

Municipal Review of Religious Projects

Terresa Bakner, Esq.
Robert Rosborough, Esq.

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DISCLAIMER: This is an outline of issues and potential issues and is not intended as legal advice; this presentation is no substitute for legal advice and analysis from experienced counsel for your municipality.

Land Use Review of Religious Projects

- Special care must be taken in reviewing religious projects because of the protected nature of the proposed land use
 - Religious projects are not, however, exempt from regulation or review

Land Use Review of Religious Projects

Normal Land Use Review Regulations Apply to Religious and Non-Religious Projects Alike

- Zoning (Town Law § 261)
- Site Plan Review (Town Law § 274-a)
- Special Use Permit Review (Town Law § 274-b)
- Subdivision Review (Town Law §§ 276-279)
- Use and Area Variances (Town Law § 267-b)
- Building Permit/Certificate of Occupancy Requirements

Land Use Review of Religious Projects

- Beyond Town Law provisions, additional laws and public policy to be familiar with during review
 - Federal Law
 - Religious Land Use and Institutionalized Persons Act of 2000 (42 U.S.C. § 2000cc et seq.)
 - First Amendment (Free Speech, Free Association, Free Exercise)
 - Equal Protection
 - Fair Housing Act
 - New York State Law
 - Precedent holding that religious uses must be accommodated

Land Use Review of Religious Projects

- Religious Land Use and Institutionalized Persons Act of 2000 (42 U.S.C. § 2000cc et seq.) (“RLUIPA”)
 - Enacted to combat “subtle forms of discrimination”, as well as overt discrimination, in land use approvals

Chabad Lubavitch of Litchfield County, Inc. v Litchfield Historic Dist. Com'n, 768 F3d 183, 193 (2d Cir 2014), cert denied 135 S Ct 1853 (2015)

RLUIPA: Purpose

Sponsors' Statements In Support of RLUIPA

- “At the core of religious freedom is the ability for assemblies to gather and worship together. Finding a location to do so, however, can be quite difficult when faced with pervasive land use regulations. As was seen during congressional hearings in both the House and Senate, land use regulations, either by design or neutral application, often prevent religious assemblies and institutions from obtaining access to a place of worship.”

146 Cong. Rec. S6678-02 (daily ed. July 13, 2000) (Statement of Sen. Hatch)

RLUIPA: Purpose

- Congress enacted RLUIPA to address concerns that discrimination may “lurk[] behind . . . vague and universally applicable reasons” municipalities routinely give for land use decisions, such “as traffic, aesthetics, or ‘not consistent with the city's land use plan.’ ”
- Congress identified a “widespread practice of individualized decisions to grant or refuse permission to use property for religious purposes,” and noted individualized assessments both “readily lend themselves to discrimination” and “make it difficult to prove discrimination in any individual case.”

146 Cong. Rec. S7774 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy)

RLUIPA: Applicability

- RLUIPA applies to imposition or implementation of a “land use regulation,” which is defined as:
 - “a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant’s use or development of land.” 42 U.S.C. § 2000cc-5(5).

RLUIPA: Applicability

- Although SEQRA itself is not a zoning law, Second Circuit has held application of the environmental review process in connection with a discretionary land use approval is sufficient for RLUIPA to apply.
 - “[T]o hold that RLUIPA is inapplicable to what amounts to zoning actions taken in the context of a statutorily mandated environmental quality review would allow towns to insulate zoning decisions from RLUIPA review . . . We decline to endorse a process that would allow a town to evade RLUIPA by what essentially amounts to a re-characterization of its zoning decisions.”

Fortress Bible Church v Feiner, 694 F3d 208, 216-218 (2d Cir 2012)

- RLUIPA does not exempt religious projects from compliance with land use regulations
 - “It is important to note that this legislation does not provide a religious assembly with immunity from zoning regulation.”
-Sen. Hatch
- Courts have consistently held that facially neutral zoning ordinances that merely require religious institutions to go through a routine permit or variance application process do not run afoul of RLUIPA

- “[T]o exempt religious institutions from the normal permit/variance process would result in favoring these institutions, something which neither RLUIPA nor the Free Exercise Clause more generally require (and which the Establishment Clause might prohibit).”

