

PLANNING FOR RELIGIOUS USES IN AN AGE OF RELIGIOUS DIVERSITY AND LAWSUITS



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OUR PANEL

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THE ROAD TO RLUIPA

- *Sherbert v. Verner*, 374 U.S. 398 (1963)
- *Employment Div. v. Smith*, 494 U.S. 872 (1990)
- *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993)
- *Religious Freedom Restoration Act of 1993*
- *City of Boerne v. Flores*, 521 U.S. 507 (1997)



CONGRESS ENACTS RLUIPA IN 2000



TYPES OF RLUIPA CLAIMS

Substantial Burden

42 U.S.C. § 2000cc(a)

Equal Terms

42 U.S.C. § 2000cc(b)(1)

Nondiscrimination

42 U.S.C. § 2000cc(b)(2)

Exclusions and Limitations

42 U.S.C. § 2000cc(b)(3)



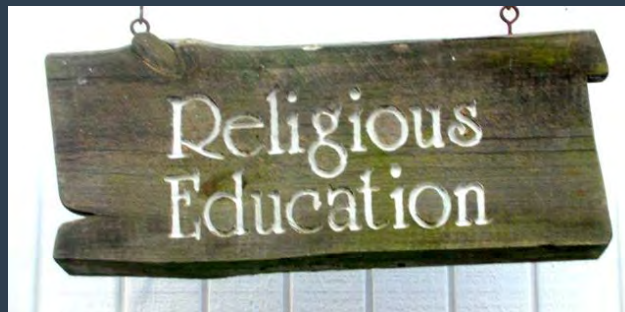
WHAT IS RELIGIOUS EXERCISE?

“The term ‘religious exercise’ includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” *42 U.S.C. Section 2000c-5(7)(A)*

“The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.” *42 U.S.C. Section 2000c-5(7)(B)*

WHAT IS RELIGIOUS EXERCISE?

- “[I]t is not up to legislatures (or to courts for that matter) to say what activities are sufficiently ‘religious.’” *Cohen v. City of Des Plaines* (7th Cir. 1993)
- Religious beliefs must be “sincerely held” to receive protection. *U.S. v. Seeger* (1965).



EXAMPLES OF RELIGIOUS USES

- Homeless shelters, soup kitchens and other social services
- Accessory uses – fellowship halls, parish halls, buildings or rooms used for meetings, religious education, and similar functions
- Religious gatherings in homes
- Construction or expansion of schools, even where the facilities would be used for both secular and religious educational activities

Photo credit: Tony Fischer



WHAT IS NOT RELIGIOUS EXERCISE?

- If “beliefs” are not sincerely held but are instead meant to circumvent zoning regulations. *Church of Universal Love & Music v. Fayette County* (W.D. PA 2008)
- “[I]f a religious school wishes to build a gymnasium to be used exclusively for sporting activities, that kind of expansion would not constitute religious exercise.” *Westchester Day Sch. v. Vill. of Mamaroneck* (2d Cir. 2007)

WHAT IS A “LAND USE REGULATION”

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

24 U.S.C. 2000-5(5)

Photo credit: Daniel Lobo



WHAT IS A “LAND USE REGULATION”?

- Eminent Domain – Maybe, but probably not.
 - St. John’s United Church of Christ v. City of Chicago (7th Cir. 2007); Congregation Adas Yerim v. City of New York (E.D.N.Y. 2009).
- Environmental Review – Possibly.
 - Fortress Bible Church v. Feiner (2d Cir. 2012).
- Building Codes – Probably not.
 - Salman v. City of Phoenix (D. AZ 2015).

WHAT IS A LAND USE REGULATION?

