).

house of worship.[20] Thus, the Second Circuit has suggested that a proposed improvement, to constitute religious exercise, must be for a religious purpose rather than merely "religiously-affiliated."[21]

Similarly, RLUIPA's legislative history indicates that the term "substantial burden" "should be interpreted by reference to Supreme Court jurisprudence."[22] The traditional rule is that a law imposes a substantial burden on religious exercise when an individual is required to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion ... on the other hand."[23] This definition, however, has been more difficult for courts to apply. In the land use context the traditional rule is not particularly helpful, as religious institutions that are denied a right to expand facilities or improve a property do not usually change their behavior or beliefs but, rather, continue to make do with existing facilities.[24] In determining whether a land use regulation imposes a substantial burden, courts instead usually ask whether the religious institution has been directly coerced to change its behavior.[25]

For practical purposes, the best way to understand what constitutes a substantial burden is by looking at the outcomes of individual cases.[26] A substantial burden has been found where: (1) a zoning board refuses to entertain or outright rejects an application encompassing work that is required for a use of land needed by a religious institution to carry out its mission;[27] (2) a land use approval is given subject to permit conditions that are difficult or impossible to satisfy;[28] and (3) there is a substantial delay in the processing of a permit application.[29] In cases where an application is denied or approved subject to conditions, the Second Circuit requires a "close nexus" between the work denied or conditioned and the religious exercise.[30] A substantial burden has been found not to exist where: (1) a religious institution is obligated to apply for a permit;[31] (2) conditions have been imposed on a permit that leave open a reasonable possibility of obtaining the permit;[32] (3) a permit is denied because the property is not suitably zoned for a religious use, but other sites are available for the use, particularly in a densely developed jurisdiction;[33] (4) compliance involves an insubstantial amount of inconvenience, cost, or delay;[34] and (5) the religious institution is found to be treated comparably to non-religious uses under a facially neutral statute.[35] The New York City Board of Standards and Appeals has held that denying a use variance for a catering establishment accessory to a synagogue in Brooklyn did not offend RLUIPA's "substantial burden" provision because, even if the denial imposed financial burdens on the synagogue and even if the catering use was limited to events accessory to the synagogue, the catering use could permissibly be located in numerous locations elsewhere in the City.[36]

As to what constitutes a compelling interest as used in the "substantial burden" context, the courts have in general found that traffic, parking, aesthetics and property values are

[20] *Compare Westchester Day School*, 504 F.3d 338 (faith-based day school held to constitute a "religious exercise" under RLUIPA) *and Men of Destiny Ministries, Inc. v. Osceola County*, No. 6:06-CV-624-Orl-31DAB, 2006 U.S. Dist. LEXIS 80908, at *11–12 (M.D. Fla. Nov. 6, 2006) (faith-based drug rehabilitation center held to constitute a "religious exercise" under RLUIPA), *with Greater Bible Way Temple of Jackson v. City of Jackson*, 733 N.W.2d 734, 745–46 (Mich. 2007) (apartment complex not a "religious exercise" under RLUIPA) *and Conference Association v. Clark County*, 74 P.3d 140, 144–45 (Wash. Ct. App. 2003) (office building not a "religious exercise" under RLUIPA).

[21] *Westchester Day School*, 504 F.3d at 347–48. Note, however, that the use need not be exclusively religious to qualify as "religious exercise" under the "substantial burden" prong of RLUIPA. See id. at 348 (finding "religious exercise" under RLUIPA because facilities would "be used at least in part for religious education and practice[.]") (emphasis added).

[22] 146 Cong. Rec. S7774, S7776 (2000) (joint statement of Senator Hatch and Senator Kennedy).

[23] *Sherbert*, 374 U.S. at 404.

[24] *Westchester Day School*, 504 F.3d at 348–49 (discussing difficulty of applying traditional "substantial burden" provision in land use context).

[25] *See id.* at 349; *Midrash Sephardi, Inc.*, 366 F.3d at 1227.

