



2008

## Law of the Land – Year in Review

Patricia E. Salkin

*Touro Law Center*, [psalkin@tourolaw.edu](mailto:psalkin@tourolaw.edu)

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/scholarlyworks>



Part of the [Land Use Law Commons](#)

---

### Recommended Citation

36 Real Est. L.J. 484 (2008)

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ Touro Law Center. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ Touro Law Center. For more information, please contact [lross@tourolaw.edu](mailto:lross@tourolaw.edu).

---

## *Zoning and Land Use Planning*

PATRICIA E. SALKIN\*

---

### **Law of the Land - Year in Review**

During the summer of 2007 I embarked on a new venture to develop a blog on land use law. The idea behind the blog, titled “Law of the Land,” (see: <http://lawoftheland.albanylaw.edu>) was to create a site of interest to land use lawyers, planners, developers, professors and students. After surveying a variety of blogs, websites and publications, the concept behind the blog was developed - a site that would be updated daily with a review of a recent land use case decided by a state or federal court. Whenever possible, the case review would be preceded or followed by brief

commentary explaining the significance of the case or the lesson learned. In addition, the site has reported on some relevant gubernatorial executive orders, offers book reviews, and occasionally starts a discussion on current events issues, such as climate change. Readers can post comments about the case or posting of the day, and sometimes this has led to robust debate about the holdings in particular land use cases. The site also contains links to other blogs about land use and zoning law, links to websites of interest, and a listing of upcoming land use law conferences.

With more than 100 reported cases discussed on the blog, the largest number of cases addressed takings, followed by the Religious Land Use and Institutionalized Persons Act, signs, due process, nonconforming uses, adult business uses, ethics, and historic preservation. Wireless communications, vested rights, standing and issues involving zoning interpretation were also the sub-

---

\*Patricia E. Salkin is Associate Dean and Director of the Government Law Center of Albany Law School. She is the author of the 4-volume *New York Zoning Law & Practice*, 4th edition (Thomson West), the annual *Zoning and Planning Law Handbook* (Thomson West), co-editor of the monthly *Zoning and Planning Law Report* (Thomson West), and author of the forthcoming 5th edition of *Anderson’s American Law of Zoning* (Thomson West).

ject of litigation. A significant number of zoning cases were decided by the federal courts, and Pennsylvania, Ohio, California, New York, New Jersey and Connecticut. This column reviews trends and interesting cases in land use law as reported on Law of the Land during the last half of 2007.

### **Adult Entertainment Facilities**

Two of the reported adult entertainment facilities opinions determined that local zoning ordinances were unconstitutional. The first case, *H.D.V.-Greektown, LLC v. City of Detroit*, 2007 WL 2261418, involved Detroit, Michigan's adult entertainment ordinance. Following 1999 amendments to the zoning ordinance of the City of Detroit, the plaintiff's establishment, "The Zoo Bar," a topless entertainment business, was grandfathered in as a nonconforming use in the City's Zone B6 (the Central Business District). In 2002, another business entered into a conditional purchase agreement to acquire all of the plaintiff's assets, including a liquor license, topless activity permit and cabaret license. The State Liquor Control Commission forwarded the application to

the City for its consideration. In 2003 and 2004 the City passed resolutions which in essence stated that where there are application requests for approval and/or transfer of licenses that have been issued by the State Liquor Control Commission, including topless activity permits, and where the bar making the request is a nonconforming use, located in a district where the use is no longer allowed, there will be a presumptive disapproval by the City Council. The plaintiffs initiated this lawsuit in March 2006, preceding the City Council's November 2006 rejection of their transfer application, challenging the constitutionality of the adult use provisions of the City's zoning ordinance, including the fact there are no time constraints imposed upon them to evaluate an application or to render a decision; and alleging that by requiring two levels of approval from the City an unconstitutional prior restraint on speech exists.

The federal court for the Eastern District of Michigan held that the local law did amount to an unconstitutional prior restraint on speech since it lacked specific standards to guide the decision-maker in judging whether a permit

should be issued. Furthermore, the Court pointed out that a “prior restraint that fails to place limits on the time within which the decision-maker must issue the license is impermissible.” The Court noted with concern that the conditional use permit, the planned development and the regulated use provisions of the City’s zoning ordinance fail to provide deadlines for the granting or denying of applications by the appropriate governmental body. As a result, the Court concluded that the zoning ordinance violates the First Amendment of the U.S. Constitution as a prior restraint on speech.

The second case finding an unconstitutional regulatory scheme arose in the Village of Washington Park, Illinois, where apparently, the Village relies on this industry for almost all of its income. In *Joelner v. Village of Washington Park, Illinois*, 2007 WL 4064511, the 7th Circuit Court of Appeals examined a Village ordinance designed to regulate adult entertainment facilities by expanding the permissible hours of operation after dark, mandating that the establishments close in the morning between 6:00 a.m. and 11:00

a.m., allowing partial nudity and on-site masturbation (but neither patrons nor employees can appear in “a state of complete nudity”), and prohibiting the sale or consumption of alcohol on site *except* in “entities licensed as adult cabarets under prior Village ordinances.” The ordinance contains both a preamble and findings asserting that the ordinance aims “to establish reasonable and uniform regulations to prevent the deleterious secondary effects of sexually oriented businesses within the Village.” The Village did not conduct its own secondary effects study, but rather referenced the “findings and narrowing constructions” in 19 listed federal court opinions. While some of these opinions refer to secondary effects of combining alcohol with adult entertainment, the Court notes that none of them claim that allowing alcohol sales to continue at already-operating venues and banning it only from future establishments ameliorates the harm from combining the two. The Plaintiff had been trying to obtain a permit to operate a cabaret in the Village for some time, and alleged that as a result of local politics, he has been unable to secure the

needed permits. He alleged that the alcohol ban at issue was adopted not to address secondary effects, but rather to stifle competition with current cabaret license holders who would still be able to serve alcohol, making it impossible for his business venue to compete.

