Chapter 34

The Religious Land Use and Institutionalized Persons Act of 2000

34-100 Introduction

The religious liberties protected by the First Amendment (*see section 6-500*) also must be considered in light of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"). RLUIPA has been described as follows:

> As a legislative accommodation of religion, RLUIPA occupies a treacherous narrow zone between the Free Exercise Clause, which seeks to assure that government does not interfere with the exercise of religion, and the Establishment Clause, which prohibits the government from becoming entwined with religion in a manner that would express preference for one religion over another, or religion over irreligion.

Westchester Day School v. Village of Mamaroneck, 386 F.3d 183, 189 (2d Cir. 2004). Another court has observed that "to a significant extent, RLUIPA merely codifies existing Supreme Court precedent." *Roman Catholic Bishop v. City of Springfield*, 760 F. Supp. 2d 172, 192 (D. Mass. 2011). In giving meaning to the terms used within RLUIPA, the Act must be "construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of [the] Act and the Constitution." *42 U.S.C. § 2000cc-3(g).*

This section examines four key provisions of RLUIPA – the prohibition against substantially burdening religious exercise under 42 U.S.C. § 2000cc(a)(1), the equal terms provision under 42 U.S.C. § 2000cc(b)(1), the prohibition against intentional discrimination under 42 U.S.C. § 2000cc(b)(2), and the prohibition against total exclusion and unreasonable limitations under 42 U.S.C. § 2000cc(b)(3). *See chapter 21 for a discussion of the application of RLUIPA to decisions made by an architectural review board as part of review of the design of a structure. See also Virginia Code § 57.2-02* (restating an individual's freedom of religion and prohibiting a locality from unduly burdening that right).

The Four Key Requirements of RLUIPA
• *Substantial burden on religious exercise prohibited*: "No government shall impose or implement a *land use regulation* in a manner that imposes a *substantial burden* on the *religious exercise* of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution – (A) is in furtherance of a *compelling governmental interest*; and (B) is *the least restrictive means* of furthering that compelling governmental interest." *42 U.S.C. § 2000cc(a)(1)* (italics added).
• *Treatment on equal terms required*: "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)* (italics added).
• *Discrimination prohibited*: "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)* (italics added).
• *Total exclusion and unreasonable limitations prohibited*: "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)* (italics added).

Note that the substantial burden provision protects individuals as well as religious assemblies and institutions. The equal terms and non-discrimination provisions protect only religious assemblies and institutions. The total exclusion provision applies only to religious assemblies, and the unreasonable limitations provision protects religious assemblies, institutions and structures.

In considering RLUIPA, the reader should be mindful of several things. First, RLUIPA has generated a lot of litigation and the body of law is constantly evolving and being refined. Second, the Fourth Circuit Court of Appeals,

whose jurisdiction includes Virginia, has had very few opportunities to consider the land use component of RLUIPA. Third, the other federal circuit courts of appeals are not uniform in how they have applied RLUIPA. Fourth, RLUIPA cases are fact-intensive, so the pleadings and the evidence in each case are critical to the outcome.

34-200 RLUIPA prohibits a locality from imposing or implementing a land use regulation that imposes a substantial burden on religious exercise, with very limited exceptions

A key provision of RLUIPA states:

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

42 U.S.C. § 2000cc(a)(1). The five key elements of this provision, identified in the italics above, are addressed in sections 34-210 through 34-250.

34-210 Whether a locality made an *individualized assessment* of the proposed uses of property under its land use regulations

RLUIPA applies to land use regulations, which are defined to mean "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).* The claimant must have an ownership, leasehold, easement, servitude, or other property interest in the land or a contract or option to acquire such an interest. *42 U.S.C. § 2000cc-5(5).*

A locality may not impose a substantial burden on a religious exercise when a locality makes an *individualized assessment* of the proposed uses for the property involved. *42 U.S.C. § 2000cc(a)(2)(C)* (though not discussed here, under 42 U.S.C. § 2000cc(a)(2)(B), the Act is also triggered when a regulation impacts interstate commerce).

Zoning ordinances "by their nature impose individual assessment regimes" because their application to particular parcels "necessarily involve[s] case-by-case evaluations of the propriety of proposed activity against extant land use regulations." *Freedom Baptist Church v. Township of Middletown*, 204 F. Supp. 2d 857, 868 (E.D. Penn. 2002). Thus, applications for rezonings affecting a single or a limited number of parcels, special use permits, site plans, variances, certificates of appropriateness, waivers and modifications are all types of *individualized assessments* that may trigger RLUIPA. *See, e.g., Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895 (7th Cir. 2005) (rezoning); *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F. Supp. 2d 961 (N.D. Ill. 2003) (ordinance amendment); *Westchester Day School v. Village of Mamaroneck*, 386 F.3d 183 (2d Cir. 2004) (special use permit); *Guru Nanak Sikh Society v. County of Sutter*, 456 F.3d 978 (9th Cir. 2006) (conditional use permit); *Konikov v. Orange County*, 410 F.3d 1317 (11th Cir. 2005) (special exception); *Episcopal Student Foundation v. City of Ann Arbor*, 341 F. Supp. 2d 691 (E.D. Mich. 2004) (landmark demolition permit).

RLUIPA does not apply to eminent domain. *Faith Temple Church v. Town of Brighton*, 405 F. Supp. 2d 250 (W.D. N.Y. 2005) (eminent domain is "conspicuously absent" from RLUIPA's definition of land use regulation); s*ee also St. John's United Church of Christ v. City of Chicago*, 401 F. Supp. 2d 887 (N.D. Ill. 2005). RLUIPA also does not apply to other governmental decisions that only may indirectly affect land use. *See Prater v. City of Burnside*, 289 F.3d 417 (6th Cir. 2002) (city decision not to close a segment of a public street to allow a church to make private use of it was not subject to RLUIPA because the decision not to close the road was not a zoning or landmarking law).

34-220 Whether the affected acts are a *religious exercise*

The question of whether the affected acts are a religious exercise requires one to first determine whether the person or group is engaged in a religion, followed by determining whether the acts are an exercise of that religion.

Whether one is engaged in a religion, as opposed to a "way of life," is guided by considerations that "present a most delicate question." *Wisconsin v. Yoder*, 406 U.S. 205, 215-216, 92 S.Ct. 1526, 1533 (1972). The courts will examine whether the beliefs more closely resemble personal and philosophical choices consistent with a way of life, or whether they are based on deep religious convictions shared by an organized group based upon some organizing principle or authority. Thus, in *Moore-King v. County of Chesterfield*, 708 F.3d 560, 571 (4th Cir. 2013), the Fourth Circuit Court of Appeals concluded that a fortune teller was not practicing a religion and was not entitled to Constitutional protections where she had declared on her website that she "pretty much goes with [her] inner flow" rather than follow any particular religion or organized recognized faith. The court concluded that her beliefs more closely resembled personal and philosophical choices consistent with a way of life, not deep religious convictions shared by an organized group that were based upon some organizing principle or authority other than herself.

When assessing whether an action qualifies as a *religious* exercise, courts may not judge the significance of the particular belief or practice in question. *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1314 (10th Cir. 2010). Additionally, RLUIPA does not require that an activity be "fundamental" to the particular religion to be considered a religious exercise. *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 663 (10th Cir. 2006). A religious exercise need not be mandatory in order to be protected under RLUIPA. *Kikemura v. Hurley*, 242 F.3d 950, 960 (10th Cir. 2001). "It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretation of those creeds." *Hernandez v. Commissioner*, 490 U.S. 680, 699, 109 S. Ct. 2136, 2148 (1989) (pre-RLUIPA). However, the belief applicable to the religious exercise must be "sincerely held." *Werner v McCotter,* 49 F.3d 1476, 1479 *fn.* 1 (10th Cir. 1995) *citing Wisconsin v Yoder,* 406 U.S. 205, 92 S. Ct. 1526 (1972).

Religious *exercise* includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *42 U.S.C. § 2000cc-5(7).* 42 U.S.C. § 2000cc-5(7) defines the term to mean "[t]he 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." Certainly, religious *exercise* is not confined to religious worship, since many religions offer services beyond traditional worship as part of their religious offerings. *Episcopal Student Foundation v. City of Ann Arbor*, 341 F. Supp. 2d 691, 701 (E.D. Mich. 2004).

However, Congress never intended for every activity carried out by a religious institution or individual to be considered *religious exercise*:

> In many cases, real property is used by religious institutions for purposes that are comparable to those carried out by other institutions. While recognizing that these activities or facilities may be owned, sponsored or operated by a religious institution, or may permit a religious institution to obtain additional funds to further its religious activities, this alone does not automatically bring these activities or facilities within [RLUIPA's] definition of 'religious exercise.' For example, a burden on a commercial building, which is connected to religious exercise primarily by the fact that the proceeds from the building's operation would be used to support religious exercise, is not a substantial burden on 'religious exercise'.

146 Cong. Rec. at S 7776.

Whether a use falls within the meaning of *religious exercise* under RLUIPA will depend on the facts of the particular case. Following is a sampling of cases where the courts considered whether various activities were religious exercise:

Is it a religious exercise?	
The spiritual	
Religious exercise	**Not religious exercise**
The church of Wicca, which adheres to a fairly complex set of doctrines relating to the spiritual aspect of the Wiccans' lives, many of which parallel those of recognized religions, is religious exercise. *Dettmer v. Landon*, 799 F.2d 929, 931-932 (4th Cir. 1986).	A doctrine described as a "way of life" is not religious exercise *Harrison v. Watts*, 609 F. Supp. 2d 561 (E.D. Va. 2009).