[26] Many of the cases cited in notes 27–35 and 37–40 are discussed in greater detail in Salkin & Levine, *supra* note 1, at 228–38.

[27] *See Kokinov v. Orange County*, 410 F.3d 1317, 1324 n.3 (11th Cir. 2005); *Castle Hills First Baptist Church v. City of Castle Hills*, No. SA-01-CA-1149-RF, 2004 U.S. Dist. LEXIS 4669, at *38 (W.D. Tex. Mar. 17, 2004) ("A municipality that refuses to accept and consider a special use permit application from a place of worship related to the occupancy of already existing facilities works a substantial burden upon religious exercise where the proposed use is religious education because in the case of a place of worship, facilities' uses may change in order to suit the needs of either religious faith or practice.").

[28] *See Westchester Day School*, 504 F.3d at 349; *Guru Nanak Sikh Society v. County of Sutter*, 456 F.3d 978, 991–92 (9th Cir. 2006).

[29] *See Westchester Day School*, 504 F.3d at 349.

[30] *Id.*

[31] *See Kokinov*, 410 F.3d at 1323 ("[R]equiring applications for variances, special permits, or other relief provisions would not offend RLUIPA's goals."); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d at 1227 n.11.

[32] *See Vision Church v. Village of Long Grove*, 468 F.3d 975, 999 (7th Cir. 2006); *Cathedral Church of the Intercessor v. Village of Malverne*, 353 F. Supp. 2d 375 (E.D.N.Y. 2005).

[33] *See Petra Presbyterian Church v. Village of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007); *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761–62 (7th Cir. 2003); *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1035 (9th Cir. 2004).

[34] *See Corp. of the Presiding Bishop v. City of West Linn*, 111 P.3d 1123, 1130 (Or. 2005) (citing "related legal, architectural, and engineering costs" as expenses not constituting a substantial burden); *Winston v. Town of Bedford*, 836 N.Y.S.2d 504 (Sup. Ct. Westchester Co. 2007) (finding no substantial burden where religious statue required to be located more than fifty feet from property line).

[35] *See Vision Church*, 468 F.3d at 998–99.

[36] *See Yeshiva Imrei Chaim Viznitz*, Calendar No. 290-05-BZ.

of insufficient weight to be a compelling interest,[37] although some have noted that traffic might rise to a compelling interest under certain circumstances.[38] They have accepted in some cases the argument that houses of worship do not belong in some zoning districts, such as those where the only permitted uses are industrial uses.[39] And different courts have come to different conclusions as to whether such considerations as economic development and the prevention of sprawl are compelling interests.[40]

In any event, the "substantial burden" provision has arguably been less important in New York than in other jurisdictions because the state's existing doctrine provides religious institutions with similar protections. Under New York law, educational and religious uses are presumed to have a beneficial effect on the community and, as such, enjoy special treatment in the land use context.[41] New York State has for many years required that the denial of a land use application by a school or religious congregation be based on factors that have a "substantial relation" to the public health, safety, and welfare[42]—a basis that is not very different in practice from the "compelling interest" required by RLUIPA to sustain a land use control that substantially burdens religious exercise. Thus, in *Westchester Day School*, the District Court, finding no such substantial relationship, concluded that the denial of the school's application for a special permit to construct additional classrooms was arbitrary and capricious.[43] Its finding contributed to the Second Circuit's decision that the denial was also a violation of RLUIPA.[44]

B. The "Equal Terms" Provision

The "equal terms" provision is one of a triad of clauses that together prohibit discrimination against and exclusion of religious assemblies and institutions. Section 2(b) of RLUIPA provides:

(1) Equal Terms. No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) Nondiscrimination. No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) Exclusion 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.[45]