The 7th Circuit noted that the three prong test to be applied to the ordinance banning alcohol is a two-stage process: 1) whether the ordinance was passed pursuant to a legitimate governmental power; 2) whether it does not totally ban all adult entertainment; and 3) whether it is aimed at combating the negative secondary effects caused by adult entertainment establishments. If all three prongs are satisfied, the ordinance is constitutional if it survives intermediate scrutiny (e.g., substantial governmental interest, narrowly tailored and reasonable alternative avenues of communication are available). However, where the regulation is not aimed at secondary effects (it fails the third prong) then strict scrutiny applies (e.g., regulation must be necessary to achieve a compelling state interest and narrowly drawn to achieve that end). In upholding the finding of the trial court, the Circuit Court

found that backdated licenses (to allow others, and not the plaintiff, to serve alcohol at their facilities); expansion of hours of operation (rather than limiting hours); and proof of lack of enforcement of an existing prohibition on complete nudity; all supported the plaintiff's allegation that the new ordinance was not designed to address negative secondary effects of adult entertainment, but rather to limit competition. Therefore, under a strict scrutiny analysis, the ordinance was unconstitutional because a "ban on alcohol in only newly licensed establishments can not possibly be considered less narrowly tailored." The Court noted that the ordinance permanently insulates eight concentrated establishments from the ban and leaves alcohol use at those establishments otherwise entirely unrestricted, and that the Court had previously held in *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702 (2003), that "a complete ban of alcohol in the premises of adult entertainment establishments is the *only* way the Village can advance that interest."

Ordinances regulating adult entertainment facilities were upheld in a number of other cases. For example, in *Smartt*

v. City of Laredo, 2007 WL 3087495, a Texas Appeals Court upheld the application of sexually oriented business regulations to an existing use in an annexed area. In 1995, a business involving nude dancers was established outside the city limits. In 1998, the property was annexed by the City and the City amended its existing ordinance to require the previously existing sexually oriented businesses to obtain a license to operate and to refrain from operating within 1,000 feet of a residential area. The city obtained an injunction from operating against the owner of this business since it was within 1,000 feet of a residential area. The business owner argued that his use was “grandfathered” because the business was operating prior to the annexation. The Court found no authority for such a proposition, and noted that the Texas Supreme Court has held that under reasonable conditions, zoning ordinances may be applied to end previously existing nonconforming uses. The business owner next argued that his business is not an “establishment,” which is the word used in the regulations. In reviewing the definition and the activities that take place on the

premises, the Court concluded that evidence existed to support the lower court’s determination that the use constituted a “sexually oriented business” irrespective of the definition of “establishment.” As to the constitutionality of the regulations, the Court held that the regulation was content neutral and that regulating the negative secondary effects of such a use amount to a reasonable time, place and manner restriction. The Court noted that the regulations did not completely ban the use, and that “a municipality has a substantial interest in preserving the quality of urban life . . . .”

In denying a motion for a preliminary injunction in *Bottoms Up Enterprises, Inc. v. Borough of Homestead*, 2007 WL 2908762, the Western District of Pennsylvania determined that the Township’s zoning, licensing and regulatory provisions restricting adult entertainment establishments did not violate the First Amendment. Here the Plaintiffs sought to open a high-end supper club with semi-nude dancing in a central business district that permitted restaurants but prohibited adult live entertainment facilities and exotic dance clubs with nude performers.

After the plaintiff's attorney indicated that the performers would not be nude, the Borough Council amended the definition of "adult live entertainment facility" in the zoning ordinance to specifically include references to performers wearing g-strings and opaque coverings, or "pasties," and they enacted an ordinance to increase from 500 feet to 1,000 feet the setback requirement between any adult use and certain "sensitive uses" which include primary and secondary schools, places of worship, parks, day-care centers, child nursery schools, a library, an existing dwelling not owned by the owner of the adult use, or any site marked on the official map as a proposed future park. The Borough asserted that these ordinances were reasonable time, place and manner regulations of speech, and that they were aimed at combating the negative secondary effects caused by adult live entertainment facilities, they were narrowly tailored, and that they were not directed at suppressing the erotic message. Furthermore, such facilities were allowed in the second largest zoning district in the municipality subject to conditional use permit review. The Plain-

tiffs did not file an application for a permit, but rather initiated a lawsuit alleging that there was no evidence that the ordinances were aimed at combating negative secondary effects when the ordinances were enacted (because this information was stated subsequent to the adoption), and that their facility would not be able to be sited in the other zoning district that conditionally allowed such uses due to the amount of land available and the existence of restrictive covenants.

The Court held that it could consider testimony presented regarding the legislative purpose for the enactment of the ordinances since the Third Circuit has held that "a municipality can support its ordinance with a factual basis even if that basis was not present to the legislative body prior to the enactment of the measure at issue." The Court then considered the type of information or evidence relied upon regarding secondary effects, and concluded that "studies from other urban environments are relevant and do provide a connection to actual adult businesses." The Court further concluded that the increase in the setback provision did not directly affect the plaintiffs



since they had not applied to locate a use in that zoning district, and that there were adequate alternatives available. In relying on *City of Renton*, 475 U.S. at 53 and *Dia v. City of Toledo*, 937 F. Supp. 673, 678 (N.D. Ohio 1996), the court concluded that regardless of whether they considered the Borough's assertion that there would be 52 acres of land available to site the use (14% of the total acreage of the municipality), or the plaintiffs' assertion that there would be 19 acres available (5% of the total acreage), even using the lower number there is sufficient land available.

