NOTES

GOD AND LAND IN THE GARDEN STATE: THE IMPACT OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT IN NEW JERSEY

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INTRODUCTION

In a quiet rural town buried deep in the heart of the central New Jersey hills, a Pentecostal church was housed in a converted horse barn on twenty-five acres of property. The church's membership was growing rapidly and the small barn could no longer house its entire congregation during Sunday services. To address the problem, the church opted to expand its facilities. In fact, the church developed plans to more than double the size of its building to 50,000 square feet for a new 600-seat sanctuary. It also planned to add a Sunday school, bookstore, separate wedding facility, gymnasium, two sports fields, and a parking lot to accommodate nearly 500 cars.

The church's property was located in a quiet neighborhood off the main road through town, designated by the township as a single-family residential zone. The town's zoning laws, which permitted houses of worship in residential areas, protected the residential character of the neighborhood by, among other things, setting limits on building construction based on the size of the land on which the building sat. Since the church's proposed expansion greatly exceeded the town's limits, regulations required that the church receive special permission from the town zoning board before beginning construction.

After a series of hearings, the zoning board ultimately denied the church's application, citing numerous concerns including increased traffic, light and noise pollution, and environmental damage. The

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zoning board also feared that the proposed expansion would not fit with the residential character of the neighborhood.

Although the two sides worked toward a compromise, negotiations ultimately fell short. In response, the church filed a lawsuit in federal court alleging that the zoning board violated a new federal law giving special protection to religious land owners. Since the lawsuit was based on a federal statute, the township could not defend its actions in state court; there, a judge might be more deferential to the zoning board's decision or at least more familiar with local concerns.

The township quickly realized that fighting the lawsuit would not be easy. The church had hired a high-powered New York law firm and constitutional law experts from Washington, D.C. who worked for a well-funded religious interest group. The township was also facing the possibility of involvement by the U.S. Department of Justice. Worse still, the town realized that if it lost the suit, it would be required to pay the church's legal fees in addition to its own costs. These costs threatened to cripple the already cash-strapped community.

Facing expensive and protracted litigation, the town opted to cut its losses and sought a settlement. Despite significant local opposition to the church's expansion, the town ultimately agreed to approve much of the church's original proposed expansion.

This story is based on an actual case.[1] Recently, it has become the commonplace experience of local New Jersey communities, as well as others throughout the country, who face challenges under the Federal Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).[2] RLUIPA was passed with the noble intention of fighting discrimination against religious groups by communities that use land regulations as pretext to keep out churches, temples, mosques, or other houses of worship. As the story above demonstrates, however, there are legitimate questions about whether the law gives religious groups de facto immunity even from inherently neutral land use controls applied without discriminatory intent. Unsurprisingly, the law has sparked controversy nationwide.

This Note tracks the development of RLUIPA and focuses on its application in New Jersey, one of the nation's most densely populated and religiously diverse states. Given the land use challenges that it

1. *See generally* Church of the Hills of Bedminister v. Twp. of Bedminster, No. 05-3332, 2006 WL 462674 (D.N.J. Feb. 24, 2006); *see also* Nyier Abdou, *Settlement to Allow Expansion of Church*, THE STAR-LEDGER (Newark, NJ), Jan. 26, 2007, at 31 [hereinafter Abdou, *Settlement to Allow Expansion of Church*].

2. 42 U.S.C. §§ 2000cc to -5 (2006). The unfortunate acronym "RLUIPA" is pronounced either as *rah-loopah* or *ahr-loopah*.

already faces, the Garden State provides a unique context for a case study on RLUIPA's impact.

Part I of this Note provides a brief historical background on the development of RLUIPA and examines how courts have interpreted the law. Part II transfers that backdrop to RLUIPA's application in New Jersey. This section will assess the impact that RLUIPA has had in the Garden State, analyzing precisely whether RLUIPA has changed the land use approval process for religious landowners. To accomplish that goal, Part II will survey how religious land use issues were resolved in the state prior to RLUIPA and will analyze RLUIPA's application in New Jersey's state and federal courts. Moreover, attention will be paid to instances, like the example above, where RLUIPA achieves success for religious groups through out-of-court settlements. Lastly, this section will explore whether RLUIPA has had an effect on statewide efforts to curb overdevelopment in New Jersey. Part III examines the prospects for legislative or judicial changes to RLUIPA in the near future.

The analysis concludes that RLUIPA has, in fact, significantly altered the landscape of New Jersey zoning law. Prior to RLUIPA, New Jersey law undoubtedly gave preferential treatment to religious landowners. While there remains a legitimate need to monitor and prevent discrete discrimination in the local zoning process, the evidence suggests that RLUIPA goes too far, and in doing so, creates an unfair process that fosters the very animosity toward religious land use that the law was intended to prevent.

I. THE ORIGIN AND SCOPE OF RLUIPA

On September 22, 2000, President Bill Clinton signed RLUIPA into law barely two months after the bill had been introduced.[3] Congress passed the legislation quietly, without a single hearing, without debate, and without a recorded vote in either the Senate or the House of Representatives.[4] The story of how this controversial and divisive law came to be enacted without so much as a whisper is well-told and will not be rehashed in detail in this Note.[5]

3. ROSS K. BAKER, STRANGERS ON A HILL 100 (2007).

4. *Id.* The House and Senate versions passed by unanimous consent in both chambers on the very same day. *Id.* Also, because the House and Senate bills were identical, no conference between the chambers was required before the bill was submitted to the President. *Id.*

5. For more comprehensive discussions, see *id.*; Daniel P. Lennington, *Thou Shalt Not Zone: The Overbroad Applications and Troubling Implications of RLUIPA's Land Use Provisions*, 29 SEATTLE U. L. REV. 805, 806-19 (2006); Ariel Graff, Note, *Calibrating the Balance of Free Exercise, Religious Establishment, and Land Use Regulation: Is RLUIPA an Unconstitutional Response to an Overstated Problem?*, 53 UCLA L. REV. 485, 488-503 (2005).

Nevertheless, a general understanding of RLUIPA's origin is essential in order to understand its current effect.

A. *Congress, the Supreme Court, and a Spar Over the First Amendment's Free Exercise Clause*

RLUIPA is the result of a decades-long sparring match between Congress and the U.S. Supreme Court on the scope of the First Amendment's Free Exercise Clause.[6] Prior to 1990, challenges to government actions that allegedly infringed the free exercise of one's religion were examined under the test announced by the Supreme Court in *Sherbert v. Verner*.[7] This test applied strict scrutiny to such government actions: "any incidental burden on the free exercise of [one's] religion [must] be justified by a 'compelling state interest.'"[8]

The Court dutifully applied the *Sherbert* test for the next several decades, viewing it as settled law.[9] The test was also perceived as highly protective of religious freedom.[10] In fact, lower courts frequently applied *Sherbert* in the context of land use controversies.[11] The Court, however, soon began to show signs that it might not apply strict scrutiny to all government actions that allegedly infringed free religious exercise. For example, in the 1982 case *United States v. Lee*, a concurring opinion by Justice Stevens foreshadowed a new direction when he noted that the Court should treat enforcement of "neutral laws of general applicability" differently than laws specifically targeted at a class of individuals.[12]

In 1990, the Court finally narrowed the scope of *Sherbert* in *Employment Division v. Smith*.[13] In that case, two Native Americans were fired from their jobs and denied unemployment benefits after ingesting peyote for religious purposes, on the grounds that the consumption of peyote was a crime under Oregon law.[14] The

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6. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

7. 374 U.S. 398 (1963).

8. *Id.* at 403 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)). In so holding, the Court expressly rejected any consideration of a rational basis test. *Id.* at 406.

9. *See, e.g.*, Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 713-15 (1981); Wisconsin v. Yoder, 406 U.S. 205, 220 (1972).

10. In the years following *Sherbert*, however, the Court rarely struck down government actions on the basis of a free exercise violation. *See* Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise*: Smith, Lukumi, *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 852 (2001).

11. *See* Bradley Donald Parkinson, *Religion, Zoning, and the Free Exercise Clause: The Impact of* Employment Division v. Smith, 7 BYU J. PUB. L. 395, 402-03 (1993).

12. United States v. Lee, 455 U.S. 252, 262-63 n.3 (1982) (Stevens, J., concurring).

13. 494 U.S. 872 (1990).

14. *Id.* at 874.

plaintiffs challenged the constitutionality of the law, arguing that it infringed the free exercise of their religious beliefs.[15]

In an opinion written by Justice Scalia, the Court took hold of the distinction between neutral laws and laws that directly regulate religious beliefs as such.[16] Justice Scalia noted that the *Sherbert* test was "developed in a context that lent itself to individualized government assessment" of a person's conduct—unemployment compensation.[17] In *Smith*, however, an "across-the-board . . . prohibition on a particular form of conduct" was at issue.[18] In short, the Court held that the *Sherbert* test was inapplicable to religiously neutral and generally applicable government actions.[19]

The *Smith* decision sent shockwaves through religious and legal communities. Many believed that the Court had "overturned a long-settled doctrine that required strict scrutiny of any law, no matter how neutral, that substantially burdened religious conduct."[20] The response among these groups was swift as they quickly organized to respond legislatively. The Court's decision in *Smith* ultimately led "to a monumental constitutional clash between the . . . Supreme Court and . . . Congress that would rank among the most contentious and prolonged in modern history."[21]

Spurred by a well-organized coalition of religious organizations, Congress responded to *Smith* in 1993 with the adroitly-titled Religious Freedom Restoration Act (RFRA).[22] RFRA's express purpose was to "restore the compelling interest test as set forth in [*Sherbert*]" that was "virtually eliminated" by the Court's decision in *Smith*.[23] The Act broadly required strict scrutiny of *any* government action that "substantially burden[ed] a person's exercise of religion even if the burden result[ed] from a rule of general applicability."[24]

The Supreme Court responded only four years later by declaring RFRA unconstitutional in *City of Boerne v. Flores*.[25] The case

15. *Id.*

16. *Id.* at 877-79.