RLUIPA's legislative history tells us that the nondiscrimination provision was enacted to enforce the Free Exercise Clause against laws that burden religion and are not neutral and generally applicable—a situation that Salkin and Lavine have suggested would trigger a violation of the "equal terms" provision as well.[46] The prohibition against barring or unreasonably limiting a congregation's ability to locate in a jurisdiction has been said by one court to be a codification of the protections accorded conduct under the First Amendment.[47] A claim of exclusion or unreasonable limitations could also be based on the enactment or implementation of a law that would run afoul of either the "substantial burden" provision or "equal terms" provision of RLUIPA. In New York, such a claim could also be based on the state doctrine that educational and religious uses presumptively benefit the community and, therefore, may not be totally excluded from a neighborhood.[48]

The meaning of the "equal terms" provision is remarkably less clear. The language of the clause is as striking for what it does not say as for what it does. The statute does not explicitly require that a plaintiff under this provision identify a similarly situated comparator as a reference point for the allegedly unequal treatment, nor does it explicitly allow the government to defend differential treatment by offering a justification, even one based on a compelling governmental interest. All that a religious institution must allege is that the enactment or implementation of a law has the effect of treating it in less than equal terms relative to a secular institution. The legislative history of RLUIPA, as

[37] *See, e.g., Mintz v. Roman Catholic Bishop*, 424 F. Supp. 2d 309, 324 (D. Mass. 2006) (traffic and congestion); *Lighthouse Community Church of God v. City of Southfield*, No. 05-40220, 2007 U.S. Dist. LEXIS 28, at *26 (E.D. Mich. Jan. 3, 2007) (parking); *Westchester Day School v. Village of Mamaroneck*, 417 F. Supp. 2d 477, 553–54 (S.D.N.Y. 2006) (aesthetics and property values).

[38] *See, e.g., Westchester Day School v. Village of Mamaroneck*, 386 F.3d 183, 191 (2d Cir. 2004).

[39] *See Petra Presbyterian Church*, 489 F.3d at 851.

[40] *See Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 406 F. Supp. 2d 507, 516 (D.N.J. 2006) (indicating, in dicta, that mitigating blight is a compelling interest); *Cottonwood Christian Center v. City of Cypress*, 218 F. Supp. 2d 1203 (1228) (C.D. Cal. 2002) (mitigating blight not a compelling interest); *Greater Bible Way Temple v. City of Jackson*, 708 N.W.2d 756 (Mich. 2005) (prevention of sprawl not a compelling interest), *rev'd*, 478 Mich. 373 (2007); *Elsinore Christian Center v. City of Lake Elsinore*, 270 F. Supp. 2d 1163, 1173 (C.D. Cal. 2003) (prevention of sprawl a compelling interest), *vacated by* No. CV 01-04842 SW (RCx), 2003 U.S. Dist. LEXIS 24057 (C.D. Cal. Aug. 21, 2003).

[41] *In re Pine Knolls Alliance Church v. Zoning Bd. of Appeals*, 5 N.Y.3d 407, 412 (2005); *see also Cornell University v. Bagnardi*, 68 N.Y.2d 583 (1986).

[42] *See Westchester Day School*, 417 F. Supp. 2d at 564.

[43] *Id.*

[44] *See Westchester Day School*, 504 F.3d at 351.

[45] 42 U.S.C. § 2000cc(b).

[46] Salkin & Levine, *supra* note 1, at 249–50.

[47] *Freedom Baptist Church v. Twp. of Middletown*, 204 F. Supp. 2d 857, 870–71 (E.D. Pa. 2002) (citing *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981)).

[48] *See Pine Knolls Alliance Church*, 5 N.Y.3d at 412; *Cornell University*, 68 N.Y.2d 583.

helpful as it has been in construing other clauses, does little to add to this picture.