In another case, *Tollis Inc., v. County of San Diego*, 2007 WL 2937012, the 9th Circuit Court of Appeals upheld the City of San Diego's regulation requiring the location of adult uses in industrial zones. In 2002, to combat the negative secondary effects that concentrate in and around adult businesses, the County of San Diego adopted a comprehensive zoning ordinance addressing adult entertainment businesses located within the unincorporated portions of the county. Among other things, the law restricts the hours of operation of these businesses, requires re-

moval of doors on peep show booths and mandates dispersal of these businesses to industrial areas within the county. The plaintiffs alleged both federal and state constitutional violations. The District Court granted summary judgment to the County, upholding the requirement that adult establishments locate only in industrial zones, and it dismissed the state law claim regarding conformance to the County's general plan (because the plaintiff failed to raise the claim in its complaint). The District Court did hold unconstitutional the County's permitting system for adult establishments since it granted the licensing authority an unreasonably long period of time to consider a permit request. By severing the offending time limits from the ordinance, the Court was able to uphold the rest of the law.

In upholding the industrial zone restriction, the Court examined the third prong of the *Renton* test, *to wit*, that the regulation must serve a substantial government interest, be narrowly tailored to serve that interest, and allow for reasonable alternative avenues of communication. The plaintiffs argued that Justice Kennedy's concurrence in *Alameda Books*



imposed a heightened evidentiary burden on the County to show “how speech would fare” under the ordinance. The Ninth Circuit disagreed with this interpretation, explaining that “So long as there are a sufficient number of suitable relocation sites, the County could reasonably assume that, given the draw of pornographic and sexually explicit speech, willing patrons would not be measurably discouraged by the inconvenience of having to travel to an industrial zone.” The Ninth Circuit agreed with the District Court’s determination that 68 potential sites were available in the industrial zones, on which eight to 10 adult businesses could operate, and that this was sufficient to allow the plaintiff to relocate. The Ninth Circuit agreed with the District Court’s dismissal of the state claim for failure to raise it in the complaint, but disagreed with the District Court’s manner of severance of the offending period of time for processing an adult business license. The Ninth Circuit said that once the offending time limit is removed from the text of the ordinance (in this case it was between 130 and 140 days), then the ordinance contains no time limits at all for the

review of license requests, and that too is unconstitutional. The Ninth Circuit remanded this issue to the District Court to correct its severance order which should still sever the offending section and no longer require the license until such time as the ordinance is amended. The Ninth Circuit concluded that the remaining provisions of the local ordinance would continue to remain in effect.

### **Condemnation/Eminent Domain**

Post *Kelo*, eminent domain, once a specialty for attorneys concentrating in condemnation law, has been prominent on the radar screen of land use lawyers. Two recent cases warrant mention in this column. In December, a New York appellate court held that eminent domain could be used to preserve farmland in *In the Matter of Aspen Creek Estates Ltd. v. Town of Brookhaven*, 2007 WL 4246603. The “Manorville Farmland Protection Area” within the Town of Brookhaven is an approximately 500-acre working farm belt that is a high priority preservation target for the Town. The Town had previously acquired development rights to four farms in the area, preserv-

ing approximately 112 acres of farmland. The Appellate Division, Second Department upheld the Town's decision to exercise its power of eminent domain to condemn property in the protection area for the purpose of preserving its use as farmland because such action serves a legitimate public purpose. The Town Board said that the property was being acquired to, among other things, "preserve open space and agricultural resources, protect and promote continuation of agriculture in the Town, ensure the continued sale of fresh, locally grown produce, prevent conflicts between residential homeowners and adjacent farmers." Furthermore, the Board found that the condemnation would help to ensure the protection of scenic vistas and the rural character of the area. Prior to initiating the condemnation action, the Town sought to acquire the property through a negotiated sale. The Town's Open Space Environmental Bond Act Committee had authorized purchase of the land in 2003, but the current owners (Aspen Creek) were in negotiation to purchase it as well and they outbid the Town, purchasing the property in 2004 for \$1.4 million. Thereafter, the

Town attempted to purchase the development rights to the property from Aspen Creek, and after a series of offers, the Town increased its bid to \$4,004 million, which was roughly half a million dollars more than the highest appraisal, and also offered to let Aspen build three houses on the property. After this offer was rejected, the Town began the process of acquiring the property and development rights through condemnation.

Among other things, Aspen Creek argued that the Town's condemnation violated the State's Eminent Domain Procedure Law (EDPL) because it did not serve a public purpose and because the Town's true intent was to take the subject property and lease it to private farmers. With respect to the issue of whether the condemnation serves a public purpose, the Court concluded that the Town's stated reasons—preserving farmland, maintaining open space and scenic vistas—are all legitimate public purposes. The Court noted that the preservation of farmland "confers a benefit upon the public, since it enables residents of the Town to enjoy locally grown produce and scenic views." The Court also found that the

preservation of farmland is consistent with the public policy of the State to “promote, foster, and encourage the agricultural industry,” (citing to N.Y. Ag. & Mkts. L. sec. 3) and “preservation of open space and enhancement of natural resources.” (citing to N.Y. Gen. Mun. L. sec. 247[1]). Lastly, the Court noted that the Town residents believe that protection of open spaces and natural resources is important because they overwhelmingly supported a \$20 million bond act of such purpose in 2002 and a bond act of up to \$100 million in 2004 for preservation of open space, farmland and wildlife habitats. As to Aspen’s claim that the condemnation is unconstitutional because the true purpose is to bestow a private benefit on certain individuals (e.g., farmers), the Court found that this allegation had no factual support in the record and is insufficient to demonstrate bad faith. The Court said that “the mere fact that the condemnation will provide incidental benefits to private individuals does not invalidate the condemnor’s determination as long as the public purpose is dominant.” Further, the Court maintained that since the land had been continuously farmed

for more than a century prior to the Aspen purchase, “allowing farming to continue on the property is fully consistent with the purpose of the condemnation, the fact that one or more individuals may benefit is merely incidental, and does not render the public benefit to be achieved by condemnation illusory.” The Court said that a comprehensive development plan was not required pursuant to *Kelo v. City of New London*, 545 U.S. 469 (2005), because that condemnation was based upon the public purpose of economic development, and here the public purpose was farmland and open space protection.

