RLUIPA

Religious Land Use and Institutionalized Persons Act

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RLUIPA and Potential Future Changes

This article is intended to provide readers with information on the federal Religious Land Use and Institutionalized Persons Act (RLUIPA) and its relation to zoning law in Georgia. The Religious Land Use and Institutionalized Persons Act (RLUIPA) is a civil rights law that protects individuals and religious institutions from discriminatory and overly burdensome land use regulations. In full disclosure, the author of this article represented the plaintiff in the 2013 Eleventh Circuit case of Islamic Center of North Fulton, Inc. v. City of Alpharetta, Georgia, et al., Case No. 1:2010cv01922.

The History of RLUIPA

In 1993, Congress enacted the Religious Freedom Restoration Act ("RFRA") in response to a U.S. Supreme Court decision holding that neutral and generally applicable laws were not susceptible to attack under the Free Exercise Clause of the U.S. Constitution,[1] even if they incidentally burden the free exercise of religion. RFRA countered the Supreme Court's decision by providing that *any* legislation substantially burdening religion would be invalidated unless the government could show that it had a "compelling governmental interest" [2] in the regulation and there was no less-burdensome way to meet that interest. In 1997, the U.S. Supreme Court in Boerne v. Flores[3] struck down RFRA as it applied to state and local governments, reasoning that Congress had overstepped its bounds. Though this application of RFRA was invalidated, RFRA still applies to the federal government.

RFRA prohibited "[g]overnment" from "substantially burden[ing]" a person's exercise of religion even if the burden results from a rule of general applicability unless

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[1] The Free Exercise clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .or abridging the freedom of speech..." U.S. Const., amend. I.
[2] Though the term "compelling governmental interest" has never been defined by the U.S. Supreme Court, the concept generally refers to core constitutional principles or matters that are necessary, such as national security and the protection of life and limb.
[3] 521 U.S. 507 (1997).

the government can demonstrate the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. RFRA's mandate applied to any "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States," as well as to any "State, or ... subdivision of a State." Id. § 2000bb-2(1). The Act's universal coverage is confirmed in § 2000bb-3(a), under which RFRA "applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after [RFRA's enactment]." In accordance with RFRA's usage of the term, "state law" includes local and municipal ordinances. 521 U.S. 534.[4]

The Boerne court reasoned that

> The substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in Smith. Simply put, RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion. In most cases, the state laws to which RFRA applies are not ones which will have been motivated by religious bigotry. If a state law disproportionately burdened a particular class of religious observers, this circumstance might be evidence of an impermissible legislative motive. Cf. Washington v. Davis, 426 U.S. 229, 241, 96 S.Ct. 2040, 2048, 48 L.Ed.2d 597 (1976). RFRA's substantial-burden test, however, is not even a discriminatory effects or disparate-impact test. It is a reality of the modern regulatory state that numerous state laws, such as the zoning regulations at issue here, impose a substantial burden on a large class of individuals. When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have

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[4] The Religious Freedom Restoration Act, as applied to the federal government, is severable from the portion of RFRA which was declared unconstitutional as applied to state and local governments in *City of Boerne v. Flores*, such that RFRA remains independently applicable to federal officials. The decision simply prevented the application of statute to a certain class of defendants, and there was no indication that Congress intended RFRA to be applied only if applicable to all defendants. Religious Freedom Restoration Act, § 3,42 U.S.C.A. § 2000bb-1. *Kikumura v. Hurley*, 242 F.3d 950 (10th Cir. 2001).

been burdened any more than other citizens, let alone burdened because of their religious beliefs.

After the U.S. Supreme Court's ruling in Boerne v. Flores, Congress compiled what is characterized as "massive evidence" that "[c]hurches in general, and new, small, or unfamiliar churches in particular, [were] frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation."[5] Congress concluded that state and local governments had enacted zoning codes that frequently excluded churches or allowed churches only with individualized permission from a zoning board, which often led to discriminatory practices. As a result of its findings, Congress enacted RLUIPA in 2000 to protect individuals, houses of worship, and other religious institutions from discrimination in zoning laws.