17. *Id.* at 884.

18. *Id.*

19. *Id.* at 885. Significantly, Justice Scalia noted that "[t]o make an individual's obligation to obey [generally applicable laws] contingent upon the law's coincidence with his religious beliefs . . . permit[s] him . . . 'to become a law unto himself.'" *Id.* (citation omitted).

20. MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 223 (2005).

21. BAKER, *supra* note 3, at 57.

22. 42 U.S.C. §§ 2000bb to -4 (2006), *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997).

23. *Id.* § 2000bb(a)(4), (b)(1).

24. *Id.* § 2000bb-1(a).

25. 521 U.S. 507.

considered RFRA in the context of a city's land use ordinance requiring preapproval for "construction affecting historic landmarks or buildings" in designated "historic district[s]."[26] There, a church invoked RFRA to challenge the denial of its application to enlarge its building, which was constructed in 1923 and located in a historic preservation district.[27] The Court found RFRA's sweeping application of strict scrutiny to any governmental action to be beyond the scope of Congress's authority under Section Five of the Fourteenth Amendment.[28] Specifically, the Court found that, because RFRA applied to religiously neutral state laws, the law improperly redefined constitutional protections.[29] Implicit in the Court's decision was the fact that a land use regulation like the city of Boerne's historic preservation plan was neutral and generally applicable.[30]

Congress's response to *Boerne* commenced less than one month after the decision and ultimately concluded with the passage of RLUIPA in 2000.[31]

B. Interpretation of RLUIPA's Land Use Provisions

RLUIPA essentially retains the strict scrutiny test of *Sherbert* and RFRA, but significantly limits its application to two discrete areas: land use and prisoner regulations.[32] With respect to land use, RLUIPA is intended to apply where a locality has in place

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26. *Id.* at 512.

27. *Id.* at 511-12.

28. *See id.* at 532 ("Sweeping coverage ensures [RFRA's] intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter.").

29. *See id.* ("RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections.").

30. *See id.* at 535.

> It is a reality of the modern regulatory state that numerous state laws, such as the zoning regulations at issue here, impose a substantial burden on a large class of individuals. When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens . . . .

Id.

31. BAKER, *supra* note 3, at 89-99. Prior to the passage of RLUIPA, members of Congress both in 1998 and 1999 introduced the Religious Liberty Protection Act. *Id.* at 93-94. However, the bill stalled in Congress. *Id.* Opposition stemmed from concerns over the bill's constitutional underpinning and from the possibility that it might interfere with state and local antidiscrimination laws. *Id.* at 94.

32. 42 U.S.C. §§ 2000cc to -1 (2006). The provisions of RLUIPA relating to institutionalized persons are beyond the scope of this Note, except insofar as court interpretation of those provisions provide a useful understanding of the land use sections.

"procedures or practices that permit the government to make[] individualized assessments of the proposed uses for the property involved."[33] In such cases, RLUIPA declares a general rule:

> 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 –
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> (A) is in furtherance of a compelling governmental interest; and
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> (B) is the least restrictive means of furthering that compelling governmental interest.[34]

By emphasizing "individualized" land use assessments and by assigning strict judicial scrutiny, Congress was clearly attempting to sidestep the Supreme Court's decisions in *Smith* and *Boerne*. Case-by-case application of land use laws, however, does not change the fact that such laws are still neutral and are by definition generally applicable to any and all proposed land uses.[35]

Notwithstanding this end-run around *Smith* and *Boerne*, RLUIPA's land use section does not readily lend itself to clear interpretation, and consequently, its application by the courts has been far from uniform.

1. The Meaning of "Religious Exercise"

The scope of RLUIPA's land use provision is governed in large part by the meaning of the term "religious exercise." RLUIPA expressly and broadly defines "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[36] As applied to the use of land, the Act goes on to declare that "[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."[37] This expansive definition is further underscored by an express rule of construction that RLUIPA is to be "construed in favor of a broad protection of religious exercise, to the

33. *Id.* § 2000cc(a)(2)(C).

34. *Id.* § 2000cc(a)(1)(A)-(B).

35. *See* HAMILTON, *supra* note 20, at 107-08 ("'Individualized assessment,' by itself, means 'case by case.' If government making individualized assessments makes the outcome presumptively unconstitutional, then every judicial decision in the United States is likely unconstitutional.").

36. 42 U.S.C. § 2000cc-5(7)(A).

37. *Id.* § 2000cc-5(7)(B).

maximum extent permitted by the terms of th[e] Act and the Constitution."[38]

This broad definition seems purposefully vague. It presumably includes as "religious exercise" accessory uses of land by religious institutions that are not directly related to religious worship or belief.[39] In fact, in some instances, judicial interpretation of this provision tests the bounds of the popular conception of "religion." For example, a California court recently found that the practices of a local branch of Freemasons—the nation's oldest fraternal order—were indistinguishable from other more widely accepted forms of religious exercise for the purposes of RLUIPA.[40]

Some courts have, nevertheless, recognized that the meaning of "religious exercise" must have sideboards. For example, the Second Circuit has expressed reservation about the law's expansive definition. In *Westchester Day School v. Village of Mamaroneck*,[41] the court, in dictum, expressed doubt about whether a religious school's proposed building expansion for secular use could be classified as "religious exercise."[42] In questioning the scope of RLUIPA's "religious exercise" definition, the court noted that:

> [a]s 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.[43]

RLUIPA's scant legislative history provides no clear direction on the scope of "religious exercise," but nevertheless seems to indicate

38. *Id.* § 2000cc-3(g).

39. *See* Sara C. Galvan, Note, *Beyond Worship: The Religious Land Use and Institutionalized Persons Act of 2000 and Religious Institutions' Auxiliary Uses*, 24 YALE L. & POL'Y REV. 207, 224-25 (2006).

40. Scottish Rite Cathedral Ass'n of L.A. v. City of L.A., 67 Cal. Rptr. 3d 207, 215 n.10 (Cal. Ct. App. 2007) ("Although Freemasonry does not identify itself as a religion and need not for purposes of RLUIPA, it plainly fosters principles and practices that resemble religious exercise . . . .").

41. 386 F.3d 183 (2d Cir. 2004).

42. *Id.* at 189.

43. *Id.* Incidentally, in a later opinion in this same case, the Second Circuit ultimately held that RLUIPA did not violate the Establishment Clause. Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 355-56 (2d Cir. 2007). The court also held that the school's expansion was a "religious exercise" within the meaning of RLUIPA based on the "careful factual findings" of the lower court that the proposed renovations would in fact be used for "religious education and practice." *Id.* at 348.

some limitations.[44] Historically, however, courts have been hesitant to define what is and is not central to one's religious beliefs.[45] Thus, it is not surprising that courts might lean towards a broader application of "religious exercise" within the meaning of RLUIPA.

2. The Meaning of "Substantial Burden"

Whether a government action imposes a "substantial burden" on one's religious exercise is perhaps the most hotly contested and litigated aspect of RLUIPA. RLUIPA itself does not define the term "substantial burden," leaving it to courts to fashion a meaning. Legislative history provides little guidance, noting only that "it is not the intent of [RLUIPA] to create a new standard for the definition of 'substantial burden' on religious exercise. Instead, that term as used in the Act should be interpreted by reference to Supreme Court jurisprudence."[46] Unsurprisingly, U.S. courts of appeals have varied in their approach to the meaning of this elusive term.[47]

Early applications of RLUIPA's "substantial burden" provision showed a fairly wide chasm of difference among federal appeals courts. Some, such as the Seventh Circuit, at least initially adopted a decisively narrow definition of the phrase, limiting its scope to government action that "necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . .

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44. A joint statement issued by the bill's two main Senate sponsors, Senators Orrin Hatch (R-UT) and Ted Kennedy (D-MA) states:

> not every activity carried out by a religious entity or individual constitutes "religious exercise." In many cases, real property is used by religious institutions for purposes that are comparable to those carried out by other institutions . . . . [The fact that these activities are carried out by a religious institution] alone does not automatically bring these activities or facilities within the bill's definition or [sic] "religious exercise."

146 CONG. REC. S7774 (daily ed. July 27, 2000) (joint statement of Sens. Hatch & Kennedy).

45. *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872, 886-87 (1990) ("What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith?").

46. 146 CONG. REC. S7774.

47. Perhaps surprisingly, despite having had several opportunities, the Supreme Court has thus far declined to take up the issue to resolve a perceived circuit split. *See, e.g.*, Vision Church v. Vill. of Long Grove, 468 F.3d 975 (7th Cir. 2006), *cert. denied*, 128 S. Ct. 77 (2007); *see also* Petra Presbyterian Church v. Vill. of Northbrook, 489 F.3d 846 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 914 (2008).

A full discussion of the various courts of appeals' tests for what constitutes a "substantial burden" is beyond the scope of this Note. For a comprehensive analysis of each court's current formulation and for an in-depth analysis of what actions have and have not been held to constitute a "substantial burden," see Patricia E. Salkin & Amy Lavine, *The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and its Impact on Local Government*, 40 URB. LAW. 195 (2008).

effectively impracticable."[48] Several courts originally sided with this approach, including, importantly for New Jersey, the Third Circuit.[49]

In contrast, some courts adopted a considerably more flexible definition. In particular, in *Midrash Sephardi, Inc. v. Town of Surfside*, the Eleventh Circuit explicitly rejected the Seventh Circuit's definition, determining that "a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct."[50] In addition, the Ninth Circuit requires that a land use regulation "must impose a significantly great restriction or onus upon" religious exercise to constitute a substantial burden.[51] In so holding, the Ninth Circuit clarified that its own test was "more lenient" than the "effectively impracticable" test of the Seventh Circuit.[52]

More recently, however, it appears that this chasm may be narrowing.[53] In a subsequent Seventh Circuit decision, Judge Posner, writing for the majority, signaled a retreat from the previously announced "effectively impracticable" standard without specifically addressing the issue.[54] In that case, the court found the burden placed on a Greek Orthodox church substantial because the regulation at issue would have resulted in "delay, uncertainty, and expense"[55]—hardly the equivalent of an "effectively impracticable burden."[56]

At the same time, there are indications that the Third Circuit may also be broadening its interpretation of substantial burden. In *Washington v. Klem*, a 2007 prisoner litigation case under RLUIPA,

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48. Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003) [hereinafter CLUB].