The three circuit courts that have considered cases brought under the "equal terms" provision—the Third, Seventh and Eleventh Circuit Courts of Appeals—have adopted different approaches to determining whether a violation has occurred. The Third Circuit asks whether there is a secular comparator to the religious use that is similarly situated in regard to the objectives of the challenged regulation and, if unequal treatment is found, imposes a standard of strict liability. In *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*,[49] a redevelopment plan of the City of Long Branch had created a "regional entertainment/commercial" sector in which churches were not permitted, but theaters, cinemas, art schools, restaurants, bars, and clubs were. The City justified its differing treatment by arguing that the operation of a state statute that prohibited the issuance of a liquor license within 200 feet of a house of worship would, if religious assemblies were permitted, interfere with the siting of entertainment-related uses dependent on such licenses, thereby frustrating the development of the regional entertainment/commercial sector. The court found no RLUIPA violation, explaining that churches were not similarly situated to uses permitted in the regional entertainment/commercial sector because their presence could have the effect of making liquor licenses unavailable in "sizeable areas" of the envisaged entertainment area. In other words, it did not find the two types of assemblies similar in regard to the purpose of the relevant statute and, as a result, did not apply strict liability.

The Seventh Circuit, similar to the Third Circuit, looks for a secular comparator that is similarly situated with reference to the interest the statute seeks to protect. The distinction between "the objectives of the challenged regulation" and "the interest sought to be protected," however, can be a significant one. For example, in *Digrugilliers v. Consolidated City of Indianapolis*,[50] Judge Posner, also considering the significance of a statute that created protective liquor-free zones around churches, held that "[g]overnment cannot, by granting churches special privileges ... furnish the premise for excluding churches from otherwise suitable districts"—a finding reached by focusing on the interests of the religious use that the liquor license restriction sought to protect. As such, the plaintiff-church's claim of a RLUIPA violation was held to have merit. Neither *Digrugilliers* nor *Vision Church v. Village of Long Grove*, a second RLUIPA case decided by the Seventh Circuit, makes clear whether the court would have unequal treatment undergo strict scrutiny analysis or instead be subject to a strict liability standard.[51]

The Eleventh Circuit, in *Midrash Sephardi, Inc. v. Town of Surfside*,[52] held that the "equal terms" provision is implicated whenever each of the religious use and the secular use is an "assembly" or "institution," as commonly defined and without reference to whether the uses are similarly situated; any differing treatment of such uses is subject to a strict scrutiny analysis and therefore must be justified by a compelling governmental interest. In *Midrash Sephardi*, a town zoning ordinance excluded religious assemblies from a retail service district but permitted in the same district private clubs, lodges, and similar secular uses. The court found, first, that the permitted private clubs constituted assemblies and, second, that the exclusion of religious uses did not withstand strict scrutiny, as the town's justification for the regulation—that churches and synagogues endangered the "retail synergy" of the district—could have applied just as much to the private clubs. The Eleventh Circuit applied this test again in *Kokinov v. Orange County*,[53] holding that a zoning ordinance, as applied, violated RLUIPA because weekly religious meetings held in a rabbi's home were deemed violations, whereas non-religious meetings held with the same frequency—*i.e.* secular comparators—were effectively permitted with no compelling justification for the differing treatment.

These approaches, or at least the complete approaches of the Eleventh and Third Circuits, should often lead to the same result. This is because a municipality's justification for treating religious and secular land uses differently informs both the Third Circuit's "similarly situated" analysis and the Eleventh Circuit's compelling interest standard. In other words, to the extent that a city has a compelling interest in treating a religious institution differently, it can be said that such religious institution is not similarly situated to a secular comparator in regard to the objective of the regulation. The Third Circuit implicitly recognized this much in explaining—rather compellingly—why it adopted its own approach over the Eleventh Circuit's: "With our definition of comparator ... we are putting the teeth into section 2(b)(1) that it needs to follow Free Exercise case law. It is because the *Midrash Sephardi* court defined 'comparator' so broadly ... that, in order to conform to Free Exercise jurisprudence, the court had to create a 'strict scrutiny' element in section 2(b)(1)."[54] Having put teeth of its own into section 2(b)(1), the Seventh Circuit might very well adopt a strict liability standard as well.