RLUIPA: Specific Provisions and Case Precedent

RLUIPA provides a number of important protections for the "religious exercise" of persons, places of worship, religious schools, and other religious assemblies and institutions. The Act broadly defines "religious exercise" to include "any exercise of religion, whether or not compelled by or central to, a system of religious belief."[6] This expansive definition encompasses a large variety of traditional and non-traditional religious beliefs. RLUIPA provides in pertinent part as follows:

(a) Substantial Burdens

General Rule

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

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[5] Statement of the Department of Justice on the Land-Use Provisions of the Religious Land Use and Institutionalized Persons Act (RILUPA), September 22, 2010 *quoting* 146 Cong. Rec. S7774-01, S7775 (July 27, 2000) (joint statement of Sens. Hatch and Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000).
[6] 42 U.S.C. § 2000cc-5(7)(A).

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.

(b) Scope of Application

This subsection applies in any case in which:

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

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

(c) Discrimination and Exclusion

(1) Equal terms

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

(2) Nondiscrimination

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

(3) Exclusions and limits

No government shall impose or implement a land use regulation that:

(A) totally excludes religious assemblies from a jurisdiction; or
(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

Substantial Burden under RLUIPA

Federal Circuit courts are split on RLUIPA's interpretation, especially the Act's "substantial burden" provision. Arguably one of the most important Eleventh Circuit cases interpreting RLUIPA was the 2004 case of Midrash Separdi v. Town of Surfside.[7] In that case, Surfside's zoning ordinance prohibited churches and synagogues in seven of its eight zoning districts, including a central business district that allowed private clubs and similar places of assemblage. The one residential district that permitted churches and synagogues did so by conditional use permit, meaning that churches and synagogues had to obtain a conditional use permit from the local government to lawfully operate. The town's permitting scheme resulted in a case-by case evaluation of the proposed activity of a religious organization such that the local government could make an "individualized assessment" about whether the church or synagogue constituted an appropriate land use for the district. A Jewish synagogue began operating in a business district that did not permit churches or synagogues by right or by conditional use permit. Members of the synagogue practiced Orthodox Judaism, which prohibits its followers from operating motor vehicles on the Sabbath and religious holidays. Therefore, most members of the congregation walked to the synagogue. Because the synagogue was operating in violation of the applicable zoning ordinance, the Town suggested that the synagogue move to a nearby zoning district that allowed synagogues by conditional use permit.

The Midrash court gave short shrift to the Congregation's contention that its inability to find suitable alternative space which allowed its members to walk to the synagogue created a substantial burden within the meaning of RLUIPA. Id. (quoting Love Church v. City of Evanston, 896 F.2d 1082, 1086 (7th Cir.1990) ("whatever specific difficulties [the plaintiff church] claims to have encountered, they are the same ones that face all [land users], not merely churches. The harsh reality of the marketplace

[7] 366 F. 3d 1214, 1220 (11th Cir. 2004).

sometimes dictates that certain facilities are not available to those who desire them.")). Nor did the court give serious consideration to the Congregation's challenge to the City's requirement that a church obtain a CUP, stating that "[r]equiring churches and synagogues to apply for CUPs allows the zoning commission to consider factors such as size, congruity with existing uses, and availability of parking." Id. (citing Lady J. Lingerie, Inc. v. Jacksonville, 176 F.3d 1358, 1362 (11th Cir.1999)(ordinance regulating lingerie shop that contained nude dancing).

The Midrash court considered the relevant inquiry for purposes of evaluating whether the City's zoning ordinance exacted a substantial burden within the meaning of RLUIPA to be whether and to what extent the zoning ordinance actually burdened the Congregation's religious exercise. Id. at 1228. The court noted that the congregation did not claim that their current location had some religious significance such that their faith required a synagogue at this particular site. Id. Moreover, the court observed that the congregation had the alternative of applying for a permit to operate only a few blocks from their current location and that the additional walk to the synagogue did not constitute a "substantial burden" within the meaning of RLUIPA. Id.

The Midrash court considered several factors in evaluating the Congregation's substantial burden claim, such as the fact that the extra distance was fairly short and the permitted RD-1 district (the proposed alternative location) was "in the geographic center of a relatively small municipality, proximate to the business, tourist and residential districts." Id. Additionally, the court considered deposition testimony to the effect that "congregants wishing to practice Orthodox Judaism customarily move where synagogues are located and do not typically expect the synagogues to move closer to them." Id. The court expressed a concern that "[m]unicipalities that allow religious exemptions to alleviate even the small burden of walking a few extra blocks would run the risk of impermissibly favoring religion over other secular institutions, or of favoring some religious faiths over others." Id.