Is it a religious exercise?	
The spiritual	
Religious exercise	**Not religious exercise**
Rabbi who held meetings at his house in a residential zoning district on Friday nights and Saturday mornings, in addition to other meetings for Torah study and celebrating holidays, was engaged in religious exercise. *Konikov v. Orange County*, 410 F. 3d 1317, 1323 (11th Cir. 2005). Weekly prayer meetings at a residence is religious exercise. *Murphy v. Zoning Commission of Town of New Milford*, 148 F. Supp. 2d 173 (D. Conn. 2001).	Fortune telling, which was based upon the appellant's set of beliefs, was not religious exercise because her beliefs more closely resembled personal and philosophical choices consistent with a way of life, not deep religious convictions shared by an organized group that were based upon some organizing principle or authority other than herself. *Moore-King v. County of Chesterfield*, 708 F.3d 560, 571 (4th Cir. 2013) (appellant herself declared on her website that she "pretty much goes with [her] inner flow" rather than follow any particular religion or organized recognized faith).
The physical	
Religious exercise	**Not religious exercise**
The removal of religious artifacts such as crosses and stained glass windows depicting scenes in the life of Jesus Christ, a process known as deconsecration, before the sale or demolition of a church, is religious exercise. *Roman Catholic Bishop of Springfield v. City of Springfield*, 760 F. Supp. 2d 172 (D. Mass. 2011).	The development and construction of an apartment complex is not a religious exercise even though it will be owned by a religious institution. *Greater Bible Way Temple of Jackson v. City of Jackson*, 733 N.W.2d 734 (Mich. 2007).
The establishment of a parish center is religious exercise because it is a "reasonable extension" of church's religious use of its property. *Mintz v. Roman Catholic Bishop of Springfield*, 424 F. Supp. 2d 309 (D. Mass. 2006).	City's delay in issuing demolition permit, which in turn delayed institution's ability to sell its property in order to fund its religious mission, was not religious exercise. *California-Nevada Annual Conference of the Methodist Church v. City and County of San Francisco*, ___ F. Supp. 3d ___ N.D. Cal. 2014).
The activities	
Religious exercise	**Not Religious Exercise**
Activities such as community outreach, social events, including a concert series, feeding members and nonmembers of the congregation, and providing a student lounge and meditation room may fall within religious exercise. *Episcopal Student Foundation v. City of Ann Arbor*, 341 F. Supp. 2d 691, 695 (E.D. Mich. 2004) (affidavit stated that the plaintiff's religious mission and beliefs included "providing a spiritual community for its members, creating a progressive and creative worship experience for its members, offering meditation, prayer and study groups for its members, and continually working to welcome new members into the congregation").	A day school for the disabled that would be owned and operated by a third party for-profit business on church property was not religious exercise, even though the church asserted that having the school was an exercise of its "sincere religious belief" to minister to emotionally and mentally disabled children, because the church failed to allege sufficient facts to show that the curriculum and administration of the day school was anything other than secular. *Calvary Christian Center v. City of Fredericksburg*, 2011 U.S. Dist. 77489 (E.D. Va. 2011) (adding: "It is difficult to find that an organization can declare a secular activity to be part of its religious doctrine, and then rent space to a for-profit business to conduct that activity").
A community center consisting of a single building, though "not a church as such," which mainly consisted of recreational and living facilities, and also had space for religious services, was religious exercise because "there is no doubt that even the recreational and other nonreligious services provided at the community center are integral to the World Outreach's religious mission." *World Outreach Conference Center v. City of Chicago*, 591 F.3d 531, 535 (7th Cir. 2009); *see World Outreach Conference Center v. City of Chicago*, 787 F.3d 839 (7th Cir. 2015) for later proceedings in this case.	"*[A]ny* church activity that furthers [the church's] worship program" is not religious exercise. *North Pacific Union Conference Association of the Seventh-Day Adventists v. Clark County*, 118 Wash.App. 22, 31 (2003) (the court rejected the church's definition of *worship*, saying that such a broad definition would allow the church to build a school, hospital, or retail store in the agricultural zoning district in which the church owned land).
Providing shelter to the homeless was an essential religious exercise to the members of the church. *Family Life Church v. City of Elgin*, 561 F. Supp. 2d 978 (N.D. Ill. 2008).	The lease of church property to a third party to hold catered social events is not religious exercise. *Third Church of Christ v. City of New York*, 617 F. Supp. 2d 201, 209 (S.D. N.Y. 2008) *affirmed on other grounds* at 626 F. 3d. 667 (2d 2010) (but holding that the city's actions violated the

Is it a religious exercise?	
The spiritual	
Religious exercise	**Not religious exercise**
Allowing the homeless to sleep in designated outdoor areas on church property was religious exercise where the church explained that its outdoor sanctuary formed an integral part of its religious mission and that the police's removal of the homeless interfered with the church's ministry and homeless outreach program. *Fifth Avenue Presbyterian Church v. City of New York*, 293 F.3d 570 (2d Cir. 2002) (church representative stated that the church was "commanded by scripture to care for the least, the lost, and the lonely of this world" and in ministering to the homeless, the church was "giving the love of God . . . .").	equal terms provision of RLUIPA, discussed in section 34-300 below).

The institution or individual claiming that a particular belief or practice is protected religious exercise has "the burden of demonstrating the honesty and accuracy of his contention that the religious practice at issue is important to the free exercise of his religion." *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004).

34-230 Whether a zoning regulation or its implementation imposes a *substantial burden* on religious exercise

When dealing with concepts such as whether a land use regulation or decision *substantially burdens* religious exercise, the standard is more abstract than concrete. The several federal courts of appeal that have addressed whether a land use regulation or decision imposes a *substantial burden* on religious exercise have not adopted a uniform standard.[1]

Whether a particular local land use regulation or decision imposes a substantial burden on religious exercise may be the most difficult element of 42 U.S.C. § 2000cc(a)(1). The legislative history of RLUIPA indicates that the term was supposed to have the same meaning given to it by the courts in Free Exercise Clause cases. The Fourth Circuit Court of Appeals, whose jurisdiction includes Virginia, has held that, in order to state a substantial burden claim under RLUIPA, a plaintiff "must show that a government's imposition of a regulation regarding land use, or application of such a regulation, caused a hardship that substantially affected the plaintiff's right to religious exercise." *Andon, LLC v. City of Newport News*, 813 F.3d 510, 514 (4th Cir. 2016).

A substantial burden on religious exercise will be found to exist under RLUIPA when a "government regulation puts substantial pressure on [a religious institution] to modify its behavior." *Bethel World Outreach Ministries v. Montgomery County Council*, 706 F.3d 548 (4th Cir. 2013) (in reversing the trial court's grant of summary judgment for the county, the court found that the church had proffered considerable evidence that its current facilities in other locations inadequately served its needs, there was a material question of fact that the county substantially burdened religious exercise where the church sought to relocate its facilities to land it owned within an agricultural reserve which, at the time the church acquired the land, the county's zoning regulations allowed institutional uses such as churches but, when the church's applications were pending, the zoning regulations were amended to prohibit any institutional uses; discussed in more depth on pages 34-6 and 34-7). This standard closely follows the standards adopted by other federal appellate courts in land use cases under RLUIPA. *See, e.g., Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) ("significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly"); *Vision Church, United Methodist v. Village of Long Grove*, 468 F.3d 975 (7th Cir. 2006); as explained in *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338, 349 (2d Cir. 2007) (when

[1]In the context of whether certain regulations adopted to implement the Affordable Care Act imposed a substantial burden on religious beliefs, the United States Supreme Court has said that "it is not for us to say that their religious beliefs are mistaken or insubstantial. Instead, our 'narrow function ... in this context is to determine' whether the line drawn reflects 'an honest conviction,' [citation omitted], and there is no dispute that it does." *Burwell v. Hobby Lobby Stores, Inc.*, ___ U.S. ___, 134 S. Ct. 2751, 2779 (2014).

speaking of substantial burden, "courts appropriately speak of government action that directly *coerces* the religious institution to change its behavior, rather than government action that forces the religious entity to choose between religious precepts and government benefits").

"Any land-use regulation that a [religious institution] would like not to have to comply with imposes a 'burden' on it, and so the adjective 'substantial' must be taken seriously lest RLUIPA be interpreted to grant [religious] institutions a blanket immunity from land use regulation." *World Outreach Conference Center v. City of Chicago*, 591 F.3d 531, 539 (7th Cir. 2009); *see also Living Water Church of God v. Charter Township of Meridian*, 2007 U.S. App. LEXIS 28825, 2007 WL 4322157 (6th Cir. 2007) (unpublished) ("If the term 'substantial burden' is not to be read out of the statute, RLUIPA cannot stand for the proposition that a construction plan is immune from a town's zoning ordinance simply because the institution undertaking the construction pursues a religious mission"). Thus, the courts have rejected any definition that finds a substantial burden arising from the mere existence of *any* obstacle to the religious institution's desired use. *Vision Church*; *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752 (7th Cir. 2003) (rejecting an interpretation where the slightest obstacle to religious exercise incidental to the regulation of land use – however minor the burden – could then constitute a substantial burden.

Substantiality "is a relative term – whether a given burden is substantial depends on its magnitude in relation to the needs and resources of the religious organization in question." *World Outreach Conference Center*, 591 F. 3d at 539. In other words, whether a burden is substantial in any given case cannot be determined by any bright-line legal test but, instead, must be determined by the facts in the particular case. A burden need not be found to be insuperable to be held substantial. *Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 901 (7th Cir. 2005).

Borrowing from *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338, 349-352 (2d Cir. 2007), the court in *Wesleyan Methodist Church of Canisteo v. Village of Canisteo*, 792 F. Supp. 2d 667 (W.D. N.Y. 2011) summarized several factors to consider when determining whether a zoning decision imposes a substantial burden on religious exercise:

Relevant Factors When Considering Whether a Zoning Decision Imposes a Substantial Burden
• A denial that is final or absolute is more likely to impose a substantial burden than a conditional denial.
• A conditional denial may impose a substantial burden if the condition itself is a burden on free exercise, the required modifications are economically unfeasible, or the locality's stated willingness to consider a modified plan is disingenuous.
• Even a final denial will not impose a substantial burden if it will have a minimal impact on the institution's religious exercise.
• A finding of substantial burden is less likely when the religious institution has other alternatives available to it, such as where it can readily build somewhere else.
• Generally applicable burdens, neutrally imposed, are not substantial.
• A substantial burden may exist where land use restrictions are imposed on the religious institution arbitrarily, capriciously, or unlawfully since the arbitrary application of laws to religious institutions may reflect bias or discrimination against religion.