Congregation Rabbinical Coll. of Tartikov, Inc. v Vil. of Pomona, No. 07-CV-6304, 2015 WL 5729783, at *54 (SDNY Sept. 29, 2015)

- RLUIPA protects against four different kinds of religious discrimination:
 - 1) Substantial burden on religious exercise
 - 2) Unequal treatment of religious assembly or institution
 - 3) Discrimination in the imposition or implementation of a land use regulation on the basis of religion
 - 4) Exclusion or limitation of religious assemblies, institutions, or structures

- Second Circuit has comprehensively addressed RLUIPA in two main cases
 - Westchester Day School v. Village of Mamaroneck, 504 F3d 338 (2d Cir. 2007)
 - Chabad Lubavitch of Litchfield County, Inc. v Litchfield Historic Dist. Com'n, 768 F3d 183, 193 (2d Cir 2014), cert denied 135 S Ct 1853 (2015)

RLUIPA: Substantial Burden

- Westchester Day School
 - Orthodox Jewish co-educational school with integrated Judaic and general studies had operated for 60 years in the Village
 - School proposed to expand its classroom facilities to “add 12 new classrooms; a learning center; small-group instructional rooms; a multi-purpose room; therapy, counseling, art and music rooms; and computer and science labs,” all of which “were to be used from time to time for religious education and practice”

RLUIPA: Substantial Burden

- School applied to Village ZBA to modify its special use permit to proceed with the expansion
- Village ZBA denied the application in its entirety after public opposition to the project
 - Stated reasons for denial were “the effect the project would have on traffic and concerns with respect to parking and the intensity of use”
- School challenged denial alleging a violation of RLUIPA, among other claims

RLUIPA: Substantial Burden

- Chabad Lubavitch
 - Chabad Lubavitch is a religious organization offering weekly religious and other services to its Orthodox Hasidic parishioners
 - Purchased property in the historic residential district of Litchfield, which contained a Victorian residence built in 1870 and altered to accommodate a commercial establishment, for its religious services

RLUIPA: Substantial Burden

- Chabad applied to Litchfield's Historic District Commission ("HDC") for permission to build a 17,000 square foot addition to the residence, which would include administrative offices, classrooms, a residence for Chabad's rabbi, an indoor swimming pool, and a clock tower featuring the Star of David

RLUIPA: Substantial Burden

- After numerous meetings, and amendments to Chabad's proposal to limit impacts, the HDC denied the application
 - The HDC found that the Victorian residence “serve[d] as one of the ‘last vestiges’ of the Borough's residential district, ‘significant alteration’ of which would destroy the ‘residential character’ of the property's environs”
- Chabad challenged the denial under RLUIPA, among other constitutional claims

RLUIPA: Substantial Burden

- RLUIPA's substantial burden provision prohibits government from implementing a land use regulation, like the special use permit application in Westchester Day School, 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.”

42 U.S.C. § 2000cc(a)(1)

RLUIPA: Substantial Burden

- The substantial burden must be “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.” 42 U.S.C. § 2000cc(a)(2)

RLUIPA: Substantial Burden

- “[A]pplication of a zoning law that permits a governmental entity to consider the applicant’s intended use of a property, applying at least partly subjective criteria on a case-by-case basis, likely would” implicate RLUIPA’s substantial burden provision

Chabad Lubavitch, 768 F3d at 193

- Thus, almost all discretionary land use approvals and the associated SEQRA reviews fall within RLUIPA’s ambit (e.g., site plan approval, subdivision approval, variance applications, etc.)