In a case dealing with the Religious Land Use and Institutionalized Persons Act (RLUIPA) and eminent domain, the 7th Circuit Court of Appeals held that RLUIPA does not apply to the condemnation of a religious cemetery. In *St. John’s United Church of Christ v. The City of Chicago*, 502 F.3d 616, the Court held that the O’Hare Modernization Act (the “OMA”), which, among other things, amended the Illinois Religious Freedom Restoration Act (IRFRA) and excluded the O’Hare expansion project from IRFRA’s reach, does not violate the U.S. Con-

stitution or the Religious Land Use and Institutionalized Persons Act (RLUIPA). The State Legislature passed the OMA in 2003 to facilitate improvements and expansion to the airport. St. John's United Church claimed that the City's attempt to condemn a cemetery located on Church property violated the First Amendment's Free Exercise Clause, the Fourteenth Amendment's Equal Protection Clause and the RLUIPA.

On the Constitutional claims the Court found that the "object" of the OMA was to clear all legal obstacles to the O'Hare expansion project, and not to target the religious cemeteries that (among many other properties) the City needs to acquire. Hence the inquiry required in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) was satisfied because the OMA did not "infringe upon or restrict practices because of their religious motivation." The Court concluded that, "there is nothing inherently religious about cemeteries or graves, and the act of relocating them thus does not on its face infringe upon a religious practice, as *Lukumi* uses that term." In dismissing the Equal Protection claim, the

Court found that the statute did not classify St. John's cemetery on the basis of religion, and further that the airport expansion was a compelling governmental interest.

With respect to the RLUIPA claim, interestingly, the Court started by stating that they assumed the constitutionality of the statute based upon the U. S. Supreme Court holding in *Cutter v. Wilkinson*, 544 U.S. 709 (2005), but since the constitutionality of the land use section of RLUIPA was not raised by the parties here, they were saving that issue for another day. The Court next turned to the definition of "land use regulation" in the statute, which provides, "[A] zoning or land-marking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest." (42 U.S.C. § 2000cc-5(5)). The Court determined that RLUIPA did not apply here because the OMA was *not* a "land use regulation." In doing so, the Court commented on the distinction between zon-

ing and eminent domain and cited *Faith Temple Church v. Town of Brighton*, 405 F. Supp. 2d 250, 254 (W.D.N.Y. 2005).

### **Nonconforming Uses**

A significant number of cases focused on whether applicants were entitled to nonconforming use status on their land. Typically, when establishing a legally existing nonconforming business use, owners will produce all kinds of records to demonstrate that the business was operational prior to the enactment of the zoning or zoning amendment. In this case, the property owner was able to do that, but the court relied on the small amount of revenue generated from the use during that time to determine that the use was not significant enough to qualify for nonconforming status. As a result, the court never got to what might have been the more appropriate inquiry—whether the change in intensity constituted an impermissible enlargement or expansion of a nonconforming use.

The South Dakota Supreme Court, in *City of Platte v. Overweg*, 2007 WL 2460112, noted that prior to the adoption of the zoning ordinance, the property owner was employed at an au-

tomobile garage, but that he moonlighted doing occasional auto repair work from his residence, located in a residential-only district. The Court, in considering sales tax reports the business owner submitted to the State, showing under \$200 in income prior to the adoption of the zoning ordinance, determined that during that time the business use of the property was minimal and sporadic. The court noted that only after the effective date of the zoning ordinance did the business use increase in intensity. Specifically, subsequent to the effective date of the zoning ordinance, the property owner quit his primary employment and opened up his own glass and auto repair shop on his residentially zoned property. As a result, the Court said the property owner failed to meet his burden to “clearly establish the prior use to avail himself of the grandfather rights.”

Similarly, in Michigan, the law does not allow property owners to acquire nonconforming use status in their land if the use has not been fully operational prior to new or changed zoning. In *Vanfarowe v. Cascade Charter Township*, 2007 WL 3309920, the Michigan Appellate Court remanded a

case involving a special use permit to construct a boat launch on a lot owned by a homeowners association to determine whether the lot is entitled to nonconforming use status. The lot at issue was conveyed to the Goodwood Plat Owners, Inc. (GPO) in 1950 as part of a riverfront subdivision development. In 1991, the owners of the lots in the Goodwood Plat, upon discovering that the GPO has lapsed as a corporation for failure to file annual reports, formed the current GPO by incorporation in 1992, filing a successful suit to confirm ownership of the deeded lot for the boat launch. A quitclaim deed was executed to the GPO in 1996 subject to certain flowage rights and restrictions in the zoning ordinance. The lot is only 75 feet wide, but the zoning regulation requires a minimum of 100 feet of lake frontage. Following a public hearing, the Township granted GPO a special use permit, determining that the 100 foot minimum did not apply because the GPO was entitled to nonconforming use status, going back to the 1950 dedication. The Township, however, made no findings of fact as to how the lot in question had been used in the past. Neigh-

bors appealed, alleging among other things, that the determination that the lot was entitled to nonconforming use status was without basis in law and not based upon any material evidence claiming that there has been no tangible change in the land nor work of a substantial character performed on the property.