These factors run through the RLUIPA case law, and the cases can be distilled into the following themes, which are further addressed in sections 34-231, 34-232 and 34-233:

When a Substantial Burden is Likely or Unlikely to be Found	
Likely to be Found	**Unlikely to be Found**
• When the locality has applied its zoning regulations in an arbitrary, capricious or otherwise unlawful way, such as when it changes the rules in the middle of the process because of religion (*e.g.*, what was a by right use now requires a special use permit), the decision is not based on substantial evidence, there are endless delays in the process, the policies and standards are vague and subjective or are inconsistently applied, unreasonable limitations are imposed that eliminate viable alternatives, legal errors are made to thwart the process, or ignorance of RLUIPA by decision-makers; the courts are quite adept at identifying these machinations.	• When the religious institution's sole claim is that complying with a locality's procedural or substantive requirements, and the related costs, delay and uncertainty in the process, imposes a substantial burden on religious exercise.

When a Substantial Burden is Likely or Unlikely to be Found	
Likely to be Found	**Unlikely to be Found**
• When the locality has applied its zoning regulations in a neutral way (*i.e.*, it has conducted a straightforward analysis of the impacts of the applications and its decision is based solely on the applicable standards and not on the fact that the applicant is a religious institution) and has denied the application, but the religious institution has no other alternatives within the locality and the decision of the locality is final.	• When the locality has applied its zoning regulations in a neutral way (*i.e.*, it has conducted a straightforward analysis of the impacts of the applications and its decision is based solely on the applicable standards and not on the fact that the applicant is a religious institution) and has denied the application, but the religious institution has other alternatives within the locality.
• When the locality changes its zoning regulations from allowing the religious institutional use to disallowing it, after the religious institution sought to establish its building or use.	• When the locality's zoning regulations do not allow the religious institutional use, the religious institutions seeks to establish the use by some kind of discretionary approval, which is disapproved for legitimate land use reasons.

Bethel World Outreach, *supra*, warrants additional discussion since it establishes the controlling law on these issues in Virginia. In that case, the church bought a 119 acre parcel within Montgomery County, Maryland's "rural density transfer zone" in its agricultural reserve in 2004 hoping to build a 3000-seat church. At the time, the church membership was large enough that it had to hold multiple services in two different locations, and the church was unable to provide a number of programs to its members because of the size of its membership. Lands in the rural density transfer zone were subject to easements that restricted residential development but, in 2004, did not restrict private institutional uses. In 2005, the county's governing body denied the church's request for public water and sewer and in 2006, it denied another church's request for approval of a private well and sewer system large enough to handle its proposed 1500 seat church in the rural density transfer zone. The governing body also amended its water and sewer plan to restrict the size of private well and sewer systems in the rural density transfer zone. In 2007, the church downsized its plans and applied for approval of an 800-seat church and sought approval of a private well and sewer system that satisfied the county's new private well and sewer system restrictions. While that application was pending, the county amended its zoning regulations to prohibit private institutional uses in the rural density transfer zone. The church sued the county, alleging violations of RLUIPA and the United States Constitution's Free Exercise of Religion (1st Amendment) and Equal Protection (14th Amendment) clauses. The trial court ruled in favor of the county on all claims and the church appealed.

As noted at the beginning of this section, the court adopted the following standard for determining whether a locality had substantially burdened religious exercise in the context of a land use matter: a substantial burden on religious exercise will be found to exist under RLUIPA when a "government regulation puts substantial pressure on [a religious institution] to modify its behavior." In reversing the trial court's grant of summary judgment in favor of the county on this issue, the court held that the church had presented sufficient evidence of material facts that the county had substantially burdened the church's religious exercise under that standard. There are four additional significant points in the court's analysis: (1) at the time the church bought its land, the zoning regulations allowed religious institutions; this key fact distinguished the church's situation from those in other cases where a religious institution bought land in a zoning district where religious institutions were not allowed and were later denied a required discretionary approval; (2) when the county amended its zoning regulations, the amendments imposed a blanket prohibition on all types of private institutions, rather than provide for a case-by-case determination as to whether a particular institution should be allowed; (3) a religious institution is not required to produce evidence showing that the land use regulation targeted it; and (4) the substantial burden provision of RLUIPA protects against both non-discriminatory and discriminatory conduct by the locality.

34-231 The neutral application of generally applicable and legitimate land use regulations will *usually* not be found to impose a substantial burden on religious exercise

The courts have cautioned against relying solely on the effect of a land use regulation or decision on the religious institution or its members as the basis for determining whether the locality has imposed a substantial

burden on religious exercise. Free exercise jurisprudence cautions that "an effect focused analysis may run up against the reality that 'the freedom asserted by [some may] bring them into collision with [the] rights asserted by' others and that 'it is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin." *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338, 349-350 (2d Cir. 2007), quoting *Lyng v. Nw. Indian Cemetery Protective Association*, 485 U.S. 439, 108 S. Ct. 1319 (1988).

Thus, under both the Free Exercise Clause and RLUIPA, a number of courts have held that land use regulations and decisions do not impose a substantial burden on religious exercise where they are "neutral and traceable to municipal land planning goals" and where there is no evidence that governmental actions were taken "because [the applicant] is a religious institution." *Westchester Day School*, 504 F.3d at 350, quoting *Vision Church, United Methodist v. Village of Long Grove*, 468 F.3d 975 (7th Cir. 2006); *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) ("costs, procedural requirements, and inherent political aspects" of the application process which are "incidental to any high-density urban land use" are not sufficient to establish a substantial burden); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227, *fn.* 11 (11th Cir. 2004) ("Reasonable 'run of the mill' zoning considerations do not constitute substantial burdens").

In *Andon, LLC v. City of Newport News*, 813 F.3d 510 (4th Cir. 2016), the plaintiffs claimed that the city violated RLUIPA when its board of zoning appeals denied a variance from a setback regulation that would have allowed a commercially zoned property to be used for a community facility (*e.g.*, a place of worship). Before the variance application was filed, the congregation was aware of the need for the variance but nonetheless entered into a lease agreement with the landowner, which was contingent upon the landowner obtaining the variance. The plaintiffs alleged that the board of zoning appeals' denial of th

e variance caused delay in obtaining a "viable worship location" and uncertainty as to whether the congregation would be able to "go forward with the lease of the property." An affidavit attached to the complaint stated that because of size, location, or price, an alternative location could not be found. The trial court dismissed the complaint, concluding that the plaintiffs had failed to allege a violation of RLUIPA, and the plaintiffs appealed.

The Fourth Circuit Court of Appeals affirmed, concluding that the board of zoning appeals' denial of the variance did not substantially burden religious exercise. Significant to the court was the fact that the plaintiffs proceeded with knowledge of the need for the variance. Therefore, "the alleged burdens they sustained were not imposed by the [board of zoning appeals'] action denying the variance, but were self-imposed hardships." *Andon*, 813 F.3d at 515. This, the court said, "generally will not support a substantial burden claim under RLUIPA because the hardship was not imposed by governmental action altering a legitimate, pre-existing expectation that a property could be obtained for a particular land use." *Andon, supra.*

A religious institution's obligation to comply with a locality's zoning regulations is consistent with RLUIPA's legislative history:

> This Act does not provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations, where available without discrimination or unfair delay.

146 Cong. Rec. S7774-01, S7776 (2000) (Joint Statement of Sens. Hatch and Kennedy); *Bethel World Outreach Ministries v. Montgomery County Council*, 706 F.3d 548, fn 4 (4th Cir. 2013) ("Certainly, Congress did not intend to permit religious organizations to exempt themselves from neutral zoning provisions"). The court in *Roman Catholic Bishop of Springfield v. City of Springfield*, 760 F. Supp. 2d 172, 187 (D. Mass. 2011) said:

> Congress's rationale is clear: any contrary interpretation would provide religious groups with carte blanche to pick and choose which zoning requirements to follow. . . .*See Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007) ("Unless the requirement of substantial burden is taken seriously, the difficulty of proving a compelling governmental interest will free religious organizations from zoning restrictions of any kind."). Certainly, RLUIPA was not intended to grant religious groups such unbounded discretion.

Generally, then, the courts have said that religious institutions must comply with a locality's procedural and substantive requirements under its zoning regulations, even though those requirements may be costly, cause delay, and create a certain level of uncertainty. Following is a sampling of cases that have addressed challenges to various facets of a locality's legitimate land use regulations:

- *Procedural requirements*: A locality's procedural zoning requirements, such as the requirement to file an application, pay an application fee, and seek an approval, do not impose a substantial burden on religious exercise. *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1035 (9th Cir. 2004) (holding that the city's requirement that the college refile a "complete" application for a building permit was not a substantial burden even though failing to comply with the ordinance rendered the college unable to provide education or worship on its property; the college was "simply adverse to complying with the PUD ordinance's requirements" and that the city's requirements imposed "no restriction whatsoever" on the college's religious exercise); *Konikov v. Orange County*, 410 F. 3d 1317, 1323 (11th Cir. 2005); ("[R]equiring applications for variances, special permits, or other relief provisions [does] not offend RLUIPA's goals"); *Civil Liberties for Urban Believers, supra* (procedural requirements, among other aspects of the application process, are not sufficient to establish a substantial burden); *Roman Catholic Bishop of Springfield*, *supra* (rejecting church's claim that requiring it to file an application before demolishing a church was not a substantial burden despite allegations of delay, uncertainty and expense); *Family Life Church v. City of Elgin*, 561 F. Supp. 2d 978, 987 (N.D. Ill. 2008) ("[w]hile surely inconvenient, the eight-month application process [plaintiff] encountered did not rise to the level of a substantial burden"); *Christian Methodist Episcopal Church v. Montgomery*, 2007 U.S. Dist. LEXIS 5133, 2007 WL 172496 (D. S.C. 2007) (town's zoning laws requiring landowners to apply for a special use permit or to assign their rights to do so to the church-tenant did not substantially burden religious exercise).