- Deed Restriction

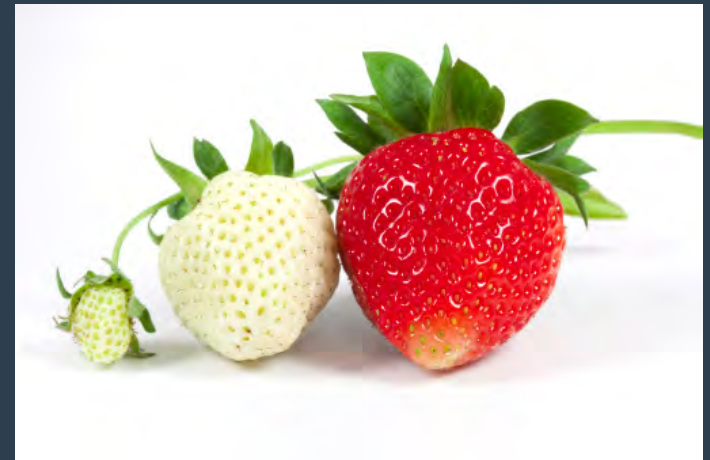
- Yes, Federal Court in West Virginia concludes that a Deed Restriction is land use regulation for purposes of RLUIPA

State Law Restricting Housing for Sex Offenders

Yes, Federal Court in Arkansas concludes that a state law restricting the housing of registered sex offenders is a land use regulations

RIPENESS REQUIREMENT

- Usually, must exhaust variance process and possibly other administrative remedies before suing
- Immediate injury exception



SUBSTANTIAL BURDEN PROVISION

- RLUIPA's substantial burden provision applies only if:
 - the substantial burden is imposed under a program that receives *federal funding*, or;
 - the imposition or removal of the substantial burden affects *interstate commerce*; or,
 - the substantial burden is imposed as part of a regulatory system that makes *individualized assessments* of the proposed uses for the property involved.

WHAT IS A SUBSTANTIAL BURDEN?

Congress intentionally left the term “substantial burden” undefined.

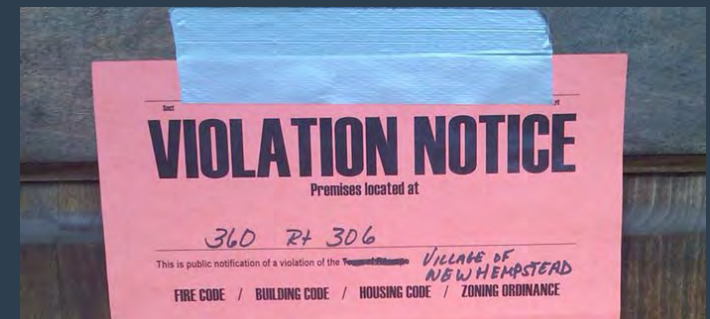
The term ‘substantial burden’ as used in this Act is not intended to be given any broader definition than the Supreme Court’s articulation of the concept of substantial burden or religious exercise.

Joint Statement, 146 Cong. Rec. 16,700 (2000)