One of the most recent expressions of this "substantial burden" standard was decided on January 31, 2013 by the Fourth Circuit in the case of Bethel World Outreach

v. Montgomery County.[8] In that case, Bethel had asked the local government for permission to build a 3,000 seat church, a daycare building, a social hall and offices on the property. Later, Bethel amended its application to request an 800 seat church because of certain additional restrictions regarding access to public water and sewer. The local jurisdiction placed additional restrictions which prohibited it from building its facility, so its request was denied.

On appeal, the district court found in favor of the County by applying RLUIPA's institutionalized persons standards to the case rather than RLUIPA's land use standards. The Fourth Circuit reversed the lower court's decisions, stating that the standard for institutionalized persons did not apply for comparable issues in the land use context. The Fourth Circuit held:

> In the institutionalized persons context, we have defined a substantial burden on religious exercise as one in which "a state or local government, through act or omission, 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" *Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006).
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> But the Government lacks comparable control in the land use context. Even government action preventing a religious organization from building a church will rarely, if ever, force the organization to violate its religious beliefs... *See Westchester Day Sch. V. Vill. Of Mamaroneck*, 504 F.3d 338, 348-49 (2d Cir. 2007) ("[I]n the context of land use, a religious institution is not ordinarily faced with . . . dilemma of choosing between religious precepts and government benefits."). Thus, requiring a religious organization to prove that a land use regulation pressured it to violate its beliefs would be tantamount to eliminating RLUIPA's substantial burden protection in the land use context. It seems very unlikely that Congress intended this.
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> Every one of our sister circuits to have considered the question has held that, in the land use context, a plaintiff can succeed on a substantial burden claim by establishing that a government regulation puts substantial pressure on it to modify its behavior. *See Westchester Day Sch.*, 504 F.3d at 349 ("[In the land use context,] courts appropriately speak of government action that directly *coerces*

[8] 706 F.3d 548 (4th Cir. Ct. App. 2013).

the religious institution to change its behavior . . . ." (emphasis in original)); *Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter*, 456 F. 3d 978, 988089 (9th Cir. 2006); *Midrash Shephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004) ("A[A] substantial burden is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly." (internal quotation marks omitted)); *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) ("[A] land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property... within the regulated jurisdiction—effectively impracticable."). We believe that this standard best accords to RLUIPA.

Discrimination and Exclusion Provisions of RLUIPA

Returning to the Midrash case discussed above, though the Eleventh Circuit failed to find that the local government's actions constituted a "substantial burden" on religion, the Eleventh Circuit found that the local government violated section (b) of RLUIPA (Discrimination and Exclusion) because it allowed secular assemblages to operate in its business district, but did not allow religious assemblages. Id. at 1231. Section (b) of RLUIPA provides that "[n]o 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." 42 U.S.C. § 2000cc(b)(1). The standard of review under § (b)(l) is strict scrutiny. Id. at 1232 (citing Employment Div., Dept. of Human Res. v. Smith, 494 U.S. 872, 877 (1990)).

The Midrash court, construing the terms "assembly" and "institution" according to their natural meanings found that "churches and synagogues, as well as private clubs and lodges, fall within the natural perimeter of 'assembly or institution.'" Id. at 1231 (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993)). The Court found that the City's zoning ordinance improperly targeted religious assemblies by excluding religious assemblies alone from the business district, thus violating the Free Exercise Clause's requirements of neutrality and general applicability. Id.

Applying strict scrutiny, the Midrash court considered whether the City, through the implementation of the City's zoning ordinance "'advance[s] interests of the highest order' and is narrowly tailored in pursuit of those interests." Id. at 1235. The court found that the zoning ordinance was not narrowly tailored to the City's interest, being both overinclusive and underinclusive. Having found that the ordinance treated religious institutions on less than equal terms with nonreligious institutions and was not narrowly tailored to the City's interest, the court did not address the "compelling interest" prong of the analysis. Id. Accordingly, the court sustained the Congregations' RLUIPA challenge to the zoning ordinance. Id. at 1219.