- *Substantive requirements*: Under RLUIPA, religious institutions have no right to establish their use wherever they choose within the locality, and they are subject to a locality's substantive zoning requirements. *See, e.g.*, *Vision Church, United Methodist v. Village of Long Grove*, 468 F.3d 975 (7th Cir. 2006) (requirements that the church obtain a special use permit and comply with the building size limitation established by the village's assembly ordinance did not impose a substantial burden); *Konikov, supra* (requirement that rabbi obtain a special use permit to operate a religious facility from his home did not impose a substantial burden); *Wesleyan Methodist Church of Canisteo, New York v. The Village of Canisteo*, 792 F. Supp. 2d 667, 674 (W.D. N.Y. 2011) (no substantial burden was alleged where the village refused to grant permission to build a church in a light industrial zoning district where the requirements of that zoning district were a generally applicable burden "neutrally imposed on churches and secular organizations"); *Christian Methodist Episcopal Church, supra* (church's claim that it should be allowed to operate wherever it so chose, without regard to zoning rules, was unreasonable and not supported by RLUIPA or by the First Amendment).

- *Cost to comply*: The cost to comply with a locality's zoning regulations does not, in and of itself, impose a substantial burden. *Civil Liberties for Urban Believers, supra* (costs and other requirements are incidental to any high-density urban land use and are not sufficient to establish a substantial burden); *Roman Catholic Bishop of Springfield, supra* (rejecting the church's claim that requiring it to file application before demolishing church was not a substantial burden despite allegations of "delay, uncertainty and expense*")*; *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F. Supp. 2d 961 (N.D. Ill. 2003) (no substantial burden because "monetary and logistical burdens do not rise to the level of a substantial burden").

In sum, religious institutions must comply with a locality's neutral and generally applicable zoning regulations and the mere requirement to comply, in and of itself, is not a substantial burden on religious exercise. However, there are two common situations discussed in sections 34-232 and 34-233 below, in which a substantial burden may be found.

34-232 When a religious institution seeks to locate or relocate within a locality, or to expand its existing facilities, the neutral application of generally applicable and legitimate land use regulations may be found to impose a substantial burden on religious exercise if the religious institution does not have reasonable alternatives in the locality or has no opportunity to reapply for a needed permit

The use, building, or conversion of real property for the purpose of religious exercise is considered to be a religious exercise by the person or entity that uses or intends to use the property for that purpose. *42 U.S.C. § 2000cc-5(7).* It appears that most of the zoning disputes under RLUIPA pertain to a religious institution's desire to locate or relocate within a locality, or to expand its existing facilities.

There is no requirement under RLUIPA that religious institutions be allowed *by right* in any zoning district within the locality. *Vision Church, United Methodist v. Village of Long Grove*, 468 F.3d 975 (7th Cir. 2006). In addition, there is no requirement that a majority, or even a significant minority, of the total area of a locality be available for religious uses. *Petra Presbyterian Church v. Village of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007) (all that is required is that there be "plenty of land on which religious organizations can build churches (or, as is common nowadays, convert to churches buildings previously intended for some other use) in a community"); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) (rejecting the synagogue's claim that the town's regulations limiting religious institutions to one of its eight zoning districts imposed a substantial burden on religious exercise); *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303 (6th Cir. 1983) (pre-RLUIPA) (city's zoning scheme which designated only 10 percent of the city's area for a use classification on which a church could be built did not substantially burden religious exercise because faith could be practiced in alternative locations such as homes, schools and other churches).

There also is no requirement that the cheapest land within the locality be available for religious uses. *Lakewood*, 699 F.2d at 307 (court rejected the congregation's claim that the zoning ordinance imposed a substantial burden because land in commercial zoning districts in which churches were permitted was more expensive and less conducive to worship than the lot owned by the church; although the "lots available to the Congregation may not meet its budget or satisfy its tastes," the Free Exercise Clause did "not require the City to make all land or even the cheapest or most beautiful land available to churches"). *Lakewood* is cited with approval in *Timberline Baptist Church v. Washington County*, 211 Ore. App. 437 (2007), a RLUIPA case.

The following table provides a sampling of the case law in some of the typical RLUIPA situations. Some of these cases appear again in section 34-233, below.

Is the locality imposing a substantial burden on religious exercise?	
Substantial burden	**No substantial burden**
A request to locate in the locality or to establish a use	
There was a substantial burden on religious exercise where the county denied applications for water and sewer designation changes on a religious institution's land near a reservoir, even though on the same day the county approved 25 other applications and the religious institution was the sole applicant seeking a religious land use. *Reaching Hearts International, Inc. v. Prince George's County*, 2010 U.S. App. LEXIS 4478, 2010 WL 724162 (4th Cir. 2010) (unpublished).	There was no substantial burden on religious exercise where the township granted a special use permit for a religious school, but denied the special use permit required to allow the gross floor area to exceed 25,000 square feet. *Living Water Church of God v. Charter Township of Meridian*, 2007 U.S. App. LEXIS 28825, 2007 WL 4322157 (6th Cir. 2007) (unpublished) (finding that the inability of the church to construct its "ideal building" did not constitute a substantial burden).
There was a substantial burden on religious exercise where the city denied the church's request to rezone land from residential to institutional to allow a church use, where the city rejected a variety of viable options offered by the church, the options offered by the city were not viable, and the court found that the city was simply playing a delay game with the church and was convinced that the city was acting in a discriminatory manner. *Saints Constantine & Helen*	There was no substantial burden on religious exercise where the church sought to establish a facility on its property, and the village regulations allowed up to a 55,000 square foot facility, which experts estimated would be able to meet the needs of an 800 to 1,000 member congregation, where the church at the time had 120 members, had previously submitted plans for a 56,200 square foot facility, and could submit amended plans to comply with the village regulations.

Is the locality imposing a substantial burden on religious exercise?	
Substantial burden	**No substantial burden**
Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895 (7th Cir. 2005).	*Vision Church, United Methodist v. Village of Long Grove*, 468 F.3d 975 (7th Cir. 2006).
There was sufficient evidence of material facts to show that there was a substantial burden on religious exercise where, at the time the church bought its land, the zoning regulations allowed religious institutions but while the church's development applications were pending the county amended its zoning regulations and imposed a blanket prohibition on all private institutions in the district. *Bethel World Outreach Ministries v. Montgomery County Council*, 706 F.3d 548 (4th Cir. 2013) (adding that the church was not required to produce evidence showing that the land use regulation targeted it and that the substantial burden provision of RLUIPA protects against both non-discriminatory and discriminatory conduct by the locality).	There was no substantial burden on religious exercise where a locality did not permit religious institutions in a particular zoning district, "because then every zoning ordinance that didn't permit churches everywhere would be a *prima facie* violation of RLUIPA." *Petra Presbyterian Church v. Village of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007) (explaining that "[w]hen there is plenty of land on which religious organizations can build churches (or, as is common nowadays, convert to churches buildings previously intended for some other use) in a community, the fact that they are not permitted to build everywhere does not create a substantial burden. . . . Any such organization would have to show that a paucity of other land available for churches made the exclusion from the [desired] zone a substantial burden to it").
There was a substantial burden on religious exercise where the county denied two conditional use permits for properties in different zoning districts because the denials barred the organization from constructing a building in the county since: (1) the county's "broad reasons given for its tandem denials could easily apply to all future applications by Guru Nanak"; and (2) Guru Nanak agreed to all mitigation measures (regarding traffic, noise, and other impacts) suggested by the planning department, but the county nonetheless denied the permits. *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, 456 F.3d 978 (9th Cir. 2006).	There was no substantial burden on religious exercise where five religious institutions that located in the city were faced with the scarcity of affordable land available for development in residential zones, along with the costs, procedural requirements, and inherent political aspects of the special use, zoning map amendment and planned development approval processes, because these conditions were "incidental to any high-density urban land use"; while "they may contribute to the ordinary difficulties associated with location (by any person or entity, religious or nonreligious) in a large city, they do not render impracticable the use of real property in Chicago for religious exercise, much less discourage churches from locating or attempting to locate in Chicago." *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003).
A request to expand or renovate the present site	
There was a substantial burden on religious exercise where the village denied a religious school's request for a permit to expand to provide adequate facilities for religious instruction, where the village's justifications for its denial did "not bear the necessary substantial relation to public health, safety or welfare, and the zoning board's findings [were] not supported by substantial evidence." *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338, 351 (2nd Cir. 2007) (noting in an example, however, that there would have been no substantial burden on religious exercise if the school could easily rearrange its existing classrooms to meet its religious needs).	There was no substantial burden on religious exercise where the township denied a special use permit that would have allowed the church to exceed 25,000 square feet gross floor area (increasing the size of the church and school from approximately 11,000 square feet to 35,000 square feet), even though: (1) it prevented the church from expanding to its desired size; (2) it required the church to apply for another permit to make any change to the special use permit for the religious school; and (3) it required the church to develop new plans to comply with the limitation on the gross floor area; the court said that the fact that the church's "current facility is too small does not give the church free reign to construct on its lot a building of whatever size it chooses, regardless of limitations imposed by the zoning ordinance." *Living Water Church of God v. Charter Township of Meridian*, 2007 U.S. App. LEXIS 28825, 2007 WL 4322157 (6th Cir. 2007) (unpublished) (adding that if church had proffered evidence that it cannot carry out its missions and ministries due to the township's denial, outcome might be different).
There was a substantial burden on religious exercise where the city denied the church's request for a certificate of occupancy for a building it owned, previously used for worship by others, because the site did not have sufficient on-site parking under the current regulations, and the city denied the church's variance from the parking	There was no substantial burden on religious exercise where the city's zoning ordinance allowed the property to be used as a church and the only restriction on its expansion was providing adequate parking, because the church could use the entire facility as it existed and it could be expanded as the church desired with either a variance from the minimum