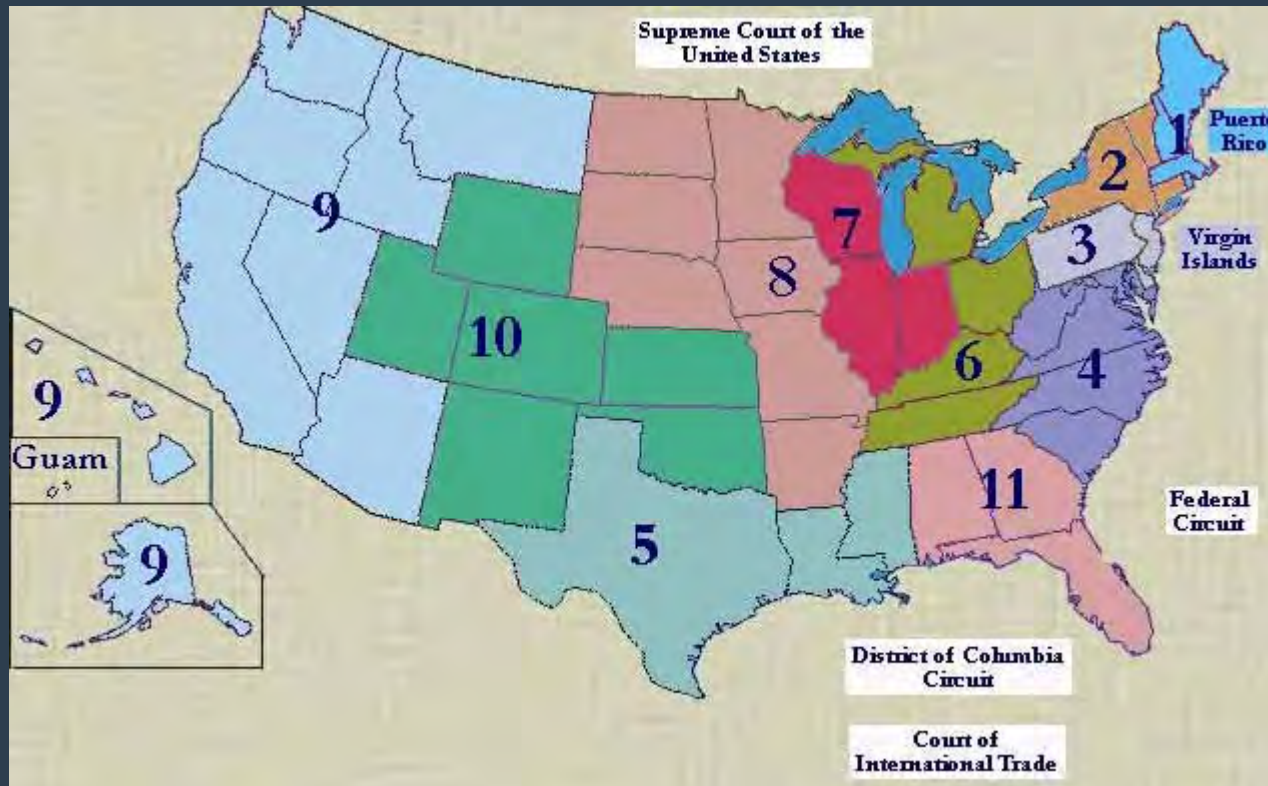


WHERE MIGHT A SUBSTANTIAL BURDEN CLAIM ARISE?

- Complete or partial denial of application for zoning relief (special permit, rezone, site plan, etc.)
- Approval of application for zoning relief subject to conditions
- Order from local official (i.e., cease and desist order, notice of violation, etc.)
- Text of zoning regulations



SUBSTANTIAL BURDEN IN THE CIRCUITS



WHAT IS A SUBSTANTIAL BURDEN?

- A substantial burden may occur with the application of *neutral and generally applicable* regulations. *Chabad Lubavitch v. Borough of Litchfield* (2d Cir., 2014)
- A substantial burden is a regulation that renders religious exercise “*effectively impracticable*” in the jurisdiction. *C.L.U.B. v. Chicago* (7th Cir. 2003)
- A substantial burden is akin to significant pressure that *coerces* adherents to forego religious precepts or *mandates* religious conduct. *Midrash Sephardi v. Surfside* (11th Cir. 2004)

WHAT IS A SUBSTANTIAL BURDEN?

- Imposing *unjustified delay, uncertainty and expense* on a religious group can be a substantial burden. *Sts. Constantine & Helen v. New Berlin* (7th Cir. 2005)
- *Denial* of an approval is *not* a substantial burden where: (a) no “reasonable” expectation of approval and (b) other sites are available. *Vision Church v. Long Grove* (7th Cir. 2006) & *Petra Presbyterian v. Northbrook* (7th Cir. 2007)

Photo Credit: Garry Knight



WHAT IS A SUBSTANTIAL BURDEN?

- Even where a denial is definitive, it may *not* be a substantial burden if the denial will have *only a minimal impact* on the institution's religious exercise.
- BUT, if the denial leaves the institution with *no real alternatives* ... OR, where alternatives would impose *substantial delay, uncertainty and expense*, then the denial is more likely to be a substantial burden. *Westchester Day School v. Mamaroneck* (2d Cir. 2007)

SUBSTANTIAL BURDEN FACTORS

Very Likely Yes

- Nowhere to locate in the jurisdiction.
- Unable to use property for religious purposes.
- Imposing excessive and unjustified delay, uncertainty or expense.
- Religious animus expressed by City Officials.