RLUIPA: Substantial Burden

- The substantial burden must be on religious exercise
 - RLUIPA defines “religious exercise” as “any exercise of religion, whether or not compelled by, or central to, a system of religious belief,” and explicitly includes using, building, or converting real property for religious exercise purposes. 42 U.S.C. § 2000cc–5(7)(A)-(B).
 - Religious exercise is to be construed broadly “to the maximum extent permitted by the terms of this chapter and the Constitution.” Id. § 2000cc-3(g).

RLUIPA: Substantial Burden

- In Westchester Day School, Second Circuit held that because the classrooms would all be used for integrated religious and secular education, the expansion project was religious exercise
 - The Second Circuit declined in 2007, however, to “demarcate the exact line at which a school expansion project comes to implicate RLUIPA. That line exists somewhere between this case, where every classroom being constructed will be used at some time for religious education, and a case like the building of a headmaster's residence, where religious education will not occur in the proposed expansion.” Westchester Day School, 504 F3d at 348.

RLUIPA: Substantial Burden

- If implementation of a land use regulation implicates religious exercise, the analysis turns to whether a substantial burden is imposed.
 - A denial of a religious land use application generally constitutes a substantial burden where it “directly coerces the religious institution to change its behavior.”
Westchester Day School, 504 F3d at 349 (denial of application for expansion coerced school to continue teaching in inadequate facilities, thereby impeding its religious exercise)
 - “[A] burden need not be found insuperable to be held substantial.” Id.

RLUIPA: Substantial Burden

- The courts examine a number of factors:
 - 1) Whether the law is neutral and generally applicable
 - Zoning laws rarely impose a substantial burden, even if the effect is to prevent a religious land use in certain zoning districts
 - 2) Whether the denial was arbitrary and capricious, unlawful, or undertaken in bad faith
 - CPLR Article 78 standard is relevant to analysis (whether land use decision relates to a legitimate zoning purpose and is supported by substantial evidence)
 - “The arbitrary application of laws to religious organizations may reflect bias or discrimination against religion.” Westchester Day School, 504 F3d at 350.

RLUIPA: Substantial Burden

- 3) Whether the denial was conditional; if so, whether the condition was itself a substantial burden
 - Whether the municipal board classified the denial as complete or offered proposed modifications that would lead to approval
 - If there is a reasonable opportunity for the institution to submit a modified application, the denial likely does not constitute a substantial burden on the free exercise of religion
 - Whether cure of any problems noted by the board would impose so great an economic burden as to make amendment of the application unworkable
 - Whether the board's stated willingness to consider a modified proposal was disingenuous
 - E.g, evidence from board members such as comments, e-mails, social media posts, etc. opposing the project

RLUIPA: Substantial Burden

- 4) Whether the institution had ready alternatives to accommodate its religious exercise, and whether the alternatives require substantial delay, uncertainty, and expense
 - When an institution has a ready alternative—even if it is an entirely different plan to meet the same needs—its religious exercise has not been substantially burdened
- 5) Whether the plaintiff reasonably expected it would be permitted to use or expand the property or building for religious exercise

RLUIPA: Substantial Burden

- Westchester Day School
 - Court held that the school had established a substantial burden on religious exercise by denying application to expand, thereby forcing school to remain in inadequate facilities
 - ZBA denied application in its entirety, instead of fashioning appropriate conditions for approval
 - School would have had to submit an entirely new application at great expenses to modify proposal
 - ZBA members were not credible when they testified that they would consider another application
 - School established there was no viable alternatives to facilitate its religious education without expansion

RLUIPA: Substantial Burden

- Chabad Lubavitch
 - Court held that Chabad had raised a question of fact regarding whether a substantial burden was placed on its religious exercise by the denial of the application to alter the Victorian residence and to build the addition
 - Court remanded for consideration of the factors and whether the HDC's conditions—maintaining the original front door with stained glass, eliminating the clocktower, but allowing a finial with the Star of David, and reducing the size of the proposed addition from 17,000 sq. ft. to no more than 2,600 sq. ft.—imposed a substantial burden on Chabad's religious exercise

RLUIPA: Substantial Burden

- If religious institution can establish a substantial burden on its religious exercise, the burden shifts to the municipality to prove:
 - 1) It acted in furtherance of a compelling governmental interest; and
 - Municipality must show a compelling interest in imposing the burden on religious exercise in the particular case at hand, not a compelling interest in general
 - 2) Its action is the least restrictive means of furthering that interest.