Is the locality imposing a substantial burden on religious exercise?	
Substantial burden	**No substantial burden**
requirements. *Lighthouse Community Church of God v. City of Southfield*, 2007 U.S. Dist. LEXIS 28, 2007 WL 756647 (E.D. Mich. 2007) (holding that the city's denials precluded the church from using its building for religious worship purposes).	parking requirements, a shared on-site parking arrangement, or by obtaining sufficient off-site parking, even though the church contended that the existing smaller facility was "less than ideal" and that it did not have the space to provide the necessary training, auditing and other religious services mandated by Scientology. *Church of Scientology of Georgia, Inc. v. City of Sandy Springs*, 843 F. Supp. 2d 1328 (N.D. Ga. 2011).
There was a substantial burden on religious exercise where the jury found that the county had applied the zoning ordinance non-neutrally, which resulted in unequal treatment of the church's special use permit application to expand its building, where there was evidence that: (1) the church had been treated less favorably than a similarly situated school; (2) the county treated the church's application as a new application even though it was an existing use; and (3) the county used a "less advantageous" method to determine whether the church's proposed use was over-intensive. *Rocky Mountain Christian Church v. Board of County Commissioners,* 612 F. Supp. 2d 1163 (D. Colo. 2009) *affirmed* at 613 F.3d 1229 (10th Cir. 2010).	There was no substantial burden on religious exercise where the city denied the church's special use permit to allow a day school to be located on-site where the space for the day school would be rented to a for-profit business, even though the operator of the school stated that it wanted to operate only at the church's facilities, because there were no allegations that there were no alternative locations. *Calvary Christian Center v. City of Fredericksburg*, 2011 U.S. Dist. 77489 (E.D. Va. 2011) (on the issue of substantial burden, the court assumed that the day school was religious exercise).
A request to relocate within the locality	
There was a substantial burden on religious exercise where the city denied the church's request to rezone a lot and grant a conditional use permit to allow a church use on land currently zoned industrial, which would have allowed the church to relocate within the city, where its current location was too small to support the congregation and its activities, where the church established that there were no suitable alternate sites, and the church's core beliefs required it to be able to meet in one place at one time, rather than in multiple services at its current site. *International Church of the Foursquare Gospel v. City of San Leandro*, 634 F.3d 1037 (9th Cir. Cal., 2011) (holding that the trial court "erred in determining that the denial of space adequate to house all of the Church's operations was not a substantial burden").	There was no substantial burden on religious exercise where the synagogue sought to relocate in a downtown business district, even though religious institutions were not allowed in that district; the court rejected the synagogue's claim that the town's regulations limiting religious institutions to one of its eight zoning districts, thereby requiring the synagogue's members to walk to temple, substantially burdened religious exercise; the court noted that the limited amount of land available in the town was merely a hardship faced by all potential landowners and that the inconvenience of having to walk "a few extra blocks" did not rise to the level of a substantial burden required by RLUIPA. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004).
There was a substantial burden on religious exercise where the city denied the church's request for a conditional use permit to relocate three blocks from its current location which lacked on-site parking which the church contended posed particular difficulties for elderly church members and those with disabilities, and the church contended that the current facility was too small to accommodate a growing congregation; the court said that the city had "effectively barred *any* use" by the church at the new location, and this was distinguishable from a minor or insubstantial burden resulting from, for example, a limitation on the building's size or occupancy. *Elsinore Christian Ctr. v. City of Lake Elsinore*, 291 F. Supp. 2d 1083 (C.D. Cal. 2003).	There was no substantial burden on religious exercise where the synagogue asserted on summary judgment that, because its congregation had grown and its current site had become inadequate and the proposed location was larger and would alleviate the problem, RLUIPA required the city to allow the synagogue to relocate absent a compelling governmental interest; the court found that the city's denial of the conditional use permit did not impose a substantial burden and instead said that it was "not concerned simply with the inadequacy of [the synagogue's] current location or the adequacy of the proposed location." The court said it was required to determine whether the city's application of its zoning regulations imposed pressure so significant as to require the synagogue's congregation to forego their religious beliefs. *Williams Island Synagogue v. City of Aventura*, 329 F. Supp. 2d 1319, 1326 (S.D. Fla. 2004).
There was a substantial burden on religious exercise where the conditional use permit granted by the city was for only one-half the duration requested by the church, and where the city allowed no reasonable expectation that it would be extended; the court noted that the church experienced	There was no substantial burden on religious exercise where the village denied the church permission to relocate to a lot that was zoned light industrial, even though the church alleged that its current facilities were inadequate because, from the pleadings, it was clear that the requirements of the

Is the locality imposing a substantial burden on religious exercise?	
Substantial burden	**No substantial burden**
"outright hostility to its application," decision-making that was "seemingly arbitrary and pretextual," and ignorance about RLUIPA. *Grace Church v. City of San Diego*, 555 F. Supp. 2d 1126 (S.D. Cal. 2008).	light industrial zoning district imposed a neutral burden on not only the church but also on secular organizations, and the church conceded that it had several alternatives available to it. *Wesleyan Methodist Church of Canisteo v. Village of Canisteo*, 792 F. Supp. 2d 667 (W.D. N.Y. 2011).

34-233 The arbitrary, capricious, or unlawful application of generally applicable and legitimate land use regulations will likely result in a finding that the locality substantially burdened religious exercise

A substantial burden on religious exercise may be found if land use regulations are imposed on a religious institution arbitrarily, capriciously, or unlawfully. *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007). The arbitrary application of laws to religious institutions may reflect bias or discrimination against religion. *Westchester Day School; Vision Church, United Methodist v. Village of Long Grove*, 468 F.3d 975 (7th Cir. 2006).

The courts will likely find that a locality has acted arbitrarily and capriciously in applying its standards in the following circumstances:

Seven Trouble Areas
• The locality's decision is not based on substantial evidence.
• The locality engages in endless delays in the process.
• The locality's standards are vague and subjective.
• The locality imposes unreasonable limitations that eliminate viable alternatives.
• The locality commits legal errors or displays ignorance about its obligations under RLUIPA.
• The locality inconsistently applies its policies and standards.
• The locality treats religious assemblies and institutions differently than nonreligious assemblies and institutions.

- *Absence of substantial evidence*: Decisions by localities that deny an application but which are not supported by substantial evidence are likely to be found to substantially burden religious exercise. In *Westchester Day School*, 504 F.3d at 351, the court concluded that the village's justifications for its denial of a religious school's application "set forth in the Resolution [did] not bear the necessary substantial relation to public health, safety or welfare, and the zoning board's findings are not supported by substantial evidence"; *see also Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895 (7th Cir. 2005) (where the court held that the decision-maker could not justify its decision to deny the church's application, that the city had no legitimate concerns on which to base its denial, and the city acted with standardless discretion).

- *Endless delays in the process*: Schemes by localities to endlessly delay action on an application may be found to substantially burden religious exercise. In *Saints Constantine & Helen, supra*, the church sought to build a new church on a lot requiring a zoning approval and the city rejected a variety of viable options offered by the church and the options offered by the city were not viable. The court said the city was simply playing a delay game with the church and was convinced that the city was acting in a discriminatory manner. In *Layman Lessons, Inc. v. City of Millersville, Tenn.*, 636 F. Supp. 2d 620 (M.D. Tenn. 2008), the court found that the city imposed a substantial burden when it effectively barred the religious organization from using its own property for religious exercise. The evidence showed that the city used a proposed ordinance that had not yet taken effect to delay issuing a certificate of occupancy that the religious organization should have been entitled to by-right. However, delay of a land use approval alone, in the absence of evidence tying the locality's actions to intentional discrimination, does not necessarily establish that religious exercise has been substantially burdened. *Vision Church, supra* (religious exercise was not substantially burdened where the church was still seeking permission to build on its property seven years after it was purchased; noting that the delay issue should have more properly been considered as a land use matter in state court).

- *Standards that are vague and subjective*: If a locality's zoning regulations rely on vague and subjective standards, the courts may find that the religious institution has been substantially burdened by a decision under those standards unless the locality makes a strong evidentiary showing to support its decision. *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, 456 F.3d 978, 989 (9th Cir. 2006) (holding that the county's denial of two conditional use permits for separate properties amounted to a substantial burden and citing its main concern being that the county's "broad reasons given for its tandem denials could easily apply to all future applications by Guru Nanak"); *Cambodian Buddhist Society of Connecticut v. Newtown*, 2005 Conn. Super. LEXIS 3158, 2005 WL 3370834 (2005) *affirmed* at 285 Conn. 381, 941 A.2d 868 (2008) (noting that architectural harmony and integrity of the neighborhood were "intrinsically vague"; however, the town's decision was upheld on the basis of other standards where the evidence was sufficient); *compare Living Water Church of God v. Charter Township of Meridian*, 2007 U.S. App. LEXIS 28825, 2007 WL 4322157 (6th Cir. 2007) (unpublished), in which the court held that the church failed to establish a substantial burden merely because the township considered matters not contained in the zoning ordinance, where the town based the denial of a special use permit to allow the gross floor area to expand beyond 25,000 square feet on the ground that the size of the proposed church and school facilities was "out of proportion to similarly situated schools and combined church and school facilities in the township," even though there were no such appropriate ratios in the township's comprehensive plan or zoning ordinance.

- *Unreasonable limitations that eliminate of viable alternatives*: Schemes by localities to allow only those options that are not viable to the religious institution may be found to substantially burden religious exercise. *See Guru Nanak*, 456 F.3d at 992 (stating that the effect of the county's two denials, which included disregarding Guru Nanak's proposed mitigation conditions, was "to shrink the large amount of land theoretically available to Guru Nanak under the Zoning Code to several scattered parcels that the County may or may not ultimately approve" to the extent that a substantial burden was imposed); *Saints Constantine & Helen, supra* (city's rejection of an option proposed by a church to limit its property's use to a church use through the creation of an overlay district based on the city's misunderstanding of its effect, combined with the city's insistence that the church seek a conditional use permit, which was not a viable option because the city's regulations required that construction begin within one year, and the church had to engage in fundraising, which imposed a substantial burden). Note also that RLUIPA provides that a government cannot "impose or implement a land use regulation that (1) totally excludes religious assemblies from a jurisdiction; or (2) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." *42 U.S.C. § 2000(cc)(b)(3) (discussed in section 34-500).*

- *Legal errors or ignorance*: The locality's legal errors or ignorance about RLUIPA may reflect a discriminatory motive. In *Saints Constantine & Helen*, 396 F.3d at 899-900, the court said that "repeated legal errors by the City's officials casts doubt on their good faith" in an attempt to mask a discriminatory motive, and that the city was "flaunting as it were its own incompetence." In *Grace Church v. City of San Diego*, 555 F. Supp. 2d 1126 (S.D. Cal. 2008), the court noted the city's decision-makers' ignorance about the city's obligations under RLUIPA as one of its reasons for finding a substantial burden.