Very Likely No

- Timely denial that leaves other sites available.
- Denial that has a minimal impact.
- Denial where no reasonable expectation of an approval.
- Personal preference, cost, inconvenience.

COMPELLING INTERESTS

- Compelling interests are interests of the highest order (public health and safety)
- MERE SPECULATION, not compelling; need specific evidence that religious use at issue jeopardizes the municipality's stated interests
- Need consultants' reports, expert testimony, or evidence of harm likely to occur

EXAMPLES OF COMPELLING INTERESTS

- Preserving the rural and rustic single family residential character of a residential zone. *Eagle Cove Camp Conf. Ctr. v. Town of Woodboro* (7th Cir. 2013)
- Preventing crime and ensuring the safety of residential neighborhoods. *Harbor Missionary Church Corp. v. City of San Buenaventura* (9th Cir. 2016)
- Traffic? Possibly. *Westchester Day Sch.* (2d Cir. 2004)

LEAST RESTRICTIVE MEANS

- “The least-restrictive-means standard is exceptionally demanding,’ and it requires the government to ‘sho[w] that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y].” *Holt v. Hobbs* (2015)(quoting *Hobby Lobby*)



LEAST RESTRICTIVE MEANS

- “We do not doubt that cost may be an important factor in the least restrictive means analysis ... Government may need to expend additional funds to accommodate citizens’ religious beliefs.” *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014)



MORE ON LEAST RESTRICTIVE MEANS

- Denial of zoning application without considering any conditions or alternatives fails this test. *Westchester Day Sch.* (2d Cir. 2007)
- “But nothing in the Court’s opinion suggests that prison officials must refute every conceivable option to satisfy RLUIPA’s least restrictive means requirement.” *Holt v. Hobbs* (2015) (Sotomayor, J., concurring) (emphasis added)
- Must strike “delicate balance” between religious practice and governmental interest. *Jova v. Smith* (2d Cir. 2009)

EQUAL TERMS PROVISION

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.

42 U.S.C. Section 2000c-(b)(1).



EQUAL TERMS CLAIMS

- Facial Challenge
 - Challenge to zoning code
- As Applied Challenge
 - Challenge to treatment of religious group compared to secular assembly uses

THE FOUR EQUAL TERMS TESTS

Midrash Sephardi, Inc. v. Town of Surfside (11th Cir. 2004)

“A zoning ordinance that permits any ‘assembly,’ as defined by dictionaries, to locate in a district must permit a church to locate there as well, even if the only secular assemblies permitted are hospital operating theaters, bus terminals, air raid shelters, restaurants that have private dining rooms in which a book club or professional association might meet, and sports stadiums. Thus, private clubs are allowed, so must churches.”

THE FOUR EQUAL TERMS TESTS

Lighthouse Institute for Evangelism, Inc. v. City of Long Branch (3d Cir. 2007).

“A regulation will violate the Equal Terms provision if it treats religious assemblies or institutions worse than secular assemblies that are similarly situated as to the **regulatory purpose**. A secular comparator is needed to demonstrate the impact of the regulatory purpose in the same way that the religious assembly would. Once established, strict liability.”

THE FOUR EQUAL TERMS TESTS

River of Life Kingdom Ministries v. Vill. of Hazel Crest (7th Cir. 2010)

The city violates the Equal Terms provision only when a church is treated on a less than equal basis with a secular comparator, similarly situated with respect to an **accepted zoning criteria**. While still somewhat restrictive in terms of available secular comparators, this test is theoretically more objective since criteria are typically less open to interpretation than an abstract purpose might be.