49. *See* Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 100 F. App'x 70, 76-77 (3d Cir. 2004).

50. 366 F.3d 1214, 1227 (11th Cir. 2004). The court more specifically found that "a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly." *Id.*

51. Guru Nanak Sikh Soc'y v. County of Sutter, 456 F.3d 978, 988-89 (9th Cir. 2006) (quoting San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004)).

52. *Id.* at 988-89 n.12.

53. *See* Edward W. McClenathan, *Swinging the Big Stick: How the Circuits Have Interpreted RLUIPA and What Practitioners Need to Know*, 36 REAL EST. L.J. 405, 425 (2008).

54. Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 899-901 (7th Cir. 2005). In a more recent case (again penned by Judge Posner), the Seventh Circuit drew on both the *CLUB* case and *City of New Berlin* to find a lack of substantial burden. Petra Presbyterian Church v. Vill. of Northbrook, 489 F.3d 846, 850-51 (7th Cir. 2007). In any event, the Seventh Circuit formulation appears to be still in the developmental stage.

55. *City of New Berlin*, 396 F.3d at 901.

56. CLUB, 342 F.3d 752, 761 (7th Cir. 2003).

the Third Circuit considered at length the various meanings given to the phrase "substantial burden" in both prisoner and land use cases.[57] In order to make clear what it deemed "unnecessary confusion" on the issue, the court adopted a disjunctive test in line with its previous understanding of the phrase in the context of *Sherbert*:

> [f]or the purposes of RLUIPA, a substantial burden exists where: 1) a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available to other inmates versus abandoning one of the precepts of his religion in order to receive a benefit; OR 2) the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs.[58]

The Third Circuit adopted this approach without reference to its earlier holding in *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, where the court applied the Seventh Circuit's narrower definition.[59] At least one district court in New Jersey has already considered the Third Circuit's new "substantial burden" standard in the context of a RLUIPA land use suit. In *Albanian Associated Fund v. Township of Wayne*,[60] the district court noted the differences between the previous "non-precedential Third Circuit view used prior to *Washington*" and the *Washington* approach.[61]

Importantly, the district court noted that even though *Washington* did not consider RLUIPA's land use provision, its "substantial burden" definition was adopted "for the purposes of RLUIPA" broadly.[62] Without answering whether it fully applies in the land use context, the court held that under both standards, the zoning board's actions constituted a substantial burden, even though the plaintiff was not precluded from practicing aspects of its religion in its present facilities.[63] As a result, there is considerable doubt about future application of the "effectively impracticable" standard in New Jersey, which has significant implications for RLUIPA litigation in the state.[64]

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57. Washington v. Klem, 497 F.3d 272, 277-83 (3d Cir. 2007).

58. *Id.* at 280. This test is essentially identical to the approach taken by the Fifth Circuit in RLUIPA prisoner suits. *See* Adkins v. Kaspar, 393 F.3d 559, 570 (5th Cir. 2004).

59. 100 F. App'x 70, 76-77 (3d Cir. 2004).

60. No. 06-cv-3217, 2007 WL 2904194 (D.N.J. Oct. 1, 2007).

61. *Id.* at *9.

62. *Id.*

63. *Id.* at *9-10.

64. CLUB, 342 F.3d 752, 761 (7th Cir. 2003).

3. RLUIPA's Equal Terms and Nondiscrimination Provisions

RLUIPA's land use section also contains provisions aimed at more direct discrimination against religious institutions. Legislative history indicates that RLUIPA's Equal Terms and Nondiscrimination provisions were intended to "prohibit various forms of discrimination against or among religious land uses" and to "enforce the Free Exercise Clause rule against laws that burden religion and are not neutral and generally applicable."[65] The law states:

> (1) Equal terms. 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.
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> (2) Nondiscrimination. 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.
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> (3) Exclusions and limits. No government shall impose or implement a land use regulation that—
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> > (A) totally excludes religious assemblies from a jurisdiction; or
> >
> > (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.[66]

This section of RLUIPA has stirred some controversy,[67] particularly in the Third Circuit in a case stemming from New Jersey. In *Lighthouse Institute for Evangelism v. City of Long Branch*, the Third Circuit determined that RLUIPA's Equal Terms and Nondiscrimination provisions were intended to codify existing Free Exercise jurisprudence.[68] Legal analysis therefore hinged on "a comparison of how [a regulation] treats entities or behavior that has the same *effect* on its objectives."[69] While the Third Circuit agreed with the lower court that a RLUIPA plaintiff must do more than identify "*any* nonreligious assembly or institution that enjoys better terms under [a] land use regulation[,]" it nevertheless held that the plaintiff need not identify a secular comparator that proposed the same exact combination of land uses.[70] Rather, "a regulation will violate [RLUIPA's] Equal Terms provision only if it treats religious

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65. 146 CONG. REC. S7774 (daily ed. July 27, 2000) (joint statement of Sens. Hatch & Kennedy).

66. 42 U.S.C. § 2000cc(b) (2000). This section of the bill appears to be litigated with less frequency and therefore will not be discussed in great detail in this Note.

67. *See* Salkin & Lavine, *supra* note 47, at 241-46.

68. 510 F.3d 253, 264 (3d Cir. 2007).

69. *Id.*

70. *Id.*

assemblies or institutions less well than secular assemblies or institutions that are similarly situated *as to the regulatory purpose*" of the land use restriction.[71]

Under this formulation, the court held that the city's redevelopment plan did not violate RLUIPA. "[C]hurches [were] not similarly situated to the other allowed assemblies with respect to the aim[] of the [redevelopment] [p]lan," which encouraged restaurants into the city, because of an ordinance that prohibited the sale of alcohol within a certain distance of churches.[72] The court, however, did conclude that a separate city ordinance violated RLUIPA's equal terms provision because it permitted "assembly halls," but not religious assembly.[73]

The Third Circuit also made two other important holdings: (1) a RLUIPA plaintiff need not demonstrate a "substantial burden" on its religious exercise under the law's Equal Terms provision;[74] and (2) "RLUIPA's Equal Terms provision operates on a strict liability standard; strict scrutiny does not come into play."[75]

The extent of impact *Lighthouse* will have on future RLUIPA litigation is presently unclear.[76] The Third Circuit's decision creates a split among courts of appeals on several issues regarding the Equal Terms provision.[77] RLUIPA plaintiffs and defendants will therefore need to monitor this issue closely.

4. Attorney's Fees

Although not as judicially vexing as the Act's "religious exercise," "substantial burden," or "equal terms" provisions, RLUIPA's attorney fee clause may have the single most significant impact on the outcome of zoning disputes between religious land owners and municipalities. In RLUIPA, Congress explicitly provided the authority for courts to grant a "prevailing party" reasonable attorney

71. *Id.* at 266.

72. *Id.* at 270.

73. *Id.* at 272-73.

74. *Id.* at 262-64.

75. *Id.* at 269.

76. Importantly, the Third Circuit's decision left intact the lower court's holding that the town's ordinance and redevelopment plan did not impose a substantial burden on the church's religious free exercise. *See* Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 406 F. Supp. 2d 507, 515-16 (D.N.J. 2005). In dictum, the lower court signaled that even if the court had found a substantial burden, RLUIPA still would not have been violated because the city's "stated interest in creating an artistic and 'dynamic commercial center' in place of what has been a deteriorating downtown [was] a legitimate and compelling government interest." *Id.* at 516.

77. *See, e.g.*, Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County, 450 F.3d 1295, 1308 (11th Cir. 2006).

fees as part of their costs.[78] Commentators have noted that granting "attorneys fees award[s] to successful plaintiffs, has created an atmosphere wherein many counties, cities, and towns" that cannot afford to pay such fees "feel significant pressure to compromise or accede to the demands of potential plaintiffs who can assert religious reasons for the use or proposed use of their property."[79]

Other than settlement, the only alternative under RLUIPA for some local communities is to "avoid the preemptive force" of the Act by either (1) changing the land use provision at issue; or (2) retaining the provision but exempting the proposed religious land use at issue.[80] In any scenario, this provision places significant pressure on RLUIPA defendants.

II. NEW JERSEY CASE STUDY

New Jersey is the ideal candidate for an examination of RLUIPA's on-the-ground impact. Although not the most populous state, New Jersey is by far the most densely populated state in the country.[81] With an average of 1134.5 persons per square mile, New Jersey's population density stands well over the national average of 79.6.[82] New Jersey is also one of the most racially and ethnically diverse states.[83] Not surprisingly, it is also among the most religiously diverse states.[84]

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78. 42 U.S.C. § 1988(b) (2006).

79. Jeffrey H. Goldfien, *Thou Shalt Love Thy Neighbor: RLUIPA and the Mediation of Religious Land Use Disputes*, 2006 J. DISP. RESOL. 435, 447 (2006).

80. § 2000cc-3(e) (2006).

81. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, 2000 CENSUS OF POPULATION AND HOUSING, POPULATION AND HOUSING UNIT COUNTS, UNITED STATES SUMMARY, at 29 tbl.17 (2004) (excluding the District of Columbia).

82. U.S. Census Bureau, U.S. Dep't of Commerce, State & County Quickfacts: New Jersey, http://quickfacts.census.gov/qfd/states/34000.html (last visited Mar. 29, 2009).