In the case of Westchester Day School v. Village of Mamaroneck, the Second Circuit found that the denial of a special use permit to a private religious day school constituted a substantial burden on religious exercise because the day school's existing facilities were deficient and its effectiveness in providing the education mandated by Orthodox Judaism had been significantly hindered as a consequence of the Village's refusal to approve the school's expansion. 504 F. 3d 338 (2d Cir. 2007). The stated reasons for the rejection included the effect the project would have on traffic and concerns regarding parking and the intensity of use. Id. at 346. The Second Circuit cited the finding of the Southern District of New York (the "District Court") that "the stated reasons for denying the application were not supported by evidence in the public record before the ZBA, and were based on several factual errors." Id. (quoting Westchester Day Sch. v. Village of Mamaroneck, 417 F.Supp.2d 477, 539 (S.D.N.Y. 2006)). The District Court guessed that the application may have been "denied because the ZBA gave undue deference to the public opposition of the small but influential group of neighbors who were against the school's expansion plans." Id. Moreover, the District Court "noted that the denial of the application would result in long delay of [the school's] efforts to remedy the gross inadequacies of its facilities, and substantially increase construction costs." Id. (quoting 417 F. Supp. 2d at 517).

Therefore, the Second Circuit held that where the Jewish day school had no ready alternatives, or where the alternatives required substantial "delay, uncertainty, and expense," a complete denial of the school's application for expansion might be indicative of a substantial burden. Id. at 349. The Westchester court noted that "[a]lthough

reasonable run of the mill zoning considerations may not constitute substantial burdens, a land use restriction, which is imposed on the religious institution arbitrarily, capriciously, or unlawfully necessary may support a substantial burden." Id. at 350. The arbitrary application of laws to religious organizations may reflect bias or discrimination against religion. Id.

The Westchester court cautioned that:

> where the denial of an institution's application to build will have minimal impact on the institution's religious exercise, it does not constitute a substantial burden, even when the denial is definitive. There must exist a close nexus between the coerced or impeded conduct and the institution's religious exercise for such conduct to be a substantial burden on that religious exercise. Imagine, for example, a situation where a school could easily rearrange existing classrooms to meet its religious needs in the face of a rejected application to renovate. In such case, the denial would not substantially threaten the institution's religious exercise, and there would be no substantial burden, even though the school was refused the opportunity to expand its facilities.
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> Id. at 349.

However, the Second Circuit noted that "a burden need not be found insuperable to be held substantial." Id. (citing Saints Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 901 (7th Cir.2005)). "When the school has no ready alternatives, or where the alternatives require substantial 'delay, uncertainty, and expense,' a complete denial of the school's application might be indicative of a substantial burden." Id. The Westchester court observed that the arbitrary application of laws to religious organizations may reflect bias or discrimination against religion. Id. at 350. For example, in Guru Nanak Sikh Soc'y v. County of Sutter, the Ninth Circuit held that a substantial burden was shown where government officials "inconsistently applied" specific policies and disregarded relevant findings "without explanation." 456 F.3d 978, 989-91 (9th Cir. 2006).

Seventh Circuit Finds No Violation of Equal Terms

In River of Life Kingdom Ministries v. Village of Hazel Crest, 611 F.3d 367 (7th Cir. 2010), the Seventh Circuit reviewed the equal terms tests proposed by the Third and Eleventh Circuits. The River of Life church wanted to locate in an area that was designated by the Village as a commercial district. Although the area was run down, it was close to a train station and the presence of commuters could have enabled the district to be revitalized as a commercial center. Consequently, the Village amended its zoning ordinance to exclude new noncommercial uses from the area, including not only churches but also community centers, schools, and art galleries. The church sued the village under the equal-terms provision of RLUIPA and moved for a preliminary injunction against the enforcement of the ordinance. The district judge denied the motion and the Seventh Circuit affirmed, finding that the church was unlikely to prevail if the case was fully litigated. However, the existence of an inter-circuit conflict over the proper test for applying the equal-terms provision, combined with uncertainty about the consistency of its own decisions, persuaded the full court to hear the case en banc in order to decide on a test.

In reviewing the equal terms tests proposed by the Third and Eleventh Circuits, the court explained that the Third Circuit's test provides that a regulation will violate the equal-terms provision only if it treats religious assemblies or institutions less favorably than secular assemblies or institutions that are similarly situated as to the regulatory purpose. Lighthouse Institute for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 266 (3d Cir. 2007). The Third Circuit's test requires neutrality between religious and secular in the regulation. The Eleventh Circuit's test, on the other hand, takes a more literal reading of the equal terms provision. Midrash Shephardi, Inc. v. Town of Surfside, 366 F.3d 1214 (11th Cir. 2004). If an ordinance allows any assembly in an area, it must also allow religious assemblies. According to the court, the Eleventh Circuit's approach would give religious land uses favored treatment, which could result in a violation of the Establishment Clause. The court noted that the problem with the Third Circuit's approach is that it makes the meaning of "equal terms" in a federal statute dependent upon the intentions of local government officials.