42 U.S.C. § 2000cc-2(b)

RLUIPA: Substantial Burden

- Two Recent RLUIPA Substantial Burden Cases:
 - Roman Catholic Diocese of Rockville Centre, N.Y. v. Incorporated Village of Old Westbury, No. 09-cv-5195, 2015 WL 5178126 (EDNY Sept. 3, 2015)
 - Congregation Rabbinical College of Tartikov, Inc. v. Village of Pomona, No. 07-cv-6304, 2015 WL 5729783 (SDNY Sept. 29, 2015)

RLUIPA: Substantial Burden

- Roman Catholic Diocese of Rockville Centre
 - The Diocese applied to develop a cemetery and 10-lot residential subdivision on a 97-acre parcel
 - Special use permit, subdivision approval
 - The Village thereafter adopted a Place of Worship Law, which limited places of worship to certain residential zoning districts with a special use exception permit
 - The Diocese applied for 11 variances from the Law to develop the cemetery
- From May 2005-November 2009, the Village used the SEQRA process review the project and suggest revisions

RLUIPA: Substantial Burden

- In June 2010, the Village approved the project subject to 10 conditions, which included a condition that the Diocese seek renewal of its authorization to develop and operate the cemetery every 5 years, at which time the Village could modify the conditions or deny reauthorization altogether
- The Diocese challenged the conditional approval under RLUIPA as a substantial burden on its religious exercise
 - Arguing that the requirement to renew its special exception permit every five years is a substantial burden because it limits the Diocese's ability to convey a right of burial to deceased parishioners for more than five years, undermining the very purpose of the cemetery, i.e., to provide a permanent burial site for parishioners

RLUIPA: Substantial Burden

- The Court found that the 5 year reauthorization condition, which created a “potential risk that [the Village] will deny or suspend the Diocese's permit in the future,” and other conditions on the approval were sufficient to establish a prima facie case of a substantial burden
- Questions of fact remained as to whether the conditions placed on the approval were supported by compelling interests and were the least restrictive means
 - Court noted that Village’s expressed willingness to grant variances from the conditions of the approval indicated that the conditions are likely not the least restrictive means

RLUIPA: Substantial Burden

Roman Catholic Diocese of Rockville Centre

- Following denial of summary judgment, the parties reached a tentative settlement, with the Village removing the offending conditions from the approval resolution and approving a revised site plan submitted by the Diocese
- The agreement leaves open the question of the Diocese's damages, but provides that any damages will be paid solely from the Village's insurance companies, and not the Village's coffers
 - Darwin Nat. Assur. Co. v Westport Ins. Corp., No. 13-CV-02076, 2015 WL 1475887 (EDNY Mar. 31, 2015) (holding two of the Village's three insurers liable to defend and indemnify)

RLUIPA: Substantial Burden

- Congregation Rabbinical College of Tartikov
 - The Congregation bought a 100-acre parcel to develop a rabbinical college
 - A Village local law, adopted after a predecessor proposed building a Yeshiva, required an educational institution to be accredited in order to be a permitted use in the Village
 - The Congregation asserted that the rabbinical college could not be accredited by the New York State Education Department or any similar accrediting agency
 - The Village also adopted a Dormitory Law, allowing only one dormitory per lot as an accessory use to an educational institution, and that dormitory rooms could not contain separate cooking, dining, or housekeeping facilities