In reviewing the case law in Michigan with respect to nonconforming uses, the Court noted that to acquire nonconforming use status, “there must be work of a ‘substantial character’ done by way of preparation for an actual use of the premises.” The Court noted that in previous Michigan cases, the following activities were not enough to entitle owners to nonconforming use status: obtaining a building permit, ordering plans, surveying property, tearing down a barn and moving a house (*City of Lansing v. Dawley*, 247 Mich. 394); construction of a road, surveying and subdividing a plat, grading and excavating the sites, and installing 11 mobile homes (*Gackler Land Co., Inc. v. Yankee Springs Twp.*, 427 Mich. 562); development of a site plan, the clearing of trees and the construction of a commercial well and well-

house (*Heath Twp. v. Sall*, 442 Mich. 434); and obtaining financing, purchasing insurance, application for permits, designing of barn and manure pit layouts, obtaining quotes for the construction and signed contracts with suppliers, grading the site and construction of the barn and manure sewage system (*Belvidere Twp. v. Heinze*, 241 Mich. App. 324).

Because there were no findings of fact in the record below as to what, if any, work of a substantial nature had been done to the lot, the Court remanded the matter. However, based upon the long list of activities deemed not to be substantial by Michigan courts, it appears as though it will be very difficult for the property owners to establish nonconforming use status in this case, and seeking a variance may be an alternative course of action to pursue.

### **Religious Land Use and Institutionalized Persons Act (RLUIPA)**

A large number of reported cases in the last six months of 2007 focused on the siting of religious uses. Most of these cases were brought under RLUIPA. The substantial amount of litigation is due in

part to the failure of Congress to define key terms in the statute, which is requiring the courts to interpret legislative intent and constitutional standards of review. Unfortunately, the district courts and circuit courts have also failed to arrive at uniform definitions and tests, creating even more confusion and uncertainty for applicants and municipalities alike. All eyes were on the Supreme Court this fall when they had an opportunity to grant cert in the 7th Circuit Court of Appeals case of *Vision Church, United Methodist v. Village of Long Grove*, 468 F.3d 975. Many RLUIPA case followers were disappointed that the Court denied cert, leaving for another day the opportunity to review the constitutionality of the statute, as well as a uniform test for what constitutes a substantial burden on the exercise of religion and what constitutes a compelling government interest to justify a regulation that does impose a substantial burden on religious exercise. What follows are just a few examples of recent RLUIPA cases of interest.

The 7th Circuit Court of Appeals saw the most RLUIPA activity in the last six months with three reported decisions.



The first one was previously discussed in the condemnation/ eminent domain section. In the Village of Long Grove (Illinois) case, cited above, the Church sued alleging that the Village's denial of their application for voluntary annexation, its subsequent involuntary annexation of their property, its enactment of a municipal Public Assembly Ordinance, and its denial of their applications for a special use permit to build and occupy a church on real property it had purchased violated the 1st and 14th Amendments to the U.S. Constitution, the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), and various Illinois laws. The district court granted summary judgment in favor of the Village and the Seventh Circuit affirmed. According to the Village's "Comprehensive Plan," it is dedicated to preserving its "rural character," to the "provision of a quiet countryside" and to the enjoyment of "open space." The Zoning Regulations permit religious institutions (and other uses) as "special uses" in areas zoned as "R1," "R2" and "R3" Residential Districts. At the time of the initial application, the property owned by Vi-

sion Church was not located in the Village boundaries, but in its application, the Church requested as a condition of annexation that the Village zone its property "Residential (R2)" and grant it a "special use" permit to construct a church complex on the property. Vision's proposed plans called for a 99,000-square foot church facility, consisting of five main buildings and a sanctuary with over 1,000 seats. At the request of the Village, the Church submitted a revised plan, decreasing the size of the church to 56,200 square feet, consisting of three main buildings (a sanctuary, an administration building and a Sunday school building); the sanctuary would seat 600 instead of 1,000; and parking spaces were reduced from 400 to 240. In addition, the Church agreed to comply with some, but not all, of the Village's conditions on construction. In August 2001, the Plan Commission voted to recommend the denial of the Church's application for annexation, and this recommendation was accepted by the Village Board of Trustees.

Subsequently, due to an annexation of an adjacent piece of property, the Village involuntarily annexed the Church

property. The Village zoned the property “R2” Residential, the zoning classification sought by the Church in its June 2000 application for voluntary annexation. In April 2002 an amendment to the Village’s Zoning Regulations was enacted restricting the size and capacity of buildings used for “public assembly,” such as “religious institutions, aquariums, libraries, museums, private schools, and other similar uses.” (“Assembly Ordinance”) Specifically, it provides that a complex comprised of three buildings located on fifteen or more acres, but not fronting a state highway, cannot exceed a total square footage of 55,000. It also imposes restrictions on parking, setbacks from the road and the flow of traffic. In January 2002, approximately four months prior to the passage of the Assembly Ordinance, the Church applied for such a permit. However, instead of the 56,200-square foot complex discussed in March 2001 during negotiations over voluntary annexation, the Church requested approval in its special use application for the original 99,000-square foot, 5-building, 1,000-seat sanctuary facility originally proposed in 2000. The application was denied.

The Circuit court found that by permitting churches in all residential districts as a special use, the municipality has not completely or totally excluded religious assemblies from its jurisdiction, and the Court noted that six churches currently operate within the Village. The Court continued, “The requirement that churches obtain a special use permit is neutral on its face and is justified by legitimate, non-discriminatory municipal planning goals.” The Court further held that the land use regulations violated neither the Establishment Clause nor the equal terms clause of RLUIPA since they applied equally to all assembly uses, whether or not religious in nature.

In a second case, the 7th Circuit Court of Appeals found that the exclusion of religious uses from a buffer zone might violate RLUIPA’s “equal terms” provision. Arising in Indiana, *Digrugilliers v. Consolidated City of Indianapolis*, 2007 WL 3151201 involved a Baptist Church that leased space in a building located in a C-1 district, designated as a commercial office-buffer district, and religious uses were not allowed in the district without first obtaining a variance.