THE FOUR EQUAL TERMS TESTS

Opulent Life Church v. City of Holly Springs Miss. (5th Cir. 2012)

“The 'less than equal terms' must be measured by the ordinance itself and the criteria by which it treats institutions differently. In accord with this instruction, and building on the similar approaches of our sister circuits, we must determine: (1) the regulatory purpose or zoning criterion behind the regulation at issue, as stated explicitly in the text of the ordinance or regulation; and (2) whether the religious assembly or institution is treated as well as every other nonreligious assembly or institution that is "similarly situated" with respect to the stated purpose or criterion.”

NONDISCRIMINATION PROVISION

“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.”

42 U.S.C. Section 2000cc(b)(2)



NONDISCRIMINATION PROVISION

- Requires evidence of discriminatory intent
 - Series of events leading up to land use decision
 - Context in which decision made
 - Whether decision or process departed from norms
 - Statements by decision-making body
 - State by **community members**
 - Whether discriminatory impact foreseeable
 - Whether less discriminatory avenues available

Chabad Lubavitch of Litchfield County, Inc. v. Borough of Litchfield (2d Cir. 2014)

EXCLUSIONS & LIMITS PROVISION

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.

42 U.S.C. Section 2000cc(b)(3)

U.S. DOJ ENFORCEMENT

- The United States may bring an action for injunctive or declaratory relief to enforce compliance with this chapter. Nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General, the United States, or any agency, officer, or employee of the United States, acting under any law other than this subsection, to institute or intervene in any proceeding.

42 U.S.C. Sec. 2000cc-2(f)

AVOIDING A RLUIPA CLAIM

Must train and educate local officials

Lack of RLUIPA training / knowledge of RLUIPA can support substantial burden claim. *Grace Church of North County v. City of San Diego* (S.D. Cal. 2008)



RLUIPA'S "SAFE HARBOR" PROVISION

A government may avoid the preemptive force of any provision of this chapter by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

42 U.S.C Section 2000c-3(e)

RLUIPA'S "SAFE HARBOR" PROVISION

- Does not apply only to RLUIPA's Substantial Burden provision. *C.L.U.B. v. City of Chicago* (7th Cir. 2003).
- *Church of Our Savior v. City of Jacksonville* (M.D. FL 2014)
- *Tree of Life Christian Schools v. City of Upper Arlington* (6th Cir. 2016)



AVOIDING A RLUIPA CLAIM

- Be your own critic – assess your zoning code
 - How are assembly uses treated?
 - Do distinct standards apply to places of worship?
 - Are religious uses defined?
 - Are some assembly uses treated differently than religious uses (i.e., parking, height, bulk)?
 - Ensure that religious uses permitted within jurisdiction
 - **PLAN FOR RELIGIOUS USES**



AVOIDING A RLUIPA CLAIM

- When an application under your zoning code is filed by a religious organization, perform a RLUIPA analysis
 - Determine from the applicant the reasons for the application (i.e. identify and measure the burdens on religion that will exist)
 - Compare the nature and extent of the application to that of other applicants that could be regarded as comparators
 - Determine the risk of an equal terms claim if application is denied in whole or in part

AVOIDING A RLUIPA CLAIM

- Invite the applicant to propose a less intensive use (can municipal goals be met in a less restrictive manner?)
- Negotiate reasonable conditions
- Negotiate a new location



AVOIDING A RLUIPA CLAIM

Avoid discriminatory comments by agency members.
See Fortress Bible Church v. Feiner (2d Cir. 2012)

Avoid hostile atmosphere (discriminatory comments / animus by public) so public comments not imputed to land use agency. *See Al Falah Center v. Township of Bridgewater* (D. NJ 2013)

DEFENDING A RLUIPA CLAIM

- Invariably Expensive
 - Time and Money – lawyers, coincident environmental proceedings, experts (land use, damages, environmental)
 - Make sure RLUIPA claims are covered under your governmental liability policy
- Probably document intensive
 - Equal terms and substantial burden challenges usually involve extensive documentation
- Cases are fact intensive
- Can be polarizing for community



DEFENDING A RLUIPA CLAIM

- Once brought, rarely settled
 - Legal fees
 - Cases become matters of faith to plaintiffs
- Difficult to defend at trial
 - Most are claimed to a jury
 - God vs. Government bias potential
 - Cross-examination of church officials requires tact not ferocity
 - Jury instructions are confusing
 - Federal judiciary rarely has RLUIPA or land use experience



POSITIVE ECONOMIC VALUE

SPOTLIGHT: What's a Congregation Worth?