However, the Third Circuit approach may not be as rigorous as the Eleventh Circuit's, at least in its consideration of government objectives, because a regulatory purpose which explains the differing treatment of a religious use and secular use may be credible but not quite compelling. For example, in *Lighthouse Institute*, the City of Long Branch's interest in making liquor licenses available throughout the regional entertainment sector or, more broadly, in facilitating economic development may

[49] *See Lighthouse Inst. for Evangelism, Inc.*, 510 F.3d 253 (3d Cir. 2007).

[50] *Digrugilliers v. Consol. City of Indianapolis*, 506 F.3d 612 (7th Cir. 2007).

[51] *See Vision Church*, 468 F.3d 975 (finding no RLUIPA violation where a church was denied a special permit to locate in residential district because grants of such special permits to nearby schools had been made in a different year and based on different standards, thus precluding a finding that the church and schools were similarly situated uses); *Digrugilliers*, 506 F.3d 612.

[52] *Midrash Sephardi, Inc.*, 366 F.3d 1214.

[53] *Kokinov*, 410 F.3d 1317.

[54] *Lighthouse Inst.*, 510 F.3d at 269.

have been explicative of the disparate treatment of religious and secular assemblies, but it might not have been seen as a *compelling* interest by a court adopting the Eleventh Circuit test. In this way, the difference between the Circuits' approaches may be not just where they locate RLUIPA's teeth, as the Third Circuit put it, but also the extent of their bite.

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[*Editors' Note*: Part 1 of this article, which appeared in the November 2009 edition of this newsletter, discussed the background and enactment of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), as well as how courts have interpreted the statute's land use provisions.]

III. *Third Church* and Its Implications

It was against this background of a divided judiciary, with respect to the application of the "equal terms" provision of RLUIPA, that the Southern District of New York recently decided *Third Church of Christ, Scientist, of New York City v. City of New York*.[1] The case, one of first impression in the Second Circuit, raises some important questions about the application of RLUIPA at the interface between the exercise of the police power and activities of a religious assembly.

The facts of *Third Church* are quite particular to zoning law in New York City. The Third Church is located at the corner of East 63rd Street and Park Avenue in Manhattan, within a high-density residential zoning district and within the Upper East Side Historic District. Over many years, the Church's congregation had declined in number, leaving the Church with insufficient revenue to maintain its building. Unfortunately, the Church could not simply sell its land for redevelopment because, as a contributing structure to the historic district, the building could not be demolished under landmarks law. Furthermore, as a practical matter, it is unlikely that the Landmarks Preservation Commission would find a mid- or high-rise replacement for the

[1] 617 F. Supp. 2d 201(S.D.N.Y. 2008). Kramer Levin represents one of the two restaurants that were cited with a Notice of Violation by the City of New York, as explained below. Neither of the restaurants is a party to the case.

Church an appropriate addition to the Historic District. Nonetheless, the Church had received inquiries from developers and had considered selling the building. Ultimately, however, the Church's membership decided to try to save its home rather than sell it. To raise the necessary revenue, the Church entered into a lease arrangement with a catering company. The lease provided that the Church and the caterer would share use of the building. Thus, the lease did not give the caterer unlimited rights, but rather limited the caterer's use of the premises to times when such use would not interfere with the Church's regularly scheduled Wednesday and Sunday services and other religious activities. In consideration of the rights granted to it under the lease, the caterer invested several million dollars so that the Church could make extensive repairs and renovations to its historic structure. The Church sought permission from the New York City Department of Buildings (DOB), and, after review, the DOB issued a formal determination permitting a commercial catering hall as an accessory use to the church on specified terms. In reliance on this approval, the necessary construction work was begun.[2]

Work was stopped several months later when, after complaints from the Church's neighbors, DOB withdrew the work permit and the determination on which it was based. The City initially had refused to bend to the neighbor's complaints because it acknowledged that there was catering and other space sharing arrangements at religious and nonreligious non-profit institutions throughout the City. Indeed, the ranking Borough Commissioner who had initially approved the Church's catering arrangement stated in an email to the Deputy Mayor's office that he approved this arrangement, that the events were occurring without significant complaints, and that "many prominent synagogues and churches throughout Manhattan routinely hold 3 or 4 events a week of catered events[.]" Nonetheless, after significant lobbying, the determination of the Borough Commissioner was overturned and the DOB revoked the earlier-issued approvals.

