



## Finding Salvation in Religious Law's Safe Harbor

MUNICIPAL GOVERNMENTS CAN TAKE STEPS TO MITIGATE RLUIPA CLAIMS

By EVAN J. SEEMAN

Local governments have much to fear when faced with a suit under the Religious Land Use and Institutionalized Persons Act (RLUIPA). Defending against RLUIPA claims is costly, often reaching hundreds of thousands, if not millions, of dollars. And then there's the icing on the cake: a defeated government may have to pay the prevailing religious group's legal fees.

A common strategy by plaintiffs in RLUIPA litigation is to run up legal fees to pressure municipalities to agree to unfavorable settlements, lest they litigate the case to completion, lose, and have to pay attorney fees. In Norwalk, lawyers for the Al-Madany Islamic Center, which commenced RLUIPA litigation after the city's zoning commission denied Al-Madany's application for a special use permit to construct a mosque, reportedly billed \$5.5 million in legal work in just two years' time. Norwalk settled the dispute for \$2 million, \$585,000 of which went toward purchasing from Al-Madany the site of the proposed mosque with a promise that the city would help the religious group find another location.

Other municipalities have fared even worse. In 2013, Greenburgh, New York, paid \$6.5 million, with only \$1 million covered by insurance, to settle a long-standing RLUIPA case after the U.S. Court of Appeals for the Second Circuit found it had discriminated against a Christian group's efforts to obtain zoning and environmental approval to build a church and religious school. This past year, Bridgewater, New Jersey, settled a suit brought by a Muslim group that applied for and was denied zoning approval to use a former hotel property as a mosque. After the group obtained a preliminary injunction, the township set-

tled by paying \$5 million for alleged damages, costs, and legal fees and an additional \$2.75 million to purchase an alternative 15-acre site for the group.

To mitigate the risk of similar outcomes, municipalities facing the threat of RLUIPA litigation may benefit from the statute's "safe harbor" provision. This gives municipalities sweeping authority to take corrective action to avoid potential liability:

A government may avoid the pre-emptive 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.

While the provision's plain text appears limited to substantial burden claims—one of four types of claims under the statute—the courts, including the U.S. Court of Appeals for the Seventh Circuit in *CLUB v. City of Chicago*, have found that it applies across the board.

With the threat of costly and protracted litigation to defend RLUIPA claims and the chance that an unsuccessful municipality will also have to pay the prevailing plaintiff's attorney fees, it would appear natural in most cases for municipalities to use the safe harbor provision. Surprisingly, however, there are only a handful of decisions where corrective action has been taken.

One possible explanation for infrequent usage of this provision is that local governments fear that taking corrective action could be deemed an admission of liability under RLUIPA. Most recently, one

federal court, in *Church of Our Savior v. City of Jacksonville*, suggested that, based on the facts before it, this could be so where a plaintiff seeks damages, but not where only injunctive relief (e.g.

zoning approval) is sought. There, Church of Our Savior alleged Jacksonville had violated RLUIPA's equal terms provision because it treated religious uses worse than secular uses in the same zone.

While religious uses were allowed by conditional use permit, certain secular uses (public and private parks, playgrounds and recreational facilities) were allowed as-of-right. Two days before trial, Jacksonville amended its zoning code to reclassify these secular uses as conditional uses. Church of Our Savior argued the amendment was an admission of guilt, but the court observed, an "admission does not give the court jurisdiction to issue an injunction to fix a problem that no longer exists," and rejected the claim as moot.

### Substantial Burden Claims

Plaintiffs suing under RLUIPA sometimes elect not to seek damages to prevent the application of municipalities' insurance policies. In these cases and others where damages are not sought, municipalities should seriously consider using the safe harbor provision to avoid liability. Even where damages are claimed,



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the safe harbor provision could be used to increase chances of successfully defending some RLUIPA claims.