According to the court, the term "purpose" is subjective and easy to manipulate. "Regulatory criteria," on the other hand, are objective, and it is federal judges who will apply the criteria to resolve the issue. Thus, the Seventh Circuit adopted the Third Circuit's test with a shift of focus from "regulatory purpose" to "accepted zoning criteria." The new Seventh Circuit test provides that **a regulation will violate the equal-terms provision only if it treats religious assemblies or institutions less favorably than secular assemblies or institutions that are similarly situated as to accepted zoning criteria.** Since the Village's ordinance did not violate this test, the Seventh Circuit held that the church was not entitled to a preliminary injunction prohibiting the village from enforcing its ordinance.

RLUIPA and Zoning

In order for a plaintiff to rely upon RLUIPA, a plaintiff must demonstrate that facts of the case trigger one of the bases for jurisdiction provided in the statute. For example, in Prater v. City of Burnside, a church pastor sued the City challenging the City's decision to develop previously dedicated roadway located between two lots owned by church. 289 F.3d 417 (6th Cir. 2002). The United States District Court for the Eastern District of Kentucky entered summary judgment for the City as to the church's § 1983 claim and dismissed the RFRA claim (which it had converted to a RLUIPA claim) for failure to state a cause of action. The Pastor appealed. The Court of Appeals held, inter alia, that there was no jurisdictional basis for the church's claim under RLUIPA. The applicability of RLUIPA turned on whether the defendant City acted pursuant to a zoning or landmarking law when it chose to develop rather than close a certain roadway. Because the City obtained its original interest in the right of way long before the church acquired its adjacent property and later acquired its interest in the realigned roadway upon the rededication of the roadway by the church, the City had the right to choose whether to develop the roadway. The court found that the City's decision regarding the fate of the roadway was not based upon any zoning or landmarking law restricting the development or use of the Church's own private property and found RLUIPA inapplicable to the factual circumstances in the case. Id.

Likewise, in C.L.U.E. v. Covenant Outreach Church, a city's amendment of zoning ordinances to bring restrictions on the location of clubs, lodges, theaters, and similar activities more into line with those imposed on churches, precluded a claim that the ordinance discriminated against churches in violation of RLUIPA. 157 F. Supp.2d 903 (N.D. Ill. 2001).

Ripeness Concerns

A separate jurisdictional inquiry is whether a plaintiff's claims are ripe for judicial intervention. The finality requirement is concerned with whether the initial decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury. The exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate. See Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985). The ripeness inquiry reflects the need to protect agency actions "from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." Abbott Labs. v. Gardner, 387 U.S. 136 (1967). In Abbott Labs., the Supreme Court held that, in determining whether the prudential component of the ripeness doctrine had been met, a court needed to balance two considerations: "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." 387 U.S. at 149.

In Murphy v. Zoning Commission of the Town of New Milford, 148 F. Supp. 2d 173 (D. Conn. 2001), homeowners brought a RLUIPA claim challenging a cease and desist order from holding prayer meetings involving more than 25 persons in their home. The Murphy court found that plaintiffs' claim that the Zoning Commission's actions violated the Religious Land Use and Institutionalized Persons Act ("RLUIPA") was ripe for judicial review. RLUIPA contains no requirement that the local government be given an additional opportunity to comply with the Act by forcing a plaintiff to pursue an appeals process prior to bringing suit under its provisions. 148 F. Supp. 2d at 183. "Rather, plaintiffs must show that defendants imposed or implemented a land use regulation that placed a substantial burden on their religious practices. See 42 U.S.C. §

2000CC." Id. at 184. The Murphy court further noted that "in making this showing for ripeness purposes, plaintiffs must demonstrate that the governmental decision that allegedly violates RLUIP A is a decision that burdens their religious beliefs or practices. On its face, RLUIPA requires only that the 'final decision' made by the governmental agency be to implement or impose a land use regulation against an individual or entity." Id.

Conclusion

RLUIPA may provide a basis for challenging a local government's actions in land use cases where religious activities are impacted. Because of the paucity of precedent in the Eleventh Circuit, local practitioners will have to look to other jurisdictions for guidance. However, as true of most new legislation such as RLUIPA, many issues remain to be addressed and refined and reconciled among the Circuits.

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