83. For example, New Jersey has the fourth-highest Asian population, the seventh-highest Hispanic/Latino population, and the fifteenth-highest African American population in the nation. *See* U.S. CENSUS BUREAU, ASIAN POPULATION ALONE, NUMBER—JULY 2007 (2008), http://www.census.gov/compendia/statab/ranks/rank14.html; U.S. CENSUS BUREAU, HISPANIC OR LATINO ORIGIN POPULATION, NUMBER—JULY 2007 (2008), http://www.census.gov/compendia/statab/ranks/rank16a.html; U.S. CENSUS BUREAU, BLACK OR AFRICAN-AMERICAN POPULATION ALONE, NUMBER—JULY 2007 (2008), http://www.census.gov/compendia/statab/ranks/rank12.html.

84. Although Catholicism is the dominant religious group in New Jersey, other Christian groups are prevalent throughout the state as well, including Baptist, Methodist, Lutheran, Presbyterian, Protestant, and Pentecostal. BARRY A. KOSIM, EGON MAYER & ARIELA KEYSAR, THE GRADUATE CENTER OF THE CITY UNIVERSITY OF NEW YORK, AMERICAN RELIGIOUS IDENTIFICATION STUDY 2001, at 39-41 ex.15, www.gc.cuny.edu/faculty/research_briefs/aris.pdf. New Jersey has the second-highest population of Jewish residents in the country, next to New York. *Id.* Additionally, New Jersey has statistically significant percentages of Muslim/Islamic residents, Jehovah's

RLUIPA aside, New Jersey faces daunting land use challenges as it struggles to balance new development with quality of life values. As the population of the state expands and stretches farther into New Jersey's remaining rural areas, developable land is becoming scarce. One report states the issue starkly:

> Every year New Jersey adds approximately 16,600 acres of new development while losing more than 9,600 acres of farmland, 4,200 acres of forest, and 2,600 acres of wetlands. . . . Put on a more comprehensible scale, the daily urban growth rate in New Jersey [is] equivalent to adding 41 football fields worth of new urban land every day while losing 20 football fields of farmland, 9 football fields of forest and 6 football fields of wetlands.[85]

In fact, if current trends continue, all of New Jersey's remaining available land may be developed in roughly forty years.[86] The state is on pace to become the first in the nation to reach "build-out."[87]

New Jersey is attempting to address the issue through regional and local planning initiatives.[88] Nevertheless, an expanding ethnically and religiously diverse population, as well as a shrinking land base, has created a "perfect storm" for RLUIPA in New Jersey. In fact, it has become among the most controversial land use issues in New Jersey, and the state is recognized as one of the nation's primary hotbeds for RLUIPA litigation.[89]

The following section of this Note will assess the extent of RLUIPA's impact in New Jersey by examining how state law treated religious land use disputes before RLUIPA, and how RLUIPA litigation has fared in both state and federal court. It will also briefly examine instances in which the law appears to be creeping into broader planning efforts in the state.

Witnesses, and Mormons. *Id.* In fact, according to one source, New Jersey has the fourth-largest Muslim population in the United States, behind only California, New York, and Illinois. Fareed H. Numan, The Muslim Population in the United States: A Brief Statement, Dec. 1992, http://www.islam101.com/history/population2_usa.html.

85. JOHN HASSE & RICHARD LATHROP, RUTGERS UNIVERSITY, CENTER FOR REMOTE SENSING AND SPATIAL ANALYSIS, MEASURING URBAN GROWTH IN NEW JERSEY 1 (2001), http://www.crssa.rutgers.edu/projects/lc/urbangrowth8695/nj_urban_growth.pdf.

86. *Id.*

87. *Id.*

88. *See, e.g.*, The New Jersey Highlands Water Protection and Planning Act, N.J. STAT. ANN. § 13:20-1 (West Supp. 2008); Anika Singh, *Implementing Planned Development: The Case of New Jersey*, 30 N.Y.U. REV. L. & SOC. CHANGE 151 (2005); N.J. STATE PLANNING COMM'N, THE NEW JERSEY STATE DEVELOPMENT AND REDEVELOPMENT PLAN (2001), http://www.state.nj.us/dca/divisions/osg/docs/stateplan030101.pdf.

89. The litigation director of the Becket Fund for Religious Liberty, a nonprofit religious interest group and RLUIPA proponent, noted that the majority of RLUIPA cases arise in New Jersey, California, and Florida. Jerry Berrios, *Justice Department Sues City Over Synagogue*, MIAMI HERALD, Apr. 29, 2005, at 5b.

A. How RLUIPA Turns the Tables on Municipal Land Use Control

RLUIPA takes control of local land use decisions out of the hands of zoning and planning boards and places it into the hands of a federal court. The law is a unique example of a congressionally-mandated federal intrusion into inherently local decision making.[90] Indeed, New Jersey state courts have noted that "local officials 'who are thoroughly familiar with their community's characteristics and interests and are the proper representatives of its people are undoubtedly the best equipped to pass'" judgment on local land use disputes.[91] As a result, New Jersey courts have historically afforded great deference to local land use authorities.[92]

Yet, the zoning process is also parochial, reflecting the beliefs, needs, and sometimes the biases of local voters. The process does not necessarily accommodate broader concerns of the public good; thus, a certain degree of oversight is necessary. Since passage of RLUIPA, however, "local government [has been] sent a message that RLUIPA has 'changed the rules' in a fundamental way."[93] To better understand this fundamental shift as it has played out in New Jersey, a brief primer on New Jersey zoning law is necessary.[94]

1. Background on New Jersey Zoning Law

Under the New Jersey Constitution, the authority to regulate land use ultimately belongs to the state's legislature.[95] The constitution, however, authorizes the legislature to delegate that

90. Courts have long recognized that land use policy is inherently local, and that local governments have broad regulatory power over local land use issues. *See, e.g.*, Schad v. Borough of Mount Ephraim, 452 U.S. 61, 68 (1981) ("The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities. . . . Where property interests are adversely affected by zoning, the courts generally have emphasized the breadth of municipal power to control land use . . . ."); *see also* Izzo v. Borough of River Edge, 843 F.2d 765, 769 (3d Cir. 1988) ("Land use policy customarily has been considered a feature of local government and an area in which the tenets of federalism are particularly strong.").

91. Kramer v. Bd. of Adjustment, 212 A.2d 153, 169 (N.J. 1965) (quoting Ward v. Scott, 105 A.2d 851, 855 (N.J. 1954)).

92. *Id.*

93. Alan C. Weinstein, *Recent Developments Concerning RLUIPA*, *in* CURRENT TRENDS AND PRACTICAL STRATEGIES IN LAND USE LAW AND ZONING 1, 11 (Patricia E. Salkin ed., 2004).

94. A detailed examination of the complicated rules governing New Jersey zoning law is beyond the scope of this Note. For a comprehensive treatment of this issue, see WILLIAM M. COX WITH DONALD M. ROSS, NEW JERSEY ZONING AND LAND USE ADMINISTRATION (2009).

95. N.J. CONST. art. IV, § 6, para. 2.

power to municipalities.[96] The Municipal Land Use Law (MLUL)[97] of 1975 represents such delegation and grants municipalities the power to adopt zoning ordinances.[98] This authority is exercised at the local level by a planning board, a governing body, or a zoning board of adjustment.[99] The planning and zoning boards review individual land use applications to determine whether the proposal conforms to the letter and purpose of an ordinance.[100] Given their role in assessing individual applications, the boards are often named as defendants in RLUIPA lawsuits.

Not all land use proposals, however, need to conform to the letter of an ordinance. Zoning boards can make exceptions, known as "variances," under certain circumstances.[101] They may also permit a particular land use in a given zone, but only if the applicant meets certain conditions. Such uses are aptly titled "conditional uses" and must be authorized by a planning board.[102] Variances may also be granted with respect to conditional use requirements.[103]

In either case, land use applicants who are denied a variance or a conditional use permit may appeal that decision to New Jersey Superior Court.[104] The scope of this review, however, is highly deferential to the decision of the local land use authority. For example, factual determinations of a zoning board carry a presumption of validity on judicial review and will not be overturned unless an applicant can prove that the determination is "'arbitrary, capricious or unreasonable.'"[105] In addition, where a planning or zoning board must interpret its own ordinance as part of its review, courts generally grant that interpretation great deference.[106]

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96. *Id.*

97. N.J. STAT. ANN. §§ 40:55D-1 to -163 (West 2008).

98. *Id.* § 40:55D-62.

99. COX, *supra* note 94, at 5-6. The planning board first "adopts a master plan"; the governing body then works from the master "plan to enact zoning ordinances." *Id.* at 5.

100. *Id.*

101. N.J. STAT. ANN. § 40:55D-70d (the "use" variance or "d" variance); *see also id.* § 40:55D-70c (the "c" variance).

102. *Id.* § 40:55D-3.

103. *See* COX, *supra* note 94, at 459.

104. N.J. STAT. ANN. § 40:55D-17.

105. Cell S. of N.J., Inc. v. Zoning Bd. of Adjustment, 796 A.2d 247, 251 (N.J. 2002) (quoting Medici v. BPR Co., 526 A.2d 109, 112 (N.J. 1987)).

106. *See, e.g.*, Fallone Prop., L.L.C. v. Bethlehem Twp. Planning Bd., 849 A.2d 1117, 1122 (N.J. Super. Ct. App. Div. 2004) (noting that planning boards are granted "'wide latitude in the exercise of the delegated discretion' due to their 'peculiar knowledge of local conditions.'" (quoting Burbridge v. Gov. Body of Twp. of Mine Hill, 568 A.2d 527, 532 (1990))).

2. RLUIPA and the Changed Legal Landscape

RLUIPA, however, fundamentally alters this landscape by providing a new legal forum for land use disputes. Under RLUIPA, a religious group may take its case directly to federal district court.[107] Once invoked, the law removes the discretion typically given to local authorities and places it in the plaintiff's hands.