RLUIPA: Substantial Burden

- The Village also adopted a Wetlands Law prohibiting any development within 100 feet of wetlands, and expanding the definition of what constituted wetlands
 - Village was aware that the Congregation's property had wetlands, but did not conduct any studies to delineate where the Village's wetlands were or determine whether additional protection outside of state and federal law was required
- The Congregation commenced a RLUIPA challenge to the Accreditation Law, Dormitory Law, and Wetlands Law

RLUIPA: Substantial Burden

- Court noted multiple examples of potential discriminatory intent in enacting the challenged laws
 - Comments of the Board members:
 - The Mayor stated, “they,” presumably the Orthodox Jews behind the Yeshiva, “are going to come in and we’re going to be caught with our pants down if we don’t move.”
 - Member of public commented had heard that the Congregation’s proposal was for rabbinical students and their families, and sought a way to prevent institutions from being “flooded with family members and children, and all of that sort.” The Mayor responded that the accessory use provision of the Dormitory Law “addresses that to some degree.”
 - Three Trustees indicated in campaign materials that voters needed to “stand up to the threat” that the Congregation posed, further stating “you need to vote for a team that is prepared to stand up to this threat of using the fundamentally unfair RLUIPA statute as a hammer against our village.”

RLUIPA: Substantial Burden

- One Trustee posted a comment on her personal Facebook page noting her disapproval of an all-male gathering of Hasidic/Orthodox Jews. When confronted by the Mayor through an angry text message, the Trustee removed the comment.
- The Congregation was able to obtain the text messages between the Mayor and the Trustee through discovery, and when the Facebook post was destroyed, the Court permitted an adverse inference against the Village as a sanction for spoliation
 - The Court also awarded the Congregation \$43,000 in attorneys' fees as an additional sanction for destroying the evidence

RLUIPA: Substantial Burden

- The Court held that the Congregation has established a prima facie case of a substantial burden because the evidence suggested that the combined effect of the challenged laws was to bar the construction of the rabbinical college
 - Accreditation Law: proposed rabbinical college could not be accredited, which was a requirement to be a permitted use
 - Dormitory Law: prohibition of single-family, two-family and multi-family dwelling units as part of a dormitory, and the prohibition of separate cooking, dining or housekeeping facilities, arguably rendered it impossible for the Congregation to develop the rabbinical college in accord with Jewish law requirements
 - Wetlands Law: minimum lot area requirement for an educational institution of 10-acres makes the Property the only non-government-owned property in the Village on which the Congregation can build the proposed rabbinical college

RLUIPA: Substantial Burden

- Congregation Rabbinical College of Tartikov case is currently scheduled to go to trial on May 8, 2017
 - Even if the Village wins at trial, the costs will be astronomical

RLUIPA: Equal Terms

- RLUIPA's equal terms provision states:

“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. § 2000cc(b)(1).

RLUIPA: Equal Terms

- There are four elements of a RLUIPA equal terms claim:
 - 1) the plaintiff must be a religious institution;
 - 2) subject to a land use regulation;
 - 3) that treats the religious institution on less than equal terms;
 - 4) with a nonreligious institution.

Congregation Rabbinical College of Tartikov, 2015 WL 5729783, at *63

RLUIPA: Equal Terms

- There are three distinct kinds of Equal Terms violations:
 - 1) A statute that facially differentiates between religious and secular assemblies or institutions;
 - 2) A facially neutral statute that is nevertheless “gerrymandered” to place a burden solely on religious, as opposed to secular, assemblies or institutions; and
 - 3) A truly neutral statute that is selectively enforced against religious, as opposed to secular, assemblies or institutions.

Congregation Rabbinical College of Tartikov, 2015 WL 5729783, at *63 (finding a question of fact whether the challenged laws constituted unlawful religious gerrymandering)

RLUIPA: Equal Terms

- Different treatment does not necessarily equate to unequal treatment
 - Roman Catholic Diocese of Rockville Centre: Failure to identify a comparable secular assembly or institution that was treated more favorably than the Diocese was fatal to equal terms claim
- Division exists among the Circuit Courts of Appeals concerning whether the equal terms provision requires a plaintiff to produce evidence of “a ‘similarly situated’ secular comparator to establish a claim and, where such evidence is necessary, on what ground the comparison must be made.”
Chabad Lubavitch, 768 F3d at 196.