The Seventh Circuit overturned the district court's denial of a preliminary injunction requested by the Church finding that such requirement may violate the equal terms provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA) since other similar uses are allowed as of right (42 U.S.C. sec. 2000cc et seq. forbids local governments from imposing or implementing 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").

Among the uses allowed in a C-1 district without the need for a variance are: assisted-living facilities, auditoriums, assembly halls, community centers, senior citizen centers and day-care centers. Although the City pointed out that churches are allowed in SU-1 districts (special use), the Court noted that even if it was an offset, it could not eliminate any discrimination if such was found to exist. The Court also stated that the existence of alternative sites for the church is only relevant when the zoning ordinance is challenged as imposing a "substantial burden" on religious use of land. Al-

though the District Court also found persuasive the fact that State law forbids the sale of alcohol within 200 feet of a church and pornography within 500 feet, and these two uses are allowed in the C-1 district, the Circuit Court first noted that no evidence suggests that either use is currently in existence, and to argue that the government has created "protective zones" for religion constitutes discrimination in favor of religion. The Court said, "Government cannot, by granting churches special privileges . . . furnish the premise for excluding churches from otherwise suitable districts." Since the Court concluded that the church's claim that the City is violating RLUIPA has at least some, and possibly great, merit, it was an error for the District Court to deny the church a temporary injunction.

In a long awaited decision from the Second Circuit Court of Appeals in *Westchester Day School v. Village of Mamaroneck*, 2007 WL 3011061, the Court found not only that the Village violated RLUIPA because the denial of approvals for the expansion of a religious school constituted a substantial burden on the exercise of religion and the Village failed to

prove a compelling governmental interest to justify the burden, but more significantly, for the first time this Circuit Court determined that the statute is constitutional. Early RLUIPA cases in the district courts led some practitioners to believe that perhaps RLUIPA was unconstitutional. With most of the Circuit Court of Appeals now weighing in on the subject, however, there is less conflict as the Appeals Courts are finding the Act constitutional.

This decision was the latest in a five year battle between the Village of Mamaroneck, NY and the Westchester Hebrew Day School over the construction of a new school building. The School first submitted an application to the zoning board for modification of its special use permit to enable it to proceed with a \$12 million expansion project in October 2001. In February 2002, the Board voted unanimously to issue a negative declaration under the State Environmental Quality Review Act, meaning the project would have no significant environmental impacts. Following public opposition, the negative declaration was rescinded in August 2002. Rather than submit a full Environmen-

tal Impact Statement, the school commenced a lawsuit alleging that the rescission violated the Religious Land Use and Institutionalized Persons Act (RLUIPA). Following a ruling by the District court in 2002 that the negative declaration was not properly rescinded, the zoning board held hearings on the merits of the application and denied the application in May 2003. The denial was based upon the impact of the project on traffic, concerns over parking and the intensity of the use, but these grounds were identified after the hearings and affording no opportunity for the School to respond. The District Court determined that the denial was not supported by evidence in the record. After a number of procedural issues decided by the District Court and the Circuit Court, following a seven-day bench trial in November 2005, the Court ordered the Village to issue the special permit, and the Village appealed.

The Second Circuit said that the expansion of a school building used for religious purposes constitutes an exercise of religion. The Court explained that the following uses, just because they may be proposed by a religious organization, might not

constitute a “religious exercise:” a school gymnasium used solely for sporting activities; the building of a residence on school property for a headmaster; and the construction of additional office space for a school. None of these were at issue in this case. With respect to substantial burden, the Second Circuit adopted the coercion test set forth in the 11th Circuit’s *Midrashi* opinion (366 F.3d 1214), stating that “when there has been a denial of a religious institution’s building application, 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.” The Court said that an absolute rejection of the proposed plan, as in this case, was different from a rejection of a submitted plan that left open the possibility of approval of a resubmission with modifications designed to address the cited problem. Whether a conditional approval will constitute a substantial burden will depend upon whether there is a “reasonable opportunity for the institution to submit a modified applica-

tion, the denial does not place substantial pressure of it to change its behavior . . .”

The Court also noted that a substantial burden claim may exist where land use restrictions are imposed arbitrarily, capriciously or unlawfully. The Second Circuit noted that in this case, the Village Zoning Board acted unlawfully under New York State law because their decision was based on grounds “unrelated to the public’s health, safety or welfare.” In an attempt to show a compelling governmental interest, the Village raised traffic and parking concerns. While these are compelling governmental interests, in this case the Court found insufficient evidence in the record to prove these were legitimate concerns, beyond mere public opposition to the project. Lastly, with respect to the Village’s actions, the Court determined that even if they could articulate a compelling governmental interest, the Village did not satisfy the least restrictive means requirement since their denial of the application was absolute. The Court relied on the District Court’s findings that the ZBA members were not credible when they testified that they would give reasonable consid-

eration to another application by the School. The Court said, “When the board’s expressed willingness to consider a modified proposal is insincere, we do not require an institution to file a modified proposal before determining that its religious exercise has been substantially burdened.” Furthermore, the Court observed that “The ZBA had the opportunity to approve the application subject to conditions, but refused to consider doing so.”

Concluding that the Village violated RLUIPA, the Second Circuit considered the constitutionality of the Act. The Court said RLUIPA does not violate the Commerce Clause (so long as the jurisdictional element is satisfied that there is a minimal effect on commerce), it does not run afoul of the Tenth Amendment (“We do not believe RLUIPA directly compels states to require or prohibit any particular acts. Instead, RLUIPA leaves it to each state to enact and enforce land use regulations as it deems appropriate so long as the state does not substantially burden religious exercise in the absence of a compelling interests achieved by the least restrictive means.”), and that it does not violate the Establishment

Clause (“the principal primary effect of RLUIPA’s land use provisions neither advances nor inhibits religion.”).