After the Church commenced its lawsuit, it discovered and brought to the City's attention that the permitted accessory restaurants in two residential hotels in the area were operating commercial catering businesses, in violation of their respective Certificates of Occupancy. Each of these restaurants was accordingly served with a Notice of Violation (NOV), advising the restaurant of the alleged zoning violations and demanding that the offending use be stopped. However, unlike the total revocation of the Church's alteration permit, the NOVs did not physically foreclose use of the restaurants for commercial catering while the legality of their use was being adjudicated.

The court held, not surprisingly, that the City's refusal to allow the Church to be used for a commercial catering operation did not implicate the "substantial burden" provision, as the catering operation did not constitute a "religious exercise" under the terms of RLUIPA. However, the court went on to hold that the City, in shutting down the catering operation at the Church, violated RLUIPA's "equal terms" provision under either the Third Circuit or Eleventh Circuit approach, basing its decision on the disparate effects of the revocation of the Church's work permit and the NOVs issued against the neighboring restaurants. The court enjoined the City from enforcing its revocation of the Church's work permit, thereby legalizing the church's catering operation, at least for the time being.

The *Third Church* case involves a number of novel issues in the context of RLUIPA which arise mainly from the court's animation of the statute's "equal terms" provision. First, because the "equal terms" prong of RLUIPA does not require that "religious exercise" be at play in its application, the *Third Church* case involved the protection not of religious exercise *per se*, but of a church's decision to allow a secular business to share the use of its premises in order to raise revenue. This aspect of the case evokes some of the same concerns expressed by the Sixth Circuit in *Cutter*—for example, that operators of secular businesses will want to "get religion" so as to benefit from more favorable application of land use regulations—and does significantly more work with the "equal terms" provision than could be done with the "substantial burden" provision, the latter of which is limited in its application by the definition of "religious exercise."

For purposes of constitutional scrutiny, this favorable treatment of secular *accessory* businesses, like the treatment of prisoners examined in *Cutter*, may fall "in the space between the joints" of the Establishment Clause and Free Exercise Clause, allowing governments to accommodate religion beyond free exercise requirements without causing offense to the Establishment Clause. That the "equal terms" provision might extend its reach further than the "substantial burden" clause is not particularly troubling when considered in light of their different purposes—that is, the "substantial burden" provision assumes the constitutionally protected status of religion, whereas the "equal terms," nondiscrimination, and exclusion provisions are premised on the need of religious assemblies and institutions for protection from discriminatory treatment.[3] Thus, a particular land use might be too far removed from religious exercise for us to be concerned about the burden created by restricting that land use, but *uniquely* exclusionary treatment of such a use, however burdensome, might serve to alert us to discrimination in the application of land use laws. To the extent the *Third Church* decision gives a special advantage to a business that is accessory to a religious use, its effect may be a necessary consequence of the application of RLUIPA in the course of ferreting out discrimination against religious uses in the land use context. A related question is whether RLUIPA could be utilized by religious organizations to put themselves in a better position than non-religious actors in establishing

[2] The New York Landmarks Conservancy has long advocated such "shared space" arrangements as a way for non-profits to raise the money they need to preserve their historic homes. In fact, the City's own Department of Cultural Affairs routinely asks non-profits how much money they raise from the rental of their spaces before determining whether to make a grant to such institutions.

[3] *See* Robert W. Tuttle, *How Firm a Foundation? Protecting Religious Land Uses After* Boerne, 68 GEO. WASH. L. REV. 861, 865 (1999–2000).

uses, such as soup kitchens, shelters, and schools, that are typically found in connection with religious institutions.