- *Inconsistent application of policies and standards*: Government officials who inconsistently apply policies and standards and disregard relevant findings "without explanation" may substantially burden religious exercise. *Guru Nanak Society, supra.*

- *Unequal treatment*: A locality that grants approvals to nonreligious entities but denies similar approvals for religious organizations supports an inference of intentional discrimination by the locality. In *Reaching Hearts International, Inc. v. Prince George's County*, 584 F. Supp. 2d 766 (D. Md. 2008) *affirmed* at 2010 U.S. App. LEXIS 4478, 2010 WL 724162 (4th Cir. 2010) (unpublished), the trial court upheld a jury finding of substantial burden resulting from the county's denial of Reaching Hearts' ("RHI") applications for water and sewer designation changes on its land near a reservoir, where on the same day the county approved 25 other applications including one for a residential subdivision that would cross a stream flowing directly into the reservoir, and RHI was the sole applicant seeking a religious land use. There was extensive evidence that RHI was unable to build any structure on the property without the approval. The court noted that the instant case was distinguishable from those cases in which the religious institutions were seeking to expand their facilities. The court also noted that staff had recommended approval of the application but that the county council ultimately voted to deny the application based on statements of one of the councilors that he did not want a church to be built on RHI's

property due to the "[v]ery hostile" reaction of a local community association which did not want another church application to be approved in that neighborhood.

Where the arbitrary, capricious, or unlawful nature of a locality's "challenged action suggests that a religious institution received less than even-handed treatment, the application of RLUIPA's substantial burden provision usefully backstops the explicit prohibition of religious discrimination in the later section of the Act." *Westchester Day School*, 504 F.3d at 351; *see sections 34-300, 34-400 and 34-500 for a discussion RLUIPA's religious discrimination provisions.*

34-240 Whether a substantial burden on religious exercise is justified by a *compelling governmental interest*

RLUIPA does not define *compelling governmental interest*. Like *substantial burden*, the meaning of *compelling governmental interest* must be ascertained from the case law.

A *compelling governmental interest* is an interest of "the highest order" because "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 566, 113 S. Ct. 2217, 2244 (1993). "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation" on religious exercise. *Sherbert v. Verner*, 374 U.S. 398, 406, 83 S. Ct. 1790, 1795 (1963). The traditional examples of compelling governmental interests include the allocation and collection of taxes, maintaining the integrity of the social security system, eradicating racial discrimination in education, the operation of military conscription laws, enforcing child labor laws, and protecting public health and safety. *Testimony of Steven K. Green, Legal Director, Americans United for Separation of Church and State, before the House Committee on the Judiciary, Subcommittee on the Constitution, July 14, 1998*.

The following table provides a sampling of the RLUIPA cases that have considered whether a particular governmental interest is compelling:

Is it a Compelling Governmental Interest?	
The interest	**Whether it is compelling**
Controlling traffic volume	Not in this case in the absence of specific evidence. *Westchester Day School v. Village of Mamaroneck*, 386 F.3d 183 (2d Cir. 2004) (acknowledging that traffic concerns *may* be a compelling governmental interest, but not finding a compelling interest when the case returned to the court of appeals because the trial court determined that the actual basis for the zoning board of adjustment's denial of the special use permit was undue deference to the opposition of a small group of neighbors); *but see Mintz v. Roman Catholic Bishop*, 424 F. Supp. 2d 309 (D. Mass. 2006) (though not expressly ruling out traffic concerns as being compelling, the court noted that they "were not universally considered compelling").
Retaining consistency with the comprehensive plan	No, because although the policies of the comprehensive plan are legitimate, they are not compelling. *Rocky Mountain Christian Church v. Board of County Commissioners*, 612 F. Supp. 2d 1163 (D. Colo. 2009) *affirmed on other grounds at* 605 F.3d 1081 (10th Cir. 2010).
Protecting a public drinking water impoundment	Not in this case because the county had approved other developments around the reservoir and, therefore, its desire to protect the reservoir in this case was pretextual, rather than compelling. *Reaching Hearts International, Inc. v. Prince George's County*, 584 F. Supp. 2d 766 (D. Md. 2008) *affirmed* at 2010 U.S. App. LEXIS 4478, 2010 WL 724162 (4th Cir. 2010) (unpublished) (evidence also showed that other governmental bodies charged with and familiar with the county's environmental policies did not perceive any negative environmentally-based reasons upon which to deny RHI's applications).
Aesthetic concerns or historic preservation	No, because a locality has a substantial interest, but not a compelling interest, in aesthetics. *American Legion Post 7 v. City of Durham*, 239 F.3d 601 (4th Cir. 2001) (flag case); *Keeler v. Mayor and City Council of Cumberland*, 940 F. Supp. 879 (D. Md. 1996) (historic preservation is not a compelling governmental interest); *Munns v. Martin*, 131 Wn.2d 318 (1997) ("City's interest in preservation of aesthetic and historic structures is not compelling"); *First Covenant Church of Seattle v. City of Seattle*, 120 Wn.2d 203 (1992) (city's interest in preserving historic structures was not compelling enough to justify infringement on free exercise).
Enforcing land use regulations	Yes, if there is specific evidence. *Christian Methodist Episcopal Church v. Montgomery*, 2007 U.S. Dist. LEXIS 5133, 2007 WL 172496 (D. S.C. 2007) (town had a compelling governmental interest in

Is it a Compelling Governmental Interest?	
The interest	**Whether it is compelling**
	requiring the landowners to sign the application for a land use permit, or to assign the right to do so to a tenant, rather than to allow the tenant-church to sign the application without requiring the landowners to be involved in the application process); *Bikur Cholim, Inc. v. Village of Suffern,* 664 F. Supp. 2d 267 (S.D. N.Y. 2009) ("[w]hile upholding zoning laws may be considered a compelling interest, the [locality] must demonstrate that the enforcement in those zoning laws is compelling in this particular instance, not in the general scheme of things"); *Murphy v. Zoning Commission of the Town of Milford*, 289 F. Supp. 2d 87 (D. Conn. 2003) (protecting the public health and safety is a compelling governmental interest; thus, a locality has a compelling governmental interest in enforcing its land use regulations).
Preserving lands in an industrial park for industrial uses	Not in this case because religious uses were allowed by conditional use permit, several parcels in the industrial park were already occupied by non-industrial uses, and 100 acres of the 600 acre industrial park were slated for non-industrial uses. *Grace Church v. City of San Diego*, 555 F. Supp. 2d 1126 (S.D. Cal. 2008).
Architectural design of the proposed buildings, which must be in harmony with the design of other buildings on the lot and in the vicinity	No. *Cambodian Buddhist Society of Connecticut v. Newtown*, 2005 Conn. Super. LEXIS 3158, 2005 WL 3370834 (2005) *affirmed* at 285 Conn. 381, 941 A.2d 868 (2008).
Proposed use being general harmony with the general character of the neighborhood, consistent with the purpose and intent of the zoning regulations, and not substantially impairing neighborhood property values	No. *Cambodian Buddhist Society of Connecticut v. Newtown*, 2005 Conn. Super. LEXIS 3158, 2005 WL 3370834 (2005) *affirmed* at 285 Conn. 381, 941 A.2d 868 (2008).
Controlling blight	No. *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002) ("'Blight' can constitute 'an esthetic harm.' *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 807, 104 S. Ct. 2118 (1984) (quoting *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510, 101 S. Ct. 2882, 2893-94 (1980). The Supreme Court has held that esthetic concerns are substantial governmental interests. *Metromedia*, 453 U.S. at 507-510, 101 S. Ct. at 2892-94"); *see also Elsinore Christian Center v. City of Lake Elsinore*, 270 F. Supp. 2d 1163 (C.D. Cal. 2003) ("even assuming, without deciding, that curbing urban blight is a 'compelling interest' under RLUIPA, it is not sufficient for the City simply to identify a compelling interest. Rather, the City must show that the challenged decision was 'in furtherance' of that interest").
Generating tax revenue	No, because revenue generation "is not the type of activity that is needed to 'protect public health or safety'" and "[i]f revenue generation were a compelling state interest, municipalities could exclude all religious institutions from their cities." *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002) (also noting that the city's regulations were not aimed at revenue generation).

The court in *Grace Church v. City of San Diego*, 555 F. Supp. 2d 1126 (S.D. Cal. 2008) stated that "[o]ne way to evaluate a claim of compelling interest is to consider whether in the past the governmental actor has consistently and vigorously protected that interest. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. at 547, 113 S. Ct. at 2234, 124 L. Ed. 2d at 499 ('A law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprotected')."

A locality must show a compelling interest in imposing the burden on religious exercise in the particular case at hand, not a compelling interest in general. *Westchester Day School v. Village of Mamaroneck*, 386 F.3d 183 (2d Cir. 2004)*; Vision Church, United Methodist v. Village of Long Grove*, 468 F.3d 975 (7th Cir. 2006)*, citing Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 126 S. Ct. 1211 (2006); *Bikur Cholim, Inc. v. Village of Suffern*, 664 F. Supp. 2d 267 (S.D. N.Y. 2009) ("While upholding zoning laws may be considered a compelling interest, the Village must demonstrate that the enforcement in those zoning laws is compelling in this particular instance, not in the general scheme of things"). Speculation and claims of "doubts" and "serious questions" will not establish a compelling governmental interest. *Miller v. Brown*, 503 F.3d 360 (4th Cir. 2007) (holding that the government's "speculation [did] not establish a compelling interest" when the government articulated only "doubts" and "serious questions" about plaintiff's actions in the absence of extrinsic evidence). Specific evidence is required. *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526 (1972) (holding that the government must present "specific evidence" of the alleged compelling interests and how those interests were advanced by the government's actions in order to carry its burden under strict scrutiny review).