### **Signs and Billboards**

Perhaps the hottest “new” issue in the area of regulating signs and billboards has been how to address electronic message boards, or billboards that can change the messages every thirty seconds. A number of municipalities have started to discuss and ban the use of these signs, and the Federal Highway Administration has published guidance for states about the regulation of these digital signs. Municipalities in New Hampshire, Kentucky and Massachusetts have recently considered and/or enacted bans on these types of signs, and practitioners are awaiting a ruling from the First Circuit on the constitutionality of prohibitions on these types of signs in the New Hampshire case of *Naser Jewelers, Inc. v. City of Concord*, United States District Court, New Hampshire, 2007 WL 1847307.

The City of Concord, New Hampshire, enacted a sign code that bans all signs “that move or create the illusion of movement, signs which are or appear to be animated or projected,

signs that affect or look similar to traffic signs or signals, and electronic message center (EMC) type signs” without regard to the content of the sign. Naser Jewelers, Inc. (NJI) sought a preliminary injunction in federal district court. The magistrate recommended the preliminary injunction be denied because he concluded that NJI was unlikely to succeed on the merits using the *Central Hudson* test (*Central Hudson Gas & Elec. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980)).

The district court agreed with the proposed disposition, but disagreed that *Central Hudson* controls this decision because the city’s sign code is content neutral. The district court concluded the sign code passes constitutional muster under the time, place, and manner test described in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). A content-neutral regulation must meet an “intermediate scrutiny test,” the regulation must be narrowly tailored to serve a significant government interest and allow for reasonable alternative channels of communication. The court noted that the city’s interests in traffic safety and community aesthetics each constitute a substantial governmental

interest. The sign code is sufficiently narrowly tailored because the city has not prohibited all signs, “only those signs the city plausibly thinks will adversely affect traffic safety, or prove detrimental to aesthetic values the city seeks to promote.”

In an interesting case from Pennsylvania, the Commonwealth Court held that portable search lights constitute a sign under a local zoning ordinance. In *Sutliff Enterprises, Inc. v. Silver Spring Tp. Zoning Hearing Bd.*, 2007 WL 2827744, A car dealership told the local zoning officer that the portable searchlights would not be permanently mounted and that the purpose of the lights would be to “call attention generally to the business locations and on occasion to specific promotional sales and events.” Both the zoning officer, and on appeal, the zoning board, concluded that the searchlights constituted a sign because they were being used to communicate a message. As such, the use of the lights were impermissible under the zoning ordinance because it prohibits “rotating or oscillating signs,” and because the sign ordinance requires that floodlight or spotlights be shielded so that there



is no direct light transmitted to other properties or rights-of-ways. The Pennsylvania Appeals Court agreed with the zoning board that the lights constituted a “sign” under the zoning ordinance which defines “sign” as “[a] device for visual communication that is used to bring the subject to the attention of the public . . . .”

The Ninth Circuit Court of Appeals handed down three billboard decisions at the end of 2007 all upholding the constitutionality of sign ordinances from the cities of San Diego, Oakland, and Beaumont. In *Get Outdoors II, LLC v. City of San Diego*, 2007 WL 3197108, after Get Outdoors filed twenty-four applications for billboard permits with the City, the city official informed the representative that the City ordinance prohibited new billboards, but agreed to review the applications. Following a review of the applications, the City denied them, noting that the City Code prohibits new signs bearing off-site messages, that each of the permits was missing key documents, and that the proposed billboards violated the size and height restrictions in the City law. In response to the initial filing of the lawsuit, the City enacted several legislative

amendments to the law, including a “message substitution” clause, a 45-day deadline for decisions on all permit applications, and a judicial review provision. As a result, the District Court granted summary judgment for the City.

The Ninth Circuit Court of Appeals held that the billboard size and height restrictions do not violate the First Amendment because they were a reasonable time, place and manner regulation designed “to optimize communication and quality of signs while protecting the public and aesthetic character of the City.” The Court also noted that the City had calibrated its size and height restrictions for “ground signs,” which include billboards, to the width of adjacent public rights-of-way and the speed limit. The Court determined that the restrictions are not substantially broader than necessary to protect the City’s interests in traffic safety and aesthetics, they directly advance the city’s interests, and they leave open alternative avenues of communication. The Court further concluded that Get Outdoors II’s permit applications violated these restrictions, and that therefore it lacked standing to challenge the ban on off-premises messages.

The second case, *Desert Outdoor Advertising v. City of Oakland*, 506 F.3d 798, arose after Desert Outdoor Advertising erected three signs in the City of Oakland, two of which were visible from the freeway and contained commercial advertising unrelated to the premises, and one visible from the highway that said "Volunteer to Be a Big Brother," and "Pray at First Baptist Church." The City ordered the signs removed as they were in violation of their sign regulations. The City also denied a variance request for the noncommercial signs for failure to meet the criteria set forth in the local regulations. Desert Outdoor brought both a facial and an as applied challenge to the sign regulations. The Municipal Code prohibits signs adjacent to freeways by providing that, "[n]o sign shall be erected, constructed, relocated or maintained in the City of Oakland if such sign is designed to have or has the advertising thereon maintained primarily to be viewed from a freeway." The regulation provided for four exceptions that include: signs that identify the name of the person, firm, or business occupying the premises and the type of business conducted

thereon; signs that identify the product manufactured on the premises; signs limited to a certain size relating to the sale, lease, hire or display of the building premises, and time and temperature units. No variances are permitted under the freeway sign ordinance. The City Planning Code banned the construction of new "advertising signs" anywhere within the City, but prior to the amendment, the Code allowed for variances only if four conditions were met: 1) strict compliance would result in practical difficulty or unnecessary hardship inconsistent with the zoning regulations, due to unique physical or topographic circumstances or conditions of design; 2) strict compliance would deprive the applicant of the privileges enjoyed by owners of similarly zoned property; 3) a variance could not adversely affect character, livability, or appropriate development of abutting properties or the surrounding area, or be detrimental to the public welfare; and 4) a variance cannot constitute a grant of special privilege. The third condition was repealed during the pendency of the lawsuit.