Second, and related to the issue of enforcing the "equal terms" provision of RLUIPA against a use that does not comprise *per se* "religious exercise," the *Third Church* decision demonstrates how enforcement of RLUIPA can become especially tricky when evaluating the treatment of accessory uses. Under the Zoning Resolution of the City of New York, an "accessory use" is, in relevant part, a use which is "clearly incidental to, and customarily found in connection with" the principal use on the zoning lot. The City's decision that the Church's catering facility was not a permissible accessory use was based in part on its "relationship to the virtually non-existent primary use." This interpretation of the meaning of "accessory use," which incorporates the relative sizes of the principal religious use and the accessory use, was properly troubling to the court, as it suggests that small religious groups could be treated less favorably under the City's Zoning Resolution than larger congregations. It also seems contrary to the spirit of RLUIPA and Free Exercise jurisprudence that a church with more intensive use of its premises than the Third Church might be permitted to host a commercial catering business whereas a smaller church might not.[4] Indeed, the Church presented evidence that there were numerous secular non-profit organizations located in residential districts that engaged in extensive catering and restaurant activity. While the court's decision did not cite these other uses as applicable secular comparators, it plainly was troubled that the City's ruling prohibited the Church from allowing even a single catered event to be held in its building. This problem in administering the "accessory use" standard can be avoided if the focus of the "clearly incidental to" requirement is on whether the proposed accessory use has a clearly supportive relationship to the principal use on the premises, rather than on the relative sizes of the two uses. In the case of the Church, one can argue that the substantial revenues and capital improvements generated by the shared-space arrangement constitute such a supportive use. Significantly, this interpretation does little, if any, damage to the arguably more important requirement of the "accessory use" definition that the proposed accessory use be "customarily found in connection" with the principal use.

The applicability of the "equal terms" provision to non-traditional accessory uses that do not comprise "religious exercise" *per se* gives RLUIPA the potential, in other jurisdictions if not also in New York City, to be a means of broadening the range of allowable accessory uses. The implications of this potential are highlighted by the issues raised by today's evangelical "mega-churches." These churches have expanded their land uses beyond worship and traditional accessory uses to such an extent that in some cases they resemble shopping malls more than churches. The *Economist*, in an article entitled "Jesus, CEO: America's most successful churches are modeling themselves on businesses,"[5] documents how "mega-churches" and their "pastorpreneurs" in South Barrington, Illinois, Houston, Texas and Washington, DC, are, in order to attract new members and support their missions, emphasizing "customer-service" and expanding their churches' offerings to include food courts, basketball courts, cafes, video screens and parking spaces for up to 4,000 cars. In these contexts, the issue arises whether, and the extent to which, RLUIPA can be used as a vehicle to require local governments to allow these uses even if they are not permitted by traditional definitions of "accessory uses" in local zoning codes.

Third, the facts of the *Third Church* case present the question of what use or uses are appropriate comparators under the "equal terms" provision. The Church and the nearby hotel restaurants, identified by the court as appropriate comparators, were similarly situated in that they were located in the same zoning district and sought to introduce proposed accessory catering operations on their respective premises. At the same time, however, the comparators were not similarly situated with respect to their procedural or, more specifically, permitting statuses. It is this difference in permitting status, in fact, that explained the different remedial actions the City took with respect to each use. Because the permit pursuant to which the Church was performing work was based on a specific DOB determination, an appropriate response by DOB—and that taken by DOB in comparable cases—was to reverse its previous determination and revoke the work permit based thereon. On the other hand, the hotels containing restaurant uses had obtained certificates of occupancy, such that the remedies available to the City were different. The course pursued by DOB in those instances—issuing NOVs to the restaurants—was also a typical and appropriate response to that situation. Whether the *Third Church* court should have looked at procedural status in applying the Third and Seventh Circuits' test for identifying relevant comparators is an open question, one which requires consideration of just how fine-grained an analysis should be performed in an effort to identify a similarly situated comparator. To the extent that the *Third Church* decision is understood *not* to have been based on the City's means of enforcing its zoning laws, it appears to represent a hybrid approach to applying RLUIPA, adopting the less rigorous Eleventh Circuit test for selecting relevant comparators—that is, using neighboring assemblies and institutions as secular comparators without regard to their procedural stance—and the Third and Seventh Circuits' strict liability standard. The fact does remain, however, as the court's decision noted (and the City conceded) that the issuance of the NOV did not require any cessation (or even curtailment) of the unlawful catering activities at either of the nearby hotel restaurants, whereas the revocation of the accessory use permit required an immediate, complete halt to any catering activity at all at the Church. The court relied heavily on this plainly disparate result.