34-250 Whether the substantial burden on religious exercise is the *least restrictive means possible* to achieve the compelling governmental interest

If a land use regulation substantially burdens religious exercise, it is valid under RLUIPA only if it serves a compelling governmental interest using the *least restrictive means possible* to achieve that interest. *42 U.S.C. § 2000cc(a)(1)*. This means that the locality must show that there are no alternative forms of regulation that would fulfill the compelling governmental interest. *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790 (1963); *Bikur Cholim, Inc. v. Village of Suffern*, 664 F. Supp. 2d 267 (S.D. N.Y. 2009). For example, assuming for the sake of argument that controlling the amount of traffic was a compelling governmental interest, and the amount of traffic generated by a religious institution was at issue, any related conditions imposed must address the number of cars, not the number of people. *Murphy v. Zoning Commission of the Town of Milford*, 289 F. Supp. 2d 87 (D. Conn. 2003). The locality must prove that any "plausible, less restrictive alternative would be ineffective" in achieving its goals. *Bikur Cholim*, 664 F. Supp. 2d 267 at 292 quoting *United States v. Playboy Entertainment Group*, 529 U.S. 803, 824, 120 S. Ct. 1878, 1891 (2000).

As a practical matter, the outright denial of a religious institution's land use application will rarely be the least restrictive means of achieving a compelling governmental interest when reasonable conditions of approval could address the asserted interest. *Bethel World Outreach Ministries v. Montgomery County Council*, 706 F.3d 548 (4th Cir. 2013) (even assuming that a blanket prohibition on private institutions in zoning district served compelling governmental interests, the county failed to present any evidence that its interest in preserving the integrity of the district could not be served by less restrictive means, such as a minimum lot size requirement or an individualized review process); *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1229 (C.D. Cal. 2002) ("The City has not demonstrated that there is no other way to provide for revenue without taking the property and preventing [plaintiff] from building its church. Municipalities have numerous ways of generating revenue without preventing tax-free religious land uses. . . [T]he City has done the equivalent of using a sledgehammer to kill an ant."); *Bikur Cholim*, 664 F. Supp. 2d at 292 (if an application can be granted with various restrictions or conditions, a reasonable factfinder can find that there are less restrictive alternatives to further the locality's interests).

In *Reaching Hearts International, Inc. v. Prince George's County*, 584 F. Supp. 2d 766 (D. Md. 2008) *affirmed* at 2010 U.S. App. LEXIS 4478, 2010 WL 724162 (4th Cir. 2010) (unpublished), the trial concluded that, even if the county established a compelling governmental interest in protecting a public drinking water reservoir from nearby development, it failed to carry its burden because its actions in denying Reaching Heart's ("RHI") applications were not the least restrictive means of furthering any alleged compelling interests. The court found that the county failed to meet its burden because it "did not commission, examine, or adduce any evidence at trial in the form of data, studies, or reports indicating what (if any) impact RHI's water and sewer category change applications or subdivision proposal would have on Rocky Gorge Reservoir. The absence of qualitative and quantitative evidence on the county's part undermined any assertion that it fully and adequately considered any alternatives to its outright denials of RHI's applications. In addition, the fact that another county, which accounted for significantly more of the drainage into the reservoir, had less restrictive impervious surface coverage requirements than Prince George County's further undermined its claim that its denial was employing the least restrictive means. Finally, the county's

own expert testified that various methods existed to purify and mitigate any impacts on water quality due to any water runoff concerns from RHI's proposed plans (and the corresponding impervious surfaces, which could contribute to water runoff concerns).

34-300 RLUIPA requires that a locality treat a religious assembly or institution on *equal terms* with nonreligious assemblies and institutions

A key provision of RLUIPA provides:

> 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). This provision is known as the *equal terms* provision of RLUIPA.

To state an equal terms violation, the religious assembly or institution has the burden of showing: (1) that it is a religious assembly or institution; (2) subject to a land use regulation; (3) that treats the religious assembly or institution on less than equal terms; (4) with a nonreligious assembly or institution. *Covenant Christian Ministries, Inc. v. City of Marietta*, 654 F.3d 1231, 1245 (11th Cir. 2011).

As noted above, one who asserts a claim under the equal terms provision must show that it is a religious assembly or institution. *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 270 (3rd Cir. 2007). This provision does not apply to persons. In *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1230-1231 (11th Cir. 2004), the court adopted the following definitions:

> An "assembly" is "a company of persons collected together in one place [usually] and usually for some common purpose (as deliberation and legislation, worship, or social entertainment)," WEBSTER'S 3D NEW INT'L UNABRIDGED DICTIONARY 131 (1993); or "[a] group of persons organized and united for some common purpose." BLACK'S LAW DICTIONARY 111 (7th ed. 1999). An institution is "an established society or corporation: an establishment or foundation esp. of a public character," WEBSTER'S 3D NEW INT'L UNABRIDGED DICTIONARY 1171 (1993); or "an established organization, esp. one of a public character . . . ." BLACK'S LAW DICTIONARY 801 (7th ed. 1999).

The plaintiff failed to make the required showing that he was a religious assembly or institution in *Dixon v. Town of Coats*, 2010 U.S. Dist. LEXIS 56740 at 18, 2010 WL 2347506 at 6 (E.D. N.C. 2010). In support of his claim, the plaintiff contended only that he was "a religious benefactor with a specific religious vision and the willingness to use his resources and property to spread his Christian vision and advance his religious message."

34-310 A religious assembly or institution is not required to show that the locality's unequal treatment substantially burdens religious exercise

A claimant bringing a challenge under the equal terms provision does not need to show that a regulation imposes a substantial burden on its religion. *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1172 (9th Cir. 2011).

The equal terms provision is violated whenever religious land uses are treated worse than comparable nonreligious ones, whether or not the discrimination imposes a substantial burden on the religious uses. *Digrugilliers v. Consolidated City of Indianapolis*, 506 F.3d 612, 616 (7th Cir. 2007), citing *Vision Church v. Village of Long Grove*, 468 F.3d 975, 1002-1003 (7th Cir. 2006); *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1308 (11th Cir. 2006); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1228-1231 (11th Cir. 2004) ("where a zoning regulation treats religious assemblies differently than secular assemblies [such as private clubs and lodges] by excluding religious assemblies from the business district, a factor that is enough to constitute a violation of § (b) of RLUIPA . . . With respect to neutrality, the purpose and operation of the ordinance reveal an impermissible attempt to target religious assemblies").

34-320 A locality likely cannot raise a compelling governmental interest as a defense against a claim of its unequal treatment of religious assemblies or institutions

The federal appellate courts disagree as to whether a compelling governmental interest is a defense to a violation of the equal terms provision. Compare *Covenant Christian Ministries, Inc. v. City of Marietta,* 654 F.3d 1231 (11th Cir. 2011) (once the religious assembly or institution produces *prima facie* evidence that these elements are satisfied, the locality bears of burden of showing that the land use regulation employs a narrowly tailored means of achieving a compelling governmental interest) with *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1172 (9th Cir. 2011) (rejecting the notion that a "compelling governmental interest" is an exception to the equal terms provision). *See sections 34-240 and 34-250 for a discussion of compelling governmental interests and the least restrictive means test*.

34-330 Determining what uses are equal to religious assemblies and institutions

Whether uses are *equal* must be analyzed in their proper context. "Equality is always with respect to a characteristic that may or may not be material." *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1172 (9th Cir. 2011). Except when used in the context of mathematical or scientific relations, equality "signifies not equivalence or identity, but proper relation to relevant concerns." *River of Life Kingdom Ministries v. Village of Hazel Crest*, 611 F.3d 367, 371 (7th Cir. 2010). The equal terms provision does not require that all religious assemblies and institutions be treated similarly to one another, but instead requires that they be treated equally to nonreligious assemblies and institutions. *Church of Scientology of Georgia, Inc. v. City of Sandy Springs*, 843 F. Supp. 2d 1328, 1359 (N.D. Ga. 2011). The claimant may only have to show that the regulation at issue leads to religious assemblies or institutions being treated "less well" than secular assemblies or institutions that are similarly situated regarding the regulatory purpose. *Layman Lessons, Inc. v. City of Millersville*, 636 F. Supp. 2d 620 (M.D. Tenn. 2008)*; see also Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253 (3rd Cir. 2007).

The federal appellate courts are not in complete agreement as to how to determine whether a nonreligious assembly or institution is comparable to a religious assembly or institution. Although the Fourth Circuit Court of Appeals, whose jurisdiction includes Virginia, has not considered the issue, several other circuits have.

The Various Standards for Determining Whether a Use is Equal	
Federal Appellate Circuit	**Standard**
Second	The religious assembly or institution must identify a comparator that is similarly situated for all functional intents and purposes of the regulation. *Third Church of Christ, Scientist, of New York City v. City of New York*, 626 F.3d 667 (2d Cir. 2010).
Third	The religious assembly or institution must identify a *similarly situated* secular assembly or institution with respect to the goal of regulation, and compare the religious assembly's treatment to that of the similarly situated secular comparator. *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253 (3rd Cir. 2007).
Fifth	The religious assembly or institution must show more than simply that its religious use is forbidden and that some other nonreligious use is permitted because the equal terms provision "must be measured by the ordinance itself and the criteria by which it treats institutions differently." *Elijah Group, Inc. v. City of Leon Valley*, 643 F.3d 419, 424 (5th Cir. 2011).
Seventh	The religious assembly or institution must identify a similarly situated secular comparator with respect to accepted regulatory criteria such as the nature of the zoning district*, i.e.*, commercial district or residential district. *River of Life Kingdom Ministries v. Village of Hazel Crest*, 611 F.3d 367 (7th Cir. 2010) (this standard is described as a slight variation from the Third Circuit's standard).
Ninth	The religious assembly or institution must identify a similarly situated secular comparator with respect to accepted regulatory criteria such as the nature of the zoning district*, i.e.*, commercial district or residential district. *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1172 (9th Cir. 2011) (this standard is described as the Third Circuit's standard, incorporating the Seventh Circuit's "further refinement").
Eleventh	The religious assembly or institution must show that the zoning regulation facially differentiates between religious and nonreligious assemblies or institutions. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004).