A RLUIPA plaintiff need only produce prima facie evidence that the land use regulation in question "substantially burdens" its religious exercise.[108] Once a plaintiff produces sufficient evidence, RLUIPA shifts the burden of persuasion to the defendant[109] to demonstrate that its action was "in furtherance of a compelling governmental interest," and that it was "the least restrictive means of furthering" that interest.[110] RLUIPA thus allows a religious landowner to bypass both state court review of a local land use authority's determination and the deferential stance that would accompany the review. Whether the regulation at issue is generally applicable to any potential land user is simply irrelevant; as long as a "substantial burden" is identified, the regulation is presumptively invalid.

RLUIPA also authorizes the United States government to enforce the provisions of the Act by bringing an action for declaratory or injunctive relief on behalf of a religious group.[111] In fact, in 2007 the U.S. Department of Justice launched a new initiative, the *Freedom First Project*, to enforce "religious freedom laws" such as RLUIPA.[112] The Department itself boasts of its RLUIPA enforcement record[113] and has exercised its authority in several New Jersey cases.[114]

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107. 42 U.S.C. § 2000cc-2(a) (2006).

108. *Id.* § 2000cc-2(b).

109. *Id.*

110. *Id.* § 2000cc(a)(1).

111. *Id.* § 2000cc-2(f).

112. *See* Press Release, U.S. Dep't of Justice, DOJ Launches Initiative to Protect Religious Freedom: The First Freedom Project (Feb. 20, 2007), http://www.usdoj.gov/crt/religdisc/firstfreedom.html.

113. According to a report released by the U.S. Department of Justice, since 2001, the Civil Rights Division has reviewed 114 RLUIPA land uses matters, has opened 26 full field investigations, and has filed 4 lawsuits and 7 friend-of-the-court briefs in federal appellate cases. U.S. DEP'T OF JUSTICE, REPORT ON ENFORCEMENT OF LAWS PROTECTING RELIGIOUS FREEDOM: FISCAL YEARS 2001-2006, at 26 (2007), http://www.usdoj.gov/crt/religdisc/report/report.pdf.

114. *See, e.g.*, Brief of the United States as Amicus Curiae in Opposition to Defendants Motion for Summary Judgment, Albanian Associated Fund v. Twp. of Wayne, No. 2:06-cv-3217, 2007 WL 290319406 (D.N.J. July 19, 2007).

Finally, as already noted, RLUIPA allows a plaintiff who prevails in federal court to collect legal fees from a defendant zoning or planning board.[115] This provision, when coupled with the possibility of securing an exemption from a local zoning regulation, provides "religious land owners an almost irresistible incentive to assert [RLUIPA claims] if only to gain strategic leverage in the land use approval process."[116]

Along with the prospect of paying a plaintiff's legal fees, a RLUIPA defendant must also factor in its own legal costs when deciding whether to dispute a lawsuit.[117] These costs can be prohibitive for many towns already facing budget woes.[118] In one New Jersey RLUIPA dispute, legal costs forced the Monmouth County Borough of Roosevelt to pass a resolution approving emergency appropriations in order to dispute a RLUIPA claim.[119] The borough had already exceeded its annual budget for legal fees fighting the lawsuit.[120]

RLUIPA's attorney fee provision affords a significant advantage to religious land users in New Jersey; it is an advantage that would not otherwise exist under state law. Under New Jersey Court Rules, a successful litigant is generally entitled only to court costs, which

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115. *See* discussion *supra* Part I.B.4.

116. Goldfien, *supra* note 79, at 436.

117. Salkin & Lavine, *supra* note 47, at 74 ("The trend has been for municipalities to retain their own outside legal counsel and experts in RLUIPA cases, and this amount can match, if not exceed, the plaintiff's costs.").

118. In one extreme example stemming from a RLUIPA dispute in New York, the Village of Mamaroneck settled a RLUIPA suit with an Orthodox Jewish school and must now pay the school $4.75 million over three years. Juli S. Charkes, *Mamaroneck and School Settle Dispute*, N.Y. TIMES, Jan. 27, 2008, at E2. The village must borrow money and raise property taxes to pay for the settlement. *Id.*

119. Jane Meggitt, *Roosevelt Spending Over State-Mandated Budget Cap*, THE EXAMINER (Monmouth County, N.J.), Dec. 20, 2007, at A1. This particular controversy centered on an Orthodox Jewish congregation that operated a Jewish day school on the premises of its synagogue without having applied for a variance from the local zoning board. Congregation Anshei Roosevelt v. Planning and Zoning Bd., No. 07-4109, 2008 WL 4003483, at *3 (D.N.J. Aug. 21, 2008). The Borough of Roosevelt eventually succeeded in having the lawsuit dismissed on ripeness grounds. *Id.* at *12-13.

120. Meggitt, *supra* note 119, at A1. Roosevelt had hired Marci Hamilton, a professor of law at the Benjamin N. Cardozo School of Law at Yeshiva University in New York and noted constitutional law and RLUIPA expert who successfully argued *City of Boerne v. Flores* before the United States Supreme Court. Marci A. Hamilton, Paul R. Verkuil Chair in Public Law, Cardoza Faculty Profile, http://www.cardozo.yu.edu/MemberContentDisplay.aspx?ccmd=ContentDisplay&ucmd=UserDisplay&userid=10510. The religious landowners who filed the lawsuit hired Lowenstein Sandler PC, one of the largest law firms in the state of New Jersey. Jennifer Kohlhepp, *Religious Freedom Allegedly Restricted in Roosevelt*, THE EXAMINER (Monmouth County, N.J.), Aug. 30, 2007, at A1.

include filing fees, but not attorney's fees.[121] Indeed, the "general rule is that counsel fees are not awardable against governmental entities in state court proceedings in New Jersey."[122] Of course, there are exceptions to that rule if, for example, a litigant was a "prevailing party" in a Free Exercise Clause claim under the U.S. Constitution in state court.[123] Nevertheless, as has already been described, in most cases, RLUIPA gives protection to religious landowners beyond what the Constitution itself provides,[124] and litigants are therefore far more likely to be a "prevailing party" under RLUIPA.

As will be explained in more detail below, towns throughout New Jersey are struggling to adapt to the new legal landscape fostered by the passage of RLUIPA.

B. New Jersey Religious Land Use Protections, RLUIPA Notwithstanding

RLUIPA aside, many states "[are] not lacking in statutory religious protections."[125] To explore RLUIPA's true impact in New Jersey, it is therefore instructive to analyze the level of protection religious landowners enjoyed before the law's passage.

Intentional discrimination on the basis of one's religious beliefs is impermissible in any state under the First Amendment's Free Exercise Clause, which applies regardless of RLUIPA.[126] Under *Smith*, Free Exercise claims that implicate neutral zoning laws would not receive strict judicial scrutiny.[127] New Jersey law, however, has historically been highly protective of religious land use in the zoning process.

In fact, New Jersey courts have developed a legal test for assessing religious land use controversies that is strikingly similar to RLUIPA's own burden-shifting framework. One court described the state's framework:

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121. COX, *supra* note 94, at 545.

122. *Id.*

123. *Id.* Prevailing parties in such claims would be permitted to seek attorney's fees pursuant to the Civil Rights Attorney's Fee Awards Act, 42 U.S.C. § 1988 (2006). *Id.*

124. *See* discussion *infra* Part II.B.

125. Salkin & Lavine, *supra* note 47, at 82.

126. *See id.* at 83.

127. *See* Employment Div. v. Smith, 494 U.S. 872, 884-86 (1990). In the wake of *City of Boerne v. Flores*, 521 U.S. 507 (1997), which held RFRA's strict scrutiny mandate for all government action unconstitutional as applied to the federal government, many states enacted state-level RFRAs (or the equivalent thereof) to grant protection for religious groups beyond what the Free Exercise Clause provides. *See, e.g.*, ALA. CONST. art. I, § 3.01; CONN. GEN. STAT. ANN. § 52-571b (West 2007); COLO. REV. STAT. ANN. § 29-1-1201 (West 2007); FLA. STAT. ANN. § 761.02 (West 2007); IDAHO CODE ANN. § 73-401 (2007); 755 ILL. COMP. STAT ANN. 35/1-99 (West 2007); R.I. GEN. LAWS § 42-80.1-1 (2007). New Jersey is not such a state.

> The Court must determine whether the activity allegedly burdened by the zoning ordinance is in fact religious. It must determine whether the ordinance imposes a significant burden on religious practice. Another significant consideration is what alternative locations are reasonably available to the religious organization and what zoning alternatives are available to reasonably accommodate the organization. The court must also carefully identify and evaluate the governmental interest in establishing and maintaining its zoning plan.[128]

This obvious similarity between RLUIPA's "substantial burden" provision and the New Jersey formulation has been noted by state courts since RLUIPA's passage.[129]

Moreover, New Jersey courts have exhibited an explicit preference for religious land uses in the zoning process itself. Religious land uses are deemed "inherently beneficial uses," a title that greatly reduces an applicant's burden of proof before a zoning or planning board.[130] "A use is 'inherently beneficial' if it is 'so universally considered of community value that municipalities should be favorably disposed toward their inclusion.'"[131] This label gives religious land owners a significant advantage in the zoning process.

"Inherently beneficial uses" presumptively satisfy certain criteria that other land use applicants must prove in order to show that their proposed use "can be granted without substantial detriment to the public good or substantial impairment to the intent and the purpose of the . . . zoning ordinance."[132] Instead, an applicant pursuing an "inherently beneficial use" need only satisfy a balancing of the proposal's inherently beneficial attributes and of any "detrimental effect[s] that will ensue from the grant of the

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128. Jehovah's Witnesses Assembly Hall of S.N.J. v. Woolwich Twp., 537 A.2d 1336, 1339 (N.J. Super. Ct. App. Div. 1988) (citations omitted); *see also* Macedonian Orthodox Church v. Planning Bd., 636 A.2d 96, 99-101 (N.J. Super. Ct. App. Div. 1994); Burlington Assembly of God Church v. Zoning Bd. of Adjustment, 570 A.2d 495, 497-99 (N.J. Super. Ct. Law Div. 1989).