Does a congregation's tax-exempt status outweigh the economic value it adds to its community? The University of Pennsylvania's Ram Cnaan has long been searching for a specific answer. In a 1997 study, he found that urban congregations provide, on average, \$140,000 worth of services annually. In 2009, Cnaan (who describes himself as nonreligious) revised his estimate to \$476,663.24. Now he's about to release an even more detailed pilot study focusing on 12 historic Philadelphia congregations, including First Baptist Church, whose annual value to the local economy Cnaan's team places conservatively at \$6,090,032 (nearly ten times its annual budget). Some of the items that contribute:

MEMBERS' EXPENSES IN TOWN \$750

of out of town members x average visit x \$15



CHURCH BUDGET \$520,000
80% of operating budget provides stimulus to local economy



K-12 SCHOOL \$3,489,926
of students x \$9,666

GARDEN/LAWN/CEMETERY \$146
Based on water retained

SUICIDE PREVENTION \$58,800
\$19,600 per person directly saved through clergy intervention

VOLUNTEER HOURS WORKED \$94,770
Weekly hours x 52 weeks x \$20.25

GETTING PEOPLE OFF DRUGS OR ALCOHOL \$78,750
\$15,750 per person helped



HELPING PEOPLE GAIN EMPLOYMENT \$725,000
\$14,500 per arranged employment

REDUCED CRIME RATE -\$64,416
Crimes within tract compared with surrounding tracts x \$2,210



CRIME PREVENTION AND RE-ENTRY \$84,000
of prevented incarceration cases x \$28,000