Like the Jacksonville example, municipalities facing equal terms challenges could amend their respective zoning codes to ensure that religious uses and secular assembly uses are treated equally. Amending zoning codes could also be used to defend claims brought under the statute's exclusions and limits provision, which requires that local governments allow, and not unreasonably limit or completely exclude, religious uses from their jurisdictions. Amending zoning codes and maps to plan for and permit religious uses in various zones can help insulate municipalities from these claims.

The safe harbor provision could also be used to defend substantial burden claims, the most frequently brought and litigated RLUIPA claim. A plaintiff asserting this claim alleges that some governmental action has or will substantially burden its religious exercise and there are other less restrictive means available for the government to advance its interests. RLUIPA lawsuits generally arise where a religious group or individual (a) applies for and is denied zoning approval for religious use; (b) applies for and is granted partial approval for religious use; or (c) is ordered to cease using property for religious use.

There are several ways to use the safe harbor provision to defend these claims. After the lawsuit is filed, and assuming that the claim made is at least colorable, municipalities can immediately vacate any zoning decision alleged to impose a substantial burden and order that the zoning agency reconsider the religious group's proposed use. A municipality would have the benefit of having seen the religious group's claims and facts relied on in the complaint, and could then specifically address these issues when reconsidering the proposed use. Applications that had been denied outright or approved in part could now be either approved on a far lesser scale

and subject to restrictive conditions or approved with greater scale and less restrictive conditions, thereby helping the municipality establish that the least restrictive means were, in fact, taken.

If choosing to vacate a zoning decision and conduct a new series of hearings, municipalities should also educate officials about RLUIPA, if they have not already done so, and then explain on the record and in detail any educational efforts undertaken. Having the town attorney at any public hearing to provide real-time counsel to ensure that agency members properly understand RLUIPA is also essential. Taking these steps could help municipalities avoid a fate similar to that of San Diego, which was found to have violated the substantial burden provision based in part on (a) agency members' lack of legal training regarding RLUIPA; (b) the city's failure to educate these members about RLUIPA; and (c) members' mistaken understanding of RLUIPA.

### **Discriminatory Comments**

The safe harbor provision could also be used to address any potentially discriminatory comments made by agency members or other government officials. A recent decision by the Illinois Appellate Court reported that, in one instance, a government official stated to agency members that a rezoning application from an Orthodox Jewish group seemed "un-kosher" and asserted that "parting the Red Sea would be easier" than approving the application.

Trial testimony from agency members that they were not influenced by these inappropriate and offensive comments persuaded the Illinois Appellate Court to reject the RLUIPA challenge. Along the same lines, where any alleged discriminatory statement has been made by an agency member, municipal agencies could and should insist

that the member who made the statement be recused from any further proceedings on an application by the religious person or entity, and pass a resolution stating, or expressly state on the record, that their members were in no way influenced by such comments.

The same should apply when members of the public make discriminatory statements. The U.S. Court of Appeals for the Second Circuit, in *Chabad Lubavitch of Litchfield County v. Borough of Litchfield*, observed in the context of a RLUIPA non-discrimination claim that discriminatory statements made by the public may also support a RLUIPA violation.

In the Norwalk case mentioned earlier, plaintiff Al-Madany included in its complaint discriminatory statements made by the public in the comments section to online articles about the proposed mosque. One comment said: "Yay, just what the USA needs, another house where they teach to kill those that disagree with their ideology." If a RLUIPA complaint alleges inappropriate and offensive statements made by members of the public, municipalities should quickly and resolutely condemn them.

While the above examples could help shield some municipalities from RLUIPA liability, there is no guarantee of success given the shortage of meaningful case law interpreting the safe harbor provision. Based on the cost of defending RLUIPA claims, the possibility of entering an unfavorable settlement, and the risk of litigating, losing, and having to pay attorney fees, municipalities should increasingly explore using the safe harbor provision as a shield in RLUIPA litigation. ■

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