129. *See* House of Fire Christian Church v. Zoning Bd. of Adjustment, 879 A.2d 1212, 1224 (N.J. Super. Ct. App. Div. 2005).

130. *See* Saint Joseph's Korean Catholic Church v. Zoning Bd. of Adjustment, No. BER-L-4270-03, 2006 WL 1320089, at *5 (N.J. Super. Ct. App. Div. May 16, 2006); *see also House of Fire Christian Church*, 879 A.2d at 1217 (quoting State v. Cameron, 498 A.2d 1217 (N.J. 1985) (Clifford, J., concurring)) ("'Courts have held that religious activity itself is in furtherance of public morals and the general welfare, and that religious institutions enjoy a highly-favored and protected status, which severely curtails the permissible extent of governmental regulation . . . .'").

131. Cell S. of N.J. v. Zoning Bd. of Adjustment, 796 A.2d 247, 256 (N.J. 2002) (quoting WILLIAM M. COX, NEW JERSEY ZONING AND LAND USE ADMINISTRATION 153 (2002)).

132. *Saint Joseph's Korean Catholic Church*, 2006 WL 1320089, at *4.

variance."[133] To support the denial of an inherently beneficial use, "[o]nly [a detriment] that is 'substantial' will suffice."[134] This balancing test makes it more difficult for municipalities to exclude inherently beneficial uses.[135] Indeed, New Jersey courts have found it similar to RLUIPA's burden-shifting framework.[136]

Unsurprisingly, with the benefit of preferential treatment under New Jersey law, religious groups rarely lost New Jersey zoning cases prior to the passage of RLUIPA.[137] Indeed, a review of the state's case law before 2000 reveals that New Jersey zoning and common law effectively protected religious exercise against both explicit and implicit religious discrimination in the land use context.

Prior to RLUIPA, for example, New Jersey law adequately addressed discrimination against land owners for practicing and teaching the tenants of their faith in the privacy of their own homes.[138] Case law clearly established that reasonable use of one's own home for religious worship and services cannot be prohibited without some "overriding" governmental interest, and even then, only using the "least restrictive means."[139] And while New Jersey courts stopped short of deeming zoning ordinances that prohibit such conduct per se invalid,[140] the analytical framework set forth grants significant deference to constitutionally protected activities.[141]

New Jersey courts also broadly defined "religious exercise" in the context of land use, and therefore took an expansive view of the types

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133. *House of Fire Christian Church*, 879 A.2d at 1217-18 (quoting the balancing test identified by the N.J. Supreme Court in *Sica v. Bd. of Adjustment*, 603 A.2d 30 (N.J. 1992)). New Jersey zoning law makes clear that even "inherently beneficial uses" will not be granted "without a showing that such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance." N.J. STAT. ANN. § 40:55D-70 (West 2008).

134. Kali Bari Temple v. Bd. of Adjustment, 638 A.2d 839, 844 (N.J. Super. Ct. App. Div. 1994) (quoting *Sica*, 603 A.2d at 36).

135. *See id.* at 843-45.

136. *See, e.g.*, Muslim Ctr. of Somerset County, Inc. v. Zoning Bd. of Adjustment, 2006 WL 1344323, at *5 (N.J. Super. Ct. Law Div. May 16, 2006).

137. *See* Gary T. Hall, *Zoning and Religious Facilities*, N.J. LAW., Nov.-Dec. 1997, at 24-26.

138. *See* State v. Cameron, 498 A.2d 1217 (N.J. 1985); Jehovah's Witnesses Assembly Hall of S.N.J. v. Woolwich Twp. 537 A.2d 1336 (N.J. Super. Ct. App. Div. 1988); Farhi v. Comm'rs of Deal, 499 A.2d 559 (N.J. Super. Ct. Law Div. 1985).

139. *See Farhi*, 499 A.2d at 564.

140. *See Jehovah's Witnesses*, 537 A.2d at 1339 ("[T]he court must make a thorough exploration and a careful evaluation of the facts bearing on the competing religious and governmental interests.").

141. *See Farhi*, 499 A.2d at 563 ("[R]eligious institutions enjoy a highly-favored and protected status, which severely curtails the permissible extent of governmental regulation in this area.").

of activities by religious land owners that received protection. One court held that a church operating a homeless shelter was "engaging in the free exercise of religion" and that a city could not "use its zoning authority to prohibit that free exercise."[142] Even more illustrative, another court determined that a church's construction of two radio antenna towers and its operation of a radio station were protected religious uses of land.[143]

Prior to RLUIPA, New Jersey courts applied close scrutiny to facially neutral zoning ordinances to search for evidence of discriminatory enforcement—one of the primary purposes and goals of RLUIPA itself.[144] In one case, a Hindu clergyman was denied a variance to convert part of his home into a temple in which a small congregation of fifteen to twenty people could occasionally worship.[145] The local ordinance for the residential neighborhood allowed religious use conditionally, but it prohibited dual use of residential homes "except where specifically permitted."[146] The clergyman's application was denied upon vague findings that it would "lower property values, increase traffic and noise in the area, and that it was not consistent with the residential zoning scheme of the area."[147] Without specific evidence in the record to substantiate the concerns, the court held in favor of the plaintiff.[148] Importantly, the court noted the inconsistency in the fact that the zoning board denied a Hindu man's dual use of his home as a place of worship for a small congregation, but permitted dual usage for churches with larger followings.[149]

To be clear, however, zoning authorities need not always defer to religious land uses in New Jersey. New Jersey courts have long

142. Saint John's Evangelical Lutheran Church v. City of Hoboken, 479 A.2d 935, 938 (N.J. Super. Ct. Law Div. 1983).

143. Burlington Assembly of God Church v. Zoning Bd. of Adjustment, 570 A.2d 495, 499 (N.J. Super. Ct. Law Div. 1989) ("The operation of the proposed station is an activity related to the purposes of the Assembly of God Church and is, therefore, a religious use.").

144. 146 CONG. REC. S7774-01 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy) ("Sometimes, zoning board members . . . explicitly offer race or religion as the reason to exclude a proposed church . . . . More often, discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or 'not consistent with the city's land use plan.'").

145. Kali Bari Temple v. Bd. of Adjustment, 638 A.2d 839, 841 (N.J. Super. Ct. App. Div. 1994).

146. *Id.* at 840.

147. *Id.* at 844.

148. *Id.*

149. *Id.* at 843 ("[W]e decline to endorse reasoning which recognizes the benefits of dual use zoning treatment for churches with substantial followings, while rejecting far more limited dual usage by a small religious group which does not swim in the locally recognized mainstream.").

recognized that houses of worship are not exempt from zoning laws altogether simply because certain laws may abridge the freedom to worship.[150] In fact, New Jersey courts stop short of overturning zoning or planning board decisions based on enforcement of a facially neutral ordinance where there is no indication of discrimination or unfair treatment.

In *Macedonian Orthodox Church v. Planning Board*, for example—a rare New Jersey case where a religious group lost a zoning case prior to RLUIPA—the planning board held that a church's application to expand its existing facility in a single-family residential zone must be subject to conditional use approval.[151] The Board had granted approval of expansion plans to the same church many years earlier, but for a significantly smaller proposal that was never completed.[152] The church's new proposal sought to add an 11,200-square-foot hall and 143 parking spaces.[153] The court found that the Planning Board acted within its discretion given the neutrality of the ordinance, the substantially changed nature of the proposal, and evidence indicating that the church had disrupted the neighborhood in the past.[154] Importantly, the court noted that the "Planning Board did not deny the Church an opportunity to engage in social and other religious-oriented events, but . . . merely plac[ed] constraints on the additional building's size and location."[155]

Thus, New Jersey law evinces a clear preference for religious land use, but stops short of granting religious organizations immunity from facially neutral laws applied without evidence of discriminatory intent. Considering this preferential treatment and the similarity between New Jersey law and RLUIPA, one might rightfully wonder whether the additional benefits provided by RLUIPA provide meaningful or necessary protection.

C. RLUIPA Litigation in New Jersey

Interestingly, New Jersey state courts applying RLUIPA have appeared less likely to rule in favor of a religious land owner than prior to passage of the law. On the other hand, religious organizations have fared better in federal court. This section explores

150. *See* Allendale Congregation of Jehovah's Witnesses v. Grosman, 152 A.2d 569, 572 (N.J. 1959) (adopting the Pennsylvania Supreme Court's declaration that "[t]he concept[] of religious freedom . . . [has] never been construed as [an] absolute right[] and beyond the power of reasonable regulation under the police power.").

151. Macedonian Orthodox Church v. Planning Bd., 636 A.2d 96, 100 (N.J. Super. Ct. App. Div. 1994).

152. *Id.* at 101.

153. *Id.* at 97.

154. *Id.* at 101.

155. *Id.*

that anomaly and focuses more deeply on the impact federal court RLUIPA litigation has had on the legal landscape in New Jersey.

1. RLUIPA in New Jersey's State Courts

As of this writing, no available New Jersey state court RLUIPA land use decision has held in favor of a plaintiff religious organization.[156] Although newspaper reports indicate that religious groups have had some success litigating RLUIPA in New Jersey state courts,[157] the predominant trend appears to indicate otherwise. This starkly contrasts with the litigation success that religious land users enjoyed prior to the passage of RLUIPA, and it seems inconsistent with the advantage that RLUIPA was intended to bestow on potential litigants.