RLUIPA: Equal Terms

- Second Circuit has not defined the precise outlines of the comparators required to establish an equal terms claim
 - Court has held that organizations subject to different land-use regimes may well not be sufficiently similar to support a discriminatory-enforcement challenge
Third Church of Christ, Scientist v. City of New York, 626 F.3d 667, 669 (2d Cir. 2010)
 - Minor differences in land use regimes, however, may not defeat a comparison under the equal terms provision in all disputes
Chabad Lubavitch, 768 F3d at 197

RLUIPA: Nondiscrimination

- RLUIPA's nondiscrimination provision states:

“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. § 2000cc(b)(2).

RLUIPA: Nondiscrimination

- Unlike the substantial burden and equal terms provisions, evidence of discriminatory intent is required to establish a claim under RLUIPA's nondiscrimination provision.
 - Both direct evidence and circumstantial evidence will be considered
 - Although comparators may be used to establish selective enforcement of land use laws on the basis of religion, a RLUIPA nondiscrimination claim does not require secular comparators

RLUIPA: Nondiscrimination

- Assessing discriminatory intent under RLUIPA's nondiscrimination provision requires consideration of the following factors:
 - 1) The series of events leading up to a land use decision
 - 2) The context in which the decision was made
 - 3) Whether the decision or decisionmaking process departed from established norms
 - 4) Statements made by the decisionmaking body and community members

RLUIPA: Nondiscrimination

- 5) Reports issued by the decisionmaking body
- 6) Whether a discriminatory impact was foreseeable
- 7) Whether less discriminatory avenues were available

Chabad Lubavitch, 768 F3d at 199

RLUIPA: Exclusion or Unreasonable Limitation

- RLUIPA's Exclusions and Limits provision states:

“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. § 2000cc(b)(3)

RLUIPA: Exclusion or Unreasonable Limitation

- The purpose of RLUIPA's Exclusions and Limits provision "is not to examine the restrictions placed on individual landowners, but to prevent municipalities from broadly limiting where religious entities can locate."

Congregation Rabbinical College of Tartikov, 2015 WL 5729783, at *64 (quotation marks omitted) (finding that the challenged laws arguably exclude a rabbinical college from the Village entirely)

RLUIPA: USDOJ Enforcement

- USDOJ, Civil Rights Division has recently placed primary emphasis on enforcement of RLUIPA
 - U.S. v. City of Port Jervis, NY
 - Filed November 21, 2016 in Southern District of NY
 - U.S. v. City of Sterling Heights, MI
 - Filed December 15, 2016 in Eastern District of Michigan
 - U.S. v. County of Culpepper, VA
 - Filed December 12, 2016 in Western District of Virginia

RLUIPA: USDOJ Enforcement

- U.S. v City of Port Jervis, NY
 - Goodwill Evangelical Presbyterian Church bought property in City's Central Business District ("CBD") after confirming that property could be used as a place of worship
 - Two businesses sought to buy property nearby to open a microbrewery and gastropub
 - City concerned church would restrict service of alcohol under NY's ABC law, so adopted zoning amendment prohibiting places of worship in the CBD and the Service Commercial District ("SCD")
 - DOJ alleges equal terms and substantial burden claims

RLUIPA: USDOJ Enforcement

- City also adopted a zoning amendment to allow microbreweries, distilleries, etc. in the CBD and the SCD, which had not previously been permitted
- The laws prevented the Church from using its property as a place of worship, and led to the rescission of the Church's contract to buy the property
- DOJ alleges equal terms and substantial burden claims against the City