With respect to the facial challenge to the sign provisions

in the Municipal Code, the Court noted that the regulations ban only signs that are visible from the highway and that contain advertising, or commercial speech. The Court said that “advertising” does not imply noncommercial speech. The regulations the municipality relied on to deny the noncommercial signs were contained in the Oakland Planning Code, and not the Oakland Municipal Code, the regulation that Desert challenged. Although Desert argued that the Municipal Code provision contained unconstitutional content-based exceptions, the Court found that of all of the exemptions, the only one that was problematic was the exception for time and temperature units (because this is noncommercial speech), and the Court concluded that this particular exception was not enough to demonstrate that the City intended for the regulation to apply to noncommercial speech (in any event, the City did not appeal the District Court’s decision to sever this provision from the regulation). The Court held that the regulation does not impermissibly favor commercial speech over noncommercial speech and that it does not regulate speech based upon content.

With respect to Desert’s as applied challenge, the Court noted that the Municipal Code provides a flat ban on such advertising and does not allow for variances. Therefore, City officials had no discretion when applying the law to Desert’s signs. Turning to the amendment adopted by the City which was extended to be effective for 90 days after the Court of Appeals decision at which time the City will adopted permanent amendments to the Code, the Court noted that the provision was adopted to eliminate one of the four conditions required before a variance could be granted (see above). Desert argued that even with the elimination of this criteria, City officials were still left with undue discretion to permit or deny variances. The Court disagreed, finding that the remaining criteria, while not necessarily exact or explicit, were not too abstract, and not significantly concrete enough to restrict subjectivity. As a result, the Court was satisfied that the amended regulation “contains appropriate standards cabining the [City’s] discretion.” The Ninth Circuit concluded that the two sign ordinances challenged, as amended, are both constitutional, facially and as applied to Desert.

In the third case, *Outdoor Media Group, Inc. v. City of Beaumont*, 2007 WL 3197112, following a challenge to a denial of a permit to erect four billboards at a highway intersection on the grounds that the signs “would result in excessive, undue and adverse visual intrusion . . . by adding unrelated advertising to a future new commercial facility” and because the billboards would “have a detrimental effect on the general public, health, safety and welfare by adversely affecting existing views of open space and visual relief and future views of new commercial development,” the City of Beaumont (California) repealed their sign ordinance and replaced it with a new one that specifically bans new billboards. The original ordinance was challenged on the grounds that it granted discretion to the planning commission without standards for review, that it regulated more commercial speech than was necessary to advance a substantial governmental interest, and that it impermissibly burdened non-commercial speech greater than commercial speech and favored some non-commercial messages over others.

The City first sought dismissal of the challenge that the

billboard company failed to exhaust its state administrative remedies, but the Court explained that different from a takings case, such action is not a prerequisite to a proceeding under 42 U.S.C. § 1983. The Circuit Court did uphold the District Court’s determination that the repeal of the complained of sign ordinance moots the claims for declaratory and injunctive relief since there is no longer any risk that the billboard company will be subject to the challenged ordinance. The Court found no merit to the argument that the City would simply re-enact the old ordinance at a later date, noting, “The new ordinance, forbidding all billboards, accomplishes the city’s stated goals of limiting visual clutter and preserving commercial viability of future developments, meaning the city has no motive to re-enact a constitutionally suspect ordinance to accomplish the same objective.” The Circuit Court found that the new ordinance cures the constitutional deficiencies complained of with respect to the original ordinance since: the ban on new billboards now only requires the planning commission to make a determination as to whether the pro-

posed sign is an off-site sign, and this does not constitute unbridled discretion; the rationale for the new ordinance is based on aesthetic harm which is a substantial governmental interest; and the new ordinance contains a message substitution clause that permits the substitution of noncommercial content for existing copy on any otherwise permissible sign, curing any potentially impermissible burdens on noncommercial speech caused by the off-site ban. With respect to the billboard company's due process claim, the Circuit Court upheld the District Court's dismissal finding that there was no vested property right in an unapproved billboard permit application. However, the Circuit Court determined that the District Court erred in dismissing the First Amendment and Equal Protection claims on this ground since the establishment of a vested property right is irrelevant to such a challenge.

With respect to the First Amendment claims, the court found that the old sign ordinance did not impermissibly grant unbridled discretion to the permitting authority, that it was not an unconstitutional regulation of commercial speech, and that the ordinance

was not in violation of the overbreadth doctrine. The Court also upheld the dismissal of the Equal Protection claim, since billboards are not in a protected class and the regulation was rationally related to a legitimate governmental interest. The Circuit Court did find, however, that the old ordinance's off-site ban was a broad prohibition that seemed to reach beyond off-site commercial copy and could include noncommercial messages, and that it lacked the safeguard of the substitution clause contained in the new ordinance. Furthermore, the Court noted that the old ordinance may have impermissibly regulated noncommercial speech on the basis of content since it exempted certain noncommercial off-site signs from the permit requirement (e.g., political signs and certain directional signs). Since the case was before the court on a motion to dismiss, the Court said that record was not yet ripe to fully consider these claims.

### **Conclusion**

With hundreds of reported land use cases in the second half of 2007, land use and real estate lawyers are challenged to keep current and to monitor

the trends in fast-developing areas within this practice. Law of the Land offers one such vehicle, and provides readers with an option of registering for email notification as new cases are posted. When time permits, check out the growing number of land use law related blogs in cyberspace. A rich amount of information is available to assist in real estate practice.