The precise reasons for this trend are unclear. A closer look, however, reveals a combination of factors. Because of its burden-shifting framework and relatively low threshold for a prima facie showing, RLUIPA encourages lawsuits from religious landowners that likely would not have succeeded even under New Jersey law. Moreover, it appears that New Jersey state court judges are slow to adapt to the sweeping change that RLUIPA brings about, and are interpreting it through the gloss of state law, under which a nondiscriminatory application of a neutral zoning law would likely be upheld.

First, RLUIPA's framework encourages claims that likely would not have succeeded under New Jersey law prior to RLUIPA. In fact, the factual circumstances of many RLUIPA disputes in New Jersey state courts align with the few pre-RLUIPA state cases, such as *Macedonian Orthodox Church*,[158] in which a religious landowner lost a zoning dispute. That is, in nearly every instance, a religious organization sought to significantly expand or alter existing structures, or to develop land, but was denied based on non-

156. This statement refers to N.J. state court opinions available through commercial electronic databases, specifically, Westlaw and LexisNexis. A fuller examination of unpublished or unreported cases that were not otherwise made publicly available is beyond the scope of this Note.

157. *See* John Chadwick, *Church and Real Estate; Law Gives Congregations a Potent Weapon Against Towns*, THE RECORD (West Paterson, N.J.), Feb. 19, 2007, at A1 (reporting that Hackensack, N.J., had to pay $30,000 in attorney fees for the "New Hope Baptist Church after a state judge reversed the city's denial of a church addition"); Maura McDermott, *Judge Clears Expansion of Morristown Temple*, THE STAR-LEDGER (Newark, N.J.), Aug. 16, 2006, at 30 (describing a Superior Court decision to remand a zoning board ruling denying expansion plans for a temple).

158. Macedonian Orthodox Church v. Planning Bd., 636 A.2d 96, 101 (N.J. Super. Ct. App. Div. 1994).

discriminatory application of a neutral zoning ordinance.[159] This difference is likely due to the fact that RLUIPA's minimal prima facie threshold, which requires only that a religious landowner establish a nondescript "substantial burden" on its religious exercise,[160] permits, and even encourages, legal challenges that may not have been brought in the past. The ability to recover attorney's fees[161] only adds to the benefits of filing suit.

In *St. Gabriel's Syrian Orthodox Church*, for example, a church sought to develop a three-acre plot of land in a residential zone that permitted houses of worship as conditional uses.[162] The Planning Board approved the use of the property as a house of worship but denied the application for site plan approval because the proposed pavement coverage of the plot exceeded the maximum allowable threshold.[163] Adopting the "effectively impracticable" definition of "substantial burden,"[164] the court held that requiring the plaintiff to tailor its development to meet the pavement coverage requirement did not amount to a substantial burden.[165]

Importantly, in considering the plaintiff's claims, the court in *St. Gabriel's* noted that the zoning ordinance in question was facially neutral, and that no evidence had been offered to suggest it was exercised in a discriminatory fashion.[166] This is consistent with the reasoning and circumstances in the pre-RLUIPA case *Macedonian Orthodox Church*,[167] and it is noteworthy that the existence of RLUIPA in *St. Gabriel's* did not change the ultimate outcome.

Second, New Jersey state courts, when faced with a RLUIPA claim, tend to view the dispute within the context of state law

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159. *See* Saint Joseph's Korean Catholic Church v. Zoning Bd. of Adjustment, No. BER-L-4270-03, 2006 WL 1320089, at *1-3 (N.J. Super. Ct. App. Div. May 16, 2006), *cert. dismissed as improvidently granted*, 923 A.2d 226 (N.J. 2007); House of Fire Christian Church v. Zoning Bd. of Adjustment, 879 A.2d 1212, 1215-16 (N.J. Super. Ct. App. Div. 2005); Muslim Ctr. of Somerset County v. Zoning Bd. of Adjustment, 2006 WL 1344323, at *1-3 (N.J. Super. Ct. Law Div. May 16, 2006); Saint Gabriel's Syrian Orthodox Church v. Planning Bd., 2006 WL 3500965, at *1-2 (N.J. Super. Ct. Law Div. Dec. 5, 2006).

160. 42 U.S.C. § 2000cc(a)(1) (2006).

161. 42 U.S.C. § 1988(b).

162. 2006 WL 3500965, at *1.

163. *Id.*

164. *See* CLUB, 342 F.3d 752, 761 (7th Cir. 2003). Importantly, the tendency of N.J. state courts to deny RLUIPA claims is not fully explained by use of this narrow definition of "substantial burden." Indeed, other state court decisions have analyzed RLUIPA both under the narrow Seventh Circuit definition and under the more expansive Eleventh Circuit approach. *See, e.g.*, *Saint Joseph's Korean Catholic Church*, 2006 WL 1320089, at *8-9.

165. *Saint Gabriel's Syrian Orthodox Church*, 2006 WL 3500965, at *12.

166. *Id.* at *13.

167. *See* discussion *infra* Part III.B.

precedent and appear slow to adapt to RLUIPA's changes. For example, in *Muslim Center of Somerset County*, the court noted the similarity between the state law framework for weighing "inherently beneficial" land uses and RLUIPA and proceeded to consider the state law and federal claims together.[168] The court held that: (1) the plaintiff was not entitled to a conditional use variance to convert a two-family home into a place of worship because the property and structure were undersized for the proposed use, and (2) the denial of the variance did not violate RLUIPA because the plaintiff failed to show why their faith required the mosque to be located in that specific area though other options were available in the same borough.[169]

This combination of factors has contributed to the unfavorable climate for RLUIPA litigants in New Jersey state courts to date. Because of the advantageous change in the law, cases that might not have succeeded under state law are now being brought under RLUIPA. Moreover, state court judges appear to view RLUIPA through the lens of a state law system that, although highly favorable to religious land use, stops short of overriding neutral zoning laws without evidence of discriminatory implementation.

2. RLUIPA in New Jersey's Federal District Courts

Religious land owners litigating RLUIPA claims in New Jersey's federal courts have fared better than their state court counterparts.[170] Yet, even eight years after the law's passage, RLUIPA decisions in New Jersey's federal courts are scarce. While it may be difficult to parse out the reasons for this trend with so few cases, it appears at least in part due to the procedural nature of cases that have come before the courts. More importantly, however, RLUIPA is highly favorable to religious land owners and is applied in federal court without the state law gloss that New Jersey state court judges have applied.

Several RLUIPA cases that have come before the Federal District Court for the District of New Jersey have been adjudicated in

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168. Muslim Ctr. of Somerset County v. Zoning Bd. of Adjustment, 2006 WL 1344323, at *5-6 (N.J. Super. Ct. Law Div. May 16, 2006); *see also* House of Fire Christian Church v. Zoning Bd. of Adjustment, 879 A.2d 1212, 1224 (N.J. Super. Ct. App. Div. 2005) (likening RLUIPA's burden-shifting analysis "to the way in which New Jersey's courts analyzed religious zoning issues prior to the enactment of RLUIPA").

169. *Muslim Ctr. of Somerset County*, 2006 WL 1344323, at *8-9.

170. The success of RLUIPA plaintiffs in N.J.'s federal courts is at least somewhat consistent with the findings of other research on the success of RLUIPA litigants in federal courts generally. *See* Note, *Religious Land Use in the Federal Courts under RLUIPA*, 120 HARV. L. REV. 2178, 2188-92 (2007) (finding that since RLUIPA's passage, "religious land use plaintiffs have been more successful in the federal courts than ever before" as compared to Free Exercise claimants prior to the law).

motion practice.[171] In large part, federal judges appear less willing to decide as a matter of law, without a fuller exploration of the facts, whether the actions of a particular zoning authority place a substantial burden on one's religious exercise, or whether the burden is the least restrictive means of furthering a compelling state interest.[172] The same appears true for RLUIPA's Equal Terms and Nondiscrimination provisions.[173]

This is not the only difference, however. Federal court judges in New Jersey view RLUIPA from a federal law perspective, rather than through the scope of the long history of New Jersey municipal zoning law. In fact, federal judges view their task in adjudicating RLUIPA claims as entirely distinct from state law issues. At least one federal court expressly declined jurisdiction over a New Jersey Municipal Land Use Law claim in conjunction with an already-proceeding RLUIPA lawsuit:

> [F]ederal courts are reluctant to interfere in municipal land use matters. Land use planning is an essential function of local government, especially in New Jersey where grass roots decision-making is the established policy. As a result the federal courts have opined that "land use policy customarily has been considered a feature of local government and an area in which the tenets of federalism are particularly strong," and it is not the "the Court's function to act as a 'super zoning board' substituting its judgment for that of a democratically elected body of debatable issues of land use policy.[174]

But the irony in this proclamation is clear. The court in that case had already denied the Planning Board's motion for summary

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171. *See* Albanian Associated Fund v. Twp. of Wayne, No. 06-cv-3217, 2007 WL 2904194, at *1 (D.N.J. Oct. 1, 2007) (cross motions for summary judgment); Church of the Hills of Bedminster v. Twp. of Bedminster, No. 05-3332, 2006 WL 462674, *1 (D.N.J. Feb. 24, 2006) (motion to dismiss for failure to state a claim); Lighthouse Inst. for Evangelism v. City of Long Branch, 406 F. Supp. 2d. 507, 510 (D.N.J. 2005), *vacated in part*, 510 F.3d 253 (3d Cir. 2007) (cross motions for summary judgment).

172. *See, e.g.*, *Church of the Hills*, 2006 WL 462674, at *6 (finding that: 1) defendants' motion to dismiss failed because "the fact that the Plaintiffs cannot engage in worship with their entire congregation at the same time and place" *may* constitute a substantial burden; and 2) the factual record at that point was "insufficiently developed to offer support for the Defendants' assertion that, as a matter of law," the burden is the least restrictive means of furthering a compelling state interest).