RLUIPA: USDOJ Enforcement

- U.S. v City of Sterling Heights, MI
 - Involved application to build a Shia Mosque within the City to replace an growingly inadequate facility nearby
 - City at first worked with the owner of property to develop acceptable site plan, and City Planner recommended approval of application
 - After vociferous public opposition based upon the religious use, the City denied the application citing height, size of building relative to other uses in district, inadequate parking, lack of harmony with neighborhood
 - DOJ alleges substantial burden and non-discrimination claims

RLUIPA: USDOJ Enforcement

- U.S. v County of Culpepper, VA
 - Islamic Center of Culpeper sought to build a mosque to conduct daily prayer services, including washing of the hands and feet before prayer
 - Soil of property was insufficient for septic system, so ICC applied to the County to be added to the County's pump and haul permit
 - County had never before denied such a permit, but denied ICC's application, effectively precluding development of the mosque
 - DOJ alleges substantial burden and non-discrimination claims

New York State Law

- Although New York does not have a state statutory analogue to RLUIPA, state courts have routinely held that religious land use projects are entitled to special consideration during review
- As the Court of Appeals has emphasized, “[r]eligious structures enjoy a constitutionally protected status which severely curtails the permissible extent of governmental regulation in the name of the police powers.” Matter of Westchester Reform Temple v Brown, 22 NY2d 488, 496 (1968)

New York State Law

- Because religious uses are viewed as inherently beneficial, “considerations which may wholly justify the exclusion of commercial structures from residential areas are inadequate to the task when religious structures are involved.” Westchester Reform Temple, 22 NY2d at 496.
- Greater flexibility is required in evaluating applications for religious uses, and every effort to accommodate such uses must be made
 - “A local zoning board is required to suggest measures to accommodate the proposed religious use while mitigating the adverse effects on the surrounding community to the greatest extent possible.” Matter of Capriola v Wright, 73 AD3d 1043, 1045 (2d Dept 2010) (quotation marks omitted)

New York State Law: Recent Cases

- Recent Cases:
 - Matter of Winterton Properties, LLC v Town of Mamakating Zoning Bd. of Appeals, 132 AD3d 1141 (3d Dept Oct. 22, 2015)
 - Matter of Sullivan v Board of Zoning Appeals of City of Albany, 144 AD3d 1480 (3d Dept Nov. 23, 2016)
 - East End Eruv Association, Inc. v. Town of Southhampton, 2015 WL 4160461 (Sup Ct, Suffolk County June 30, 2015)

New York State Law: Recent Cases

- Winterton Properties, LLC
 - Developer sought to build a mikvah in the Town
 - During site plan approval, the Town Building Inspector determined that the mikvah constituted a “neighborhood place of worship” under zoning code
 - Because “neighborhood place of worship” was only religious use permitted under zoning code, Building Inspector determined, upon legal advice, that to conclude otherwise would exclude a mikvah anywhere in the Town and would impose a substantial burden under RLUIPA

New York State Law: Recent Cases

- After Planning Board granted site plan approval, two residents appealed Building Inspector's interpretation to the Zoning Board of Appeals
- ZBA overturned the Building Inspector's interpretation, and determined that the mikvah was not a "neighborhood place of worship," which was not defined under the zoning code, because it was not a place of communal worship
- Winterton challenged the ZBA's determination, arguing that it unilaterally imposed the requirement of "communal worship" which found no support under the zoning code

New York State Law: Recent Cases

- The Appellate Division annulled the ZBA's interpretation of "neighborhood place of worship" and interpreted the term in accord with its dictionary definition
 - "A building or location set aside in a certain area for any form of religious devotion, ritual or service showing reverence, especially for a divine being or supernatural power."
- The Court rejected the ZBA's imposition of a communal worship requirement not found in the zoning code, noting that any ambiguity in the language of the zoning code must be interpreted in favor of the property owner, especially in cases involving religious land uses