[4] *See* 146 Cong. Rec. S7774-01 (noting legislative finding that "small, or unfamiliar churches ... are frequently discriminated against ... in the highly individualized and discretionary processes of land use regulation").

[5] The Economist (Dec. 24, 2005).

Last, the *Third Church* decision ignores the role of prosecutorial discretion in zoning enforcement. While such discretion cannot be exercised in a manner that disfavors religion, it can be, and often is, exercised to favor the most vocal constituency. Viewed in this way, the Church was situated no differently from any other owner against whom a well organized group has pressed the City with a zoning complaint. Courts may begin to probe into whether such a non-discriminatory motive exists in any given case. The *Third Church* court, for its part, did not signal when the exercise of prosecutorial discretion crosses the line into discrimination or, in broader terms, when flexibility in the enforcement of land use regulations must give way to the faithful enforcement of RLUIPA.[6]

IV. Conclusion

The Third, Seventh and Eleventh Circuits—and now a district court the Second Circuit in the *Third Church* case—have variously interpreted the "equal terms" provision of RLUIPA and employed different standards in their respective analyses of the provision. The issues raised by the Circuit split are further compounded in the *Third Church* case by the court's grappling with the "accessory use" regulations of the New York City Zoning Resolution and the court's lack of a full understanding of New York City's complex land use enforcement procedures. The *Third Church* decision raised and left unanswered a number of important questions, which follow, with respect to how much weight will be given to the "equal terms" provision in the Second Circuit as RLUIPA doctrine develops therein:

- How much protection should be afforded to a secular use accessory to a religious use under RLUIPA's "equal terms" provision? Should the degree of such protection be bounded by reference to the amount of protection given to such a use under the Constitution, New York State common law, or RLUIPA's "substantial burden" provision?
- Where RLUIPA's "equal terms" provision is implicated, should the application of the New York City Zoning Resolution's "accessory use" definition take into account the size or intensity of the principal religious use?
- To what extent should a court adopting the Third and Seventh Circuits' approach to applying the "equal terms" provision take into account procedural status in identifying relevant secular comparators? Do the terms of RLUIPA leave room for the hybrid approach adopted by the Second Circuit in *Third Church*—identifying comparators that are similarly situated only with respect to substantive land use regulations, followed by a strict liability analysis?
- To what degree does the "equal terms" provision of RLUIPA limit the exercise of prosecutorial discretion and how should municipalities respond to this limitation?

As the *Third Church* litigation is not yet over, we can expect that the courts will use the opportunity presented by the facts of this case to address these issues and to develop further and clarify RLUIPA doctrine within the Second Circuit.

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[6] It bears noting that the Church raised an Equal Protection "class of one" claim, urging that the City's decision to succumb to political pressure from the Church's neighbors was not rationally based on appropriate land use analysis. In support of this challenge, the Church was able to cite the fact that many secular not-for-profits engaged in "shared use" arrangements that involved catered events, as well as the fact that many religious institutions throughout the City have long done the same thing. Because the court granted the injunction on RLUIPA "equal terms" grounds, it did not reach the Equal Protection claim.