The Various Standards for Determining Whether a Use is Equal	
Federal Appellate Circuit	**Standard**
	• *Facial challenges*: When alleging facial neutrality, claims are classified as either: (1) those that challenge ordinances of *general applicability* but that nevertheless target religion through a *religious gerrymander*; or (2) those that challenge discriminatory application. When alleging *religious gerrymander*, the religious assembly or institution must show that the challenged zoning regulation separates permissible from impermissible assemblies or institutions in a way that burdens almost only religious uses – thus assessing the treatment of the religious assembly or institution relative to all other nonreligious occupants. *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1308-1311 (11th Cir. 2006) • *As applied challenges*: When alleging *discriminatory application*, the religious assembly or institution must show that "a *similarly situated* nonreligious comparator received differential treatment under the challenged regulation." *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1308-1311 (11th Cir. 2006)

The following table provides a sampling of the RLUIPA cases that have considered whether a particular use is equal to a religious assembly or institution:

Uses That May Be Equal to Religious Assemblies and Institutions	
Equal	**Not equal**
Private parks, playgrounds and neighborhood recreation centers are equal to religious assemblies or institutions "because they are places where 'groups or individuals dedicated to similar purposes – whether social, education, recreational, or otherwise – can meet together to pursue their interests'. . . . That some individuals have different purposes for meeting in a particular place does not mean the place fails to qualify as an 'assembly'." *Covenant Christian Ministries, Inc. v. City of Marietta*, 654 F.3d 1231, 1245 (11th Cir. 2011) (rejecting the city's argument that parks, playgrounds and recreation centers were different because those who attend those places are not assembling for a common purpose).	A 10-member book club is equal only to a 10-member religious assembly or institution; it is not equal to a 1000-member religious assembly or institution. *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253 (3rd Cir. 2007) (given as an example).
Private clubs, allowed by special use permit, are equal to religious assemblies or institutions. *Elijah Group, Inc. v. City of Leon Valley*, 643 F.3d 419, 424 (5th Cir. 2011) (city violated the equal terms provision because it prohibited religious assemblies and institutions in the same zoning district where private clubs were allowed by permit).	A single-parcel district imposed on church property because of its historic value did not violate the equal terms provision. *Roman Catholic Bishop v. City of Springfield*, 760 F. Supp. 2d 172 (D. Mass. 2011).
Social organizations are equal to religious assemblies or institutions. *Konikov v. Orange County*, 410 F.3d 1317, 1329 (11th Cir. 2005) (under the county's zoning ordinance, groups that met with similar frequency were in violation of the regulations only if the purpose of their assembly was religious).	A public high school, which was not located by the county but by the school board under its exclusive authority, is not equal to a religious assembly or institution. *Grace Church of Roaring Fork Valley v. Board of County Commissioners of Pitkin County*, 742 F. Supp. 2d 1156, 1164 (D. Colo. 2010).
A hotel operating a catering service is equal to a religious assembly or institution that wanted to operate a catering service. *Third Church of Christ, Scientist, of New York City v. City of New York*, 626 F.3d 667 (2d Cir. 2010).	Small one room historic school building used as a meeting room and community gathering place is not equal to a religious assembly or institution. *Grace Church of Roaring Fork Valley v. Board of County Commissioners of Pitkin County*, 742 F. Supp. 2d 1156, 1164 (D. Colo. 2010) ("It is beyond dispute that any assembly use that was or could be made of a one-room building is not comparable" to the church's proposed use).
Membership organizations are equal to religious assemblies or institutions. *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1172 (9th Cir. 2011) (where the regulation allowed membership organizations by right in the district, but allowed religious organizations only by conditional use permit).	Golf club located on property annexed by the town and approved by the town is not equal to a religious assembly or institution in the county, since there was no evidence that the county was involved in the golf club's approval. *Grace Church of Roaring Fork Valley v. Board of County*

Uses That May Be Equal to Religious Assemblies and Institutions	
Equal	**Not equal**
	Commissioners of Pitkin County, 742 F. Supp. 2d 1156, 1164 (D. Colo. 2010).
Community centers, meeting halls and libraries, which along with religious assemblies and institutions were excluded from a commercial district, were equal to religious assemblies or institutions because they did not generate significant taxable revenue or offer shopping opportunities, which were two of the key purposes of the zoning district near a train station. *River of Life Kingdom Ministries v. Village of Hazel Crest*, 611 F.3d 367, 371 (7th Cir. 2010) (not finding a violation of the equal terms provision).	Gymnasiums are not equal to religious assemblies and institutions, where all other places of assembly are prohibited in the zoning district, because to allow religious assemblies and institutions in such a case would favor them over secular assemblies and institutions. *River of Life Kingdom Ministries v. Village of Hazel Crest*, 611 F.3d 367, 371 (7th Cir. 2010) (given as an example; rejecting the Eleventh Circuit's approach).
Assisted-living facilities, auditoriums, assembly halls, community centers, senior citizens' centers, day-care centers, nursing homes, funeral homes, radio and television studios, art galleries, civic clubs, libraries, museums, junior colleges, correspondence schools, schools that teach data processing, and nurseries, together with accessory uses and structures, subordinate, appropriate and incidental to the above permitted primary uses, including supportive services directly related to and in the same building with the primary use, plus various accessory retail and service commercial uses, including a cafeteria or other restaurants serving only employees and guests, drugstores, florists, office-supply services, and newsstands, are equal to religious assemblies and institutions. *Digrugilliers v. Consolidated City of Indianapolis*, 506 F.3d 612, 616 (7th Cir. 2007) (these uses were allowed by right in C-1 zoning district, where a use variance was required for religious institutions).	A private clubhouse in a residential community used for weddings, lectures and other events is not equal to a religious assembly or institution, since there was no evidence that the county was involved in regulating the uses or that the county knew of the events. *Grace Church of Roaring Fork Valley v. Board of County Commissioners of Pitkin County*, 742 F. Supp. 2d 1156, 1164 (D. Colo. 2010).

In order to be considered to be similarly situated, it appears that the comparable uses must be within the same zoning district as the religious assembly or institution, the locality must have played some role in allowing or approving the comparable uses, there must be some relation to relevant concerns and, where the religious assembly or institution has been denied a zoning-related approval, the relevant comparators must have needed the same type of approval (*e.g.*, comparing rezonings, but not comparing a rezoning to a variance). *See Centro Familiar Cristiano Buenas Nuevas, supra*; *Grace Church of Roaring Fork Valley, supra*; *Church of Scientology of Georgia, Inc. v. City of Sandy Springs*, 843 F. Supp. 2d 1328 (N.D. Ga. 2011).

34-400 RLUIPA prohibits a locality from *discriminating* against any assembly or institution on the basis of religion or religious denomination

A key provision of RLUIPA provides:

> 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). This provision is known as the *nondiscrimination* provision of RLUIPA.

In order to make *prima facie* case of discrimination, the religious assembly or institution must present evidence of intentional or purposeful discrimination by the locality because of its religious denomination. *Bethel World Outreach Ministries v. Montgomery County Council*, 706 F.3d 548 (4th Cir. 2013) (church failed to show any discrimination where the opposition to the church had nothing to do with the fact it was a religious institution, but instead was based on the proposed institution's size); *World Outreach Conference Center v. City of Chicago*, 591 F.3d 531 (7th Cir. 2009); *Church of Scientology of Georgia, Inc. v. City of Sandy Springs*, 843 F. Supp. 2d 1328 (N.D. Ga. 2011).

A religious assembly or institution "may either show intentional discrimination through direct evidence or establish an inference of discrimination through circumstantial evidence." *Church of Scientology*, 843 F. Supp. 2d at 1371. "Only the most blatant remarks, the intent of which could be nothing other than to discriminate on the basis of some impermissible factor constitute direct evidence of discrimination." *Church of Scientology*, 843 F. Supp. 2d at 1372 (discrimination would not be "inferred merely because Plaintiff was treated differently than other churches in terms of calculating its required parking").

In *World Outreach Conference Center*, the court found no discrimination under RLUIPA where, though there may have been discrimination by an alderman who expressed a desire that the property at issue have been sold to his political supporter rather than to World Outreach, the discrimination was not based on religious grounds. Instead, the discrimination was based on the developer's financial relationship with the alderman. *World Outreach Conference Center*, 591 F.3d at 535 ("Religion didn't enter the picture"); *see World Outreach Conference Center v. City of Chicago*, 787 F.3d 839 (7th Cir. 2015) for later proceedings in this case.

34-500 RLUIPA prohibits a locality from *totally excluding* religious assemblies or *unreasonably limiting* religious assemblies, institutions or structures

A key provision of RLUIPA provides:

> 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). The legislative history reveals that "[w]hat is reasonable must be determined in light of all the facts, including the actual availability of land and the economics of religious organizations." *146 Cong. Rec. E1563 (2000) (Statement of Rep. Canady).* RLUIPA's unreasonable limitation provision prevents government from adopting policies that make it difficult for religious institutions to locate anywhere within the locality. *Bethel World Outreach Ministries v. Montgomery County Council*, 706 F.3d 548 (4th Cir. 2013); *see Vision Church, United Methodist v. Village of Long Grove*, 468 F.3d 975, 990-992 (7th Cir. 2006).

Prohibiting religious assemblies or institutions from particular zoning districts is not an unreasonable limitation if they are allowed in other zoning districts. *Elijah Group v. City of Leon Valley*, 2009 U.S. Dist. LEXIS 92249, 2009 WL 3247996 (W.D. Tx. 2009) *reversed on other grounds* at 643 F.3d 419, 424 (5th Cir. 2011) (the ordinance violated the equal terms clause of RLUIPA).

Allowing religious institutions only by special use permit within the locality is, generally, neither a total exclusion nor an unreasonable limitation under RLUIPA. *Vision Church*, 468 F.3d at 990-991 ("The requirement that churches obtain a special use permit is neutral on its face and is justified by legitimate, non-discriminatory municipal planning goals").

In *Rocky Mountain Christian Church v. Board of County Commissioners*, 613 F.3d 1229, 1238-1239 (10th Cir. 2010), the court affirmed a jury finding that the county unreasonably limited religious institutions. Although the county's land use director testified that the county had approved all other special use applications submitted by churches, a former county planner testified that the county's land use scheme made it "more difficult for churches to operate in Boulder County" and that the county had effectively left few sites for church construction, and another witness who inquired about establishing a synagogue was told by a county commissioner that the county would only allow 100 seats because "there will never be another mega church . . . in Boulder County."