New York State Law: Recent Cases

- Matter of Sullivan
 - Bethany Reformed Church sought to partner with a non-profit to house 14 homeless individuals at its property in City of Albany, which allowed “houses of worship” as of right
 - Church sought interpretation from ZBA, which found “that the proposed use is consistent with . . . [the] mission and actions of a house of worship, which logically includes a structure or part of a structure used for worship or religious ceremonies.”
 - Neighbor challenged the ZBA interpretation, and Supreme Court annulled the determination

New York State Law: Recent Cases

- Third Department reversed, and upheld the ZBA's interpretation
- Court emphasized that a “house of worship” must be defined flexibly in light of the State's policy to permit religious land uses
 - “[S]ervices to the homeless have been judicially recognized as religious conduct, and the concept of acts of charity as an essential part of religious worship is a central tenet of all major religions” (internal quotation marks and citations omitted).
- Thus, Court held that proposed use to house homeless was permitted as a “house of worship”

New York State Law: Recent Cases

- East End Eruv Association
 - EEEA sought to establish an eruv—a virtually invisible unbroken demarcation or delineation of an area which may be established by attachment of wooden or plastic strips, called lechis, to telephone or utility poles—in the Town
 - Jewish law prohibits the carrying or pushing objects from a home out into the public on the Sabbath and Yom Kippur. For certain observant Jews, without an eruv, they are unable to leave their homes on these days to participate in mandatory communal prayers and observances

New York State Law: Recent Cases

- EEEA was unable to obtain license agreements with utility companies because the Town advised that the lechis violated the Town's sign ordinance
 - Building Inspector determined that lechis were signs because they display a message that observant Jews may carry and push objects within its bounds
- EEEA's applications for sign permits from the Town were denied, and EEEA appealed to the ZBA and sought a variance

New York State Law: Recent Cases

- ZBA denied the appeal as untimely, even though Building Inspector's interpretation was never filed, and denied the application for a variance because the EEEA did not demonstrate the necessary hardship for a use variance
 - ZBA did not offer an interpretation of whether the lechis qualified as signs under the sign ordinance
- EEEA challenged the ZBA's determination in state court

New York State Law: Recent Cases

- Supreme Court, Suffolk County annulled the ZBA determination and held that lechis were not a sign because the lechis were virtually indiscernible to the public and thus did not display a message or delineation
- The Court emphasized that the ZBA could not merely deny the application for a religious use unless the use is dangerous or contrary to the public welfare of the community. Instead, the ZBA had an affirmative duty to suggest measures to accommodate the EEEA's religious use
 - Here, the ZBA made no effort to suggest alternative measures to accommodate the EEEA's variance applications

Practical Advice for Planners and Attorneys

- RLUIPA and State Law require flexibility in reviewing applications for religious land uses
 - If the religious uses can be accommodated, without significant additional expense to the religious institution, litigation and potential liability under RLUIPA and state law can be avoided

Practical Advice for Planners and Attorneys

- Counsel municipal board members on the need to base decisions solely on proper zoning and land use considerations, regardless of community pressure or opposition
- Legitimate zoning concerns (e.g., environmental impacts, density, traffic, etc.) may form the basis for proposed modifications to religious land use applications, as long as the conditions do not effectively preclude the application
 - Must be able to demonstrate that all efforts to accommodate the religious use were taken

Practical Advice for Planners and Attorneys

- For controversial applications, ensure that relevant evidence of Board's determination is preserved
 - Advise board members that personal communications, including e-mails and social media posts, are discoverable and evidence of the intent behind a determination

Comments or Questions?

Contact:

Terresa Bakner, Esq. (tbakner@woh.com)

Robert Rosborough, Esq.
(rrosborough@woh.com)

Whiteman Osterman & Hanna LLP
One Commerce Plaza, Suite 1900
Albany, N.Y. 12260
518-487-7600
www.woh.com

DISCLAIMER: This is an outline of issues and potential issues and is not intended as legal advice; this presentation is no substitute for legal advice and analysis from experienced counsel for your municipality.