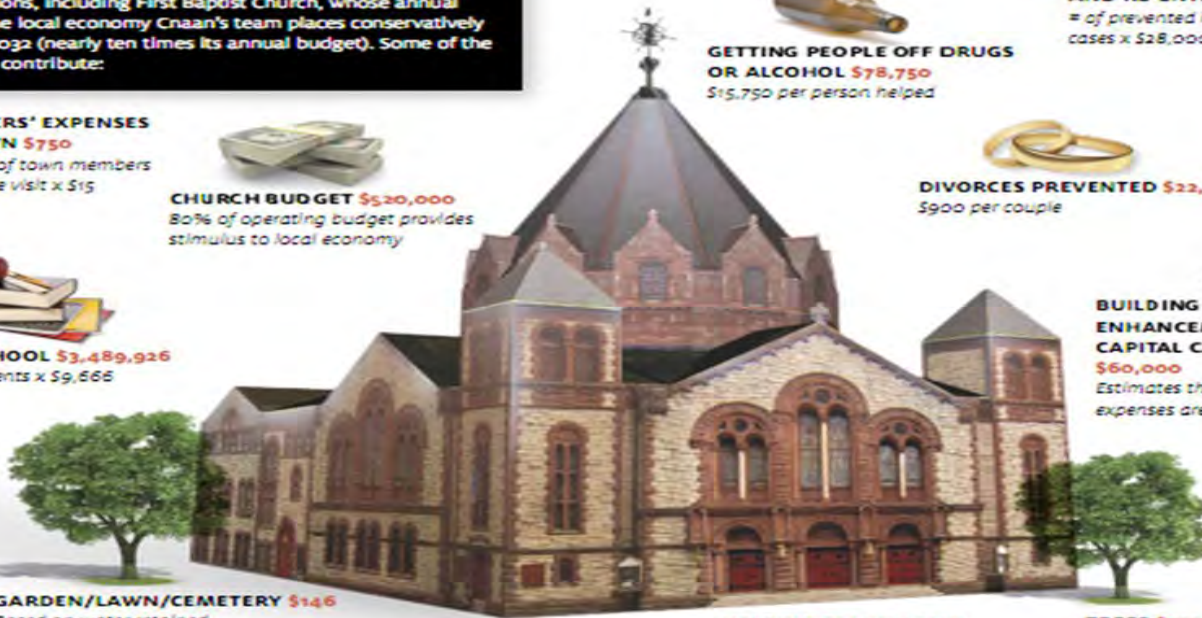


DIVORCES PREVENTED \$22,500
\$900 per couple



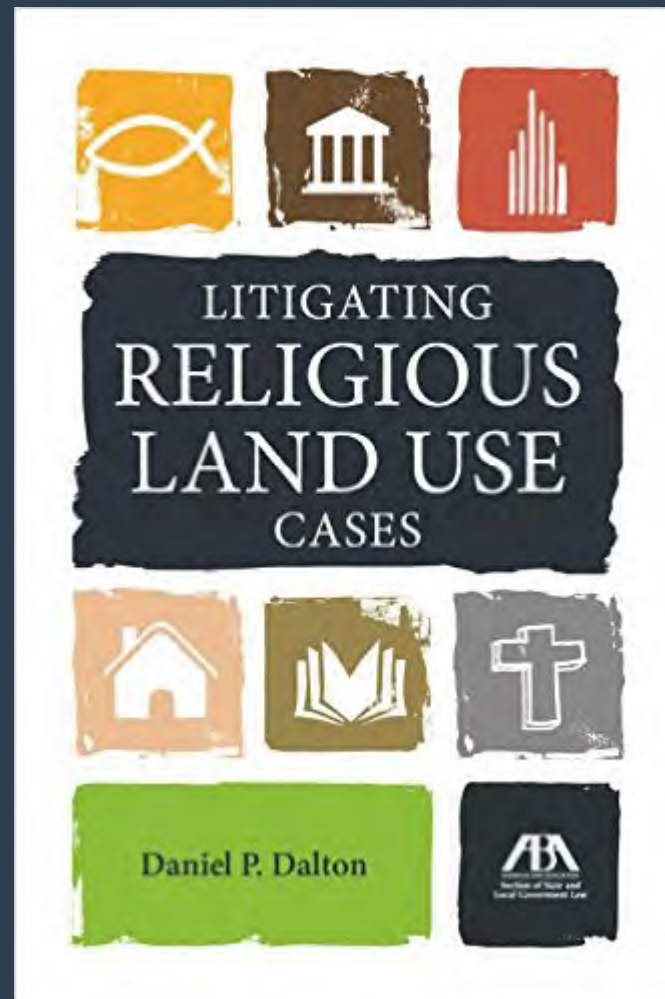
BUILDING ENHANCEMENTS/ CAPITAL CAMPAIGN \$60,000
Estimates that half of expenses are spent locally

TREES \$523
Based on USDA Forest Service values



Dr. Ram Cnaan, Director of the Program for Religion and Social Policy Research at University of Pennsylvania

RESOURCE AVAILABLE ON AMAZON:
[HTTP://AMZN.TO/1KMCSNS](http://amzn.to/1KmcsNS)



SECOND EDITION COMING SOON!

LITIGATING
RELIGIOUS
LAND USE
CASES

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RLUIPA Defense

Religious Land Uses, Zoning, and the Courts



Check Out Our New Look! RLUIPA Defense's Re-Grand Opening!

BY KARLA CHAFFEE, EVAN SEEMAN AND DWIGHT MERRIAM ON FEBRUARY 24, 2015
POSTED IN UNCATEGORIZED

RLUIPA Defense has had a makeover! The authors of RLUIPA Defense will continue to bring you breaking news and analysis of cases and controversies influencing the confluence of religion and land use—but now with a more refined, easy to use format. No need to worry, because our archive of resources, library of cases, and older posts are still easily accessible.

Check out our [new digs](#) & thanks for reading.

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QUESTIONS & ANSWERS

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