173. *See, e.g.*, *Albanian Associated Fund*, 2007 WL 2904194, at *11 (finding that sufficient evidence to raise a triable issue of fact was raised, "identifying potentially similarly situated applicants being treated differently" where the Planning Board allowed a Catholic Hospital to develop a environmentally sensitive tract of land, but denied plaintiffs' application to develop a similarly sensitive tract of land).

174. Albanian Associated Fund v. Twp. of Wayne, No. 06-cv-3217, 2007 WL 4232966, at *2 (D.N.J. Nov. 29, 2007) (quoting Hartman v. Twp. of Readington, No. 02-2017, 2006 WL 2353223, at *5 n.2 (D.N.J. Aug. 15, 2006)).

judgment on plaintiff's RLUIPA claim.[175] It held that there were material facts in dispute as to whether the town's attempted condemnation of the plaintiff's property as part of an open space initiative amounted to a substantial burden, even though the plaintiff was able to practice aspects of its religion at its former property.[176] That decision amounts to a de facto reconsideration of the Planning Board's denial of the plaintiff's land use application. That, however, is precisely what the court was reluctant to do in declining jurisdiction over the state law claim. Opponents of RLUIPA often cite this phenomenon—whereby federal courts consider local zoning matters unconfined by the history of state law—as a fatal flaw in RLUIPA's approach.[177]

Federal judges in New Jersey therefore approach RLUIPA claims from a different vantage point than their state court counterparts. As a result, a federal judge would likely be willing to allow a RLUIPA claim to proceed, where a similar claim might fail in state court, under either RLUIPA or state law.

Compare the following federal and state RLUIPA challenges in New Jersey: In a federal RLUIPA case, *Church of the Hills of Bedminster v. Township of Bedminister*, the township had denied a church's land use application because the proposed building expansion violated lot size "and impervious coverage limits" that would apply to any land use in the residential neighborhood.[178] The court found that the plaintiff sufficiently stated a substantial burden claim because the church had outgrown its facility.[179] Denial of their application would force the church to split its services in two.[180] On the other hand, in the state RLUIPA case, *St. Gabriel's Syrian Orthodox Church*, a state court found no RLUIPA violation where a similarly neutral ordinance requiring a cap on pavement coverage was applied to the plaintiff's development proposal in a residential

175. *Albanian Associated Fund*, 2007 WL 2904194, at *11.

176. *Id.* at *10.

177. *See, e.g.*, HAMILTON, *supra* note 20, at 97.

> [With RLUIPA's passage,] [l]ocal zoning and planning authorities were displaced by Congress, and the federal judiciary, who have never heard land-use cases unless there was a constitutional violation charged, became zoning board review courts. This is not a good scenario for homeowners or local governments. The balance of power in residential neighborhoods shifts to the religious landowners at the expense of the residential quality of the neighborhood.

Id.

178. No. Civ. 05-3332, 2006 WL 462674, at *1-2 (D.N.J. Feb. 24, 2006).

179. *See id.* at *6.

180. *See id.*

zone without evidence of discrimination.[181] The court noted that the Planning Board's insistence "that St. Gabriel's follow the [fifteen percent] pavement coverage ordinance" "simply [did] not amount to a substantial burden."[182]

The juxtaposition of these two cases demonstrates the impact of RLUIPA in New Jersey. The application of a neutral zoning regulation such as impervious surface coverage limits is now subject to violation of federal law. The impact of this distinction may be that local governments are less willing to risk the time and expense of litigating a RLUIPA claim in federal court, thus leading either to settlements or submission to a religious landowner's demands before a dispute ever reaches court.

3. Settlements and Submission: RLUIPA's Lasting Impact in New Jersey?

The success that RLUIPA plaintiffs have achieved in New Jersey federal court is pressuring local governments—faced with the prospect of having to pay both their own legal fees, as well as those of their adversaries—into cutting their losses. It thus appears that RLUIPA has brought about a change in the legal environment in New Jersey beyond the confines of the courtroom.

The advantages that RLUIPA bestows on religious landowners should mean an increase in the number of religious land use applications approved on a local level. Such change, however, is difficult to quantify.[183] Yet, throughout New Jersey there are well-documented examples of local zoning authorities acquiescing to the land use demands of religious organizations in the face of RLUIPA lawsuits.[184] The pressure placed on towns to accommodate religious

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181. Saint Gabriel's Syrian Orthodox Church v. Planning Bd., 2006 WL 3500965, at *12 (N.J. Super. Ct. Law Div. Dec. 5, 2006).

182. *Id.*

183. A full empirical analysis of the increase or decrease in the approval of religious land use applications in New Jersey after RLUIPA is beyond the scope of this Note. There is, however, some evidence that RLUIPA is causing towns to approve land use applications before a lawsuit is even filed. *See* Paula Saha, *Rockaway Approves Plan to Convert Building into Mosque*, THE STAR-LEDGER (Newark, N.J.), Jan. 23, 2008, at 25 (noting that the town's zoning board approved a controversial land use application by a religious landowner "after a lengthy meeting, where a planner briefed them on [RLUIPA]"). Similarly, it is equally challenging to document instances in which a township revised its ordinances out of fear of RLUIPA lawsuits. There is evidence, however, that this phenomenon is occurring in New Jersey. *See* Jennifer Kohlhepp, *Roosevelt Rezones Farmland for Schools and Other Uses*, THE EXAMINER (Monmouth County, N.J.), Apr. 26, 2007, at A1 (reporting that despite local opposition, Roosevelt, N.J.'s Borough Council voted to rezone a rural single-family neighborhood to allow houses of worship, in part, because of concerns stemming from RLUIPA).

184. *See, e.g.*, Abdou, *Settlement to Allow Expansion of Church*, *supra* note 1, at 31; *see also* Nyier Abdou, *Hindu Temple Close to Settling Lawsuit Over Expansion Plans—*

land use also appears to bring out underlying tension and hostility towards religious groups, particularly minority or non-mainstream religions.

Whether this outcome—compelling local governments to accept some level of inconvenience in the name of religious exercise—is truly deleterious to local governance is perhaps the central question in the debate over RLUIPA. A few examples from New Jersey are illustrative of the issue.

a. Sri Venkateswara Hindu Temple (Bridgewater, New Jersey)

In Bridgewater Township, New Jersey, owners of a Hindu Temple sought to expand their existing facility in a residential neighborhood by increasing the size of their temple, as well as by adding "a new two-story cultural center, . . . housing for priests, . . . youth center, and . . . two-story parking deck."[185] The town's zoning ordinance, however, which permits houses of worship as a conditional use, requires such uses to be limited in size "relative to the area of land."[186]

After more than two years of negotiations with the township, during which the temple owners reduced the size of their proposal, the zoning board finally approved the expansion of the temple and housing but denied the variance for the cultural center because it was still well over the square-footage maximum for the size of the land.[187] The temple filed suit in state court, alleging violations of New Jersey's MLUL and RLUIPA.[188] The state court bifurcated the claims, took up the state law issue first, and held that the variance denial was not arbitrary and capricious because the board legitimately found that the cultural center's negative impacts on the single-family residential neighborhood outweighed its inherently beneficial value.[189]

Agreement with Bridgewater is in the Works, THE STAR-LEDGER (Newark, N.J.), Jan. 29, 2008, at 32 [hereinafter Abdou, *Hindu Temple Close to Settling Lawsuit Over Expansion Plans*].

185. Hindu Temple & Cultural Soc'y v. Twp. of Bridgewater Zoning Bd. of Adjustment, No. 07-cv-03408, 2007 WL 1228028, at *2 (N.J. Super. Ct. App. Div. Apr. 25, 2007).

186. *Id.* at *1.

187. *Id.* at *6-7.

188. *Id.* at *7.

189. *Id.* at *12.

The plaintiff quickly took its RLUIPA claim to federal court.[190] The temple also hired Washington, D.C. attorneys specializing in RLUIPA and who had successfully helped other New Jersey religious land owners reach favorable settlement of their RLUIPA claims.[191] Within months, the parties reached a tentative settlement agreement in which the town acquiesced to the plans for a cultural center totaling 20,500 square feet, still well over the maximum allowed by the ordinance.[192] In exchange, the temple agreed to limit the use of the cultural center and to make no further applications for improvement of the existing property for ten years.[193]

Though the parties may not have reached this agreement at arm's length, it is noteworthy that the plaintiffs were able to achieve this result even after losing in state court. Without RLIUPA, this settlement would never have come to fruition.

b. Christ Church of Montclair (Rockaway, New Jersey)

Even the mere existence of looming RLUIPA litigation in federal court can sway a township into approving plans it would likely otherwise deny. The Christ Church of Montclair, a multi-racial evangelical church with over 5000 members, outgrew its building in suburban New Jersey by the mid 1990s and eventually entered into a contract to purchase a 107-acre industrial plot in Rockaway Township for a new church.[194] Christ Church intended to build a 3000 seat sanctuary, elementary school, recreational fields, and fellowship hall, but was met with significant local resistance in the zoning process.[195] The site was located within an environmentally-sensitive area, and residents also feared an increase in traffic and a diminished tax base.[196]

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190. *See* Verified Complaint For Declaratory And Injunctive Relief; For Damages; And For Costs And Attorneys' Fees, Hindu Temple & Cultural Soc'y of USA, Inc. v. Twp of Bridgewater, No. 07-cv-03408 (D.N.J. July 24, 2007).

191. *See* Nyier Abdou, *Bias Claim Filed as Hindu Temple Seeks to Expand*, THE STAR-LEDGER (Newark, N.J.), Aug. 5, 2007, at 34.

192. *Compare* Memorandum of Understanding at 5-6, *Hindu Temple & Cultural Soc'y of USA, Inc.*, No. 07-cv-03408, *with Hindu Temple & Cultural Soc'y*, 2007 WL 1228028, at *6.

193. Memorandum of Understanding at 7-8, *Hindu Temple & Cultural Soc'y of USA, Inc.*, No. 07-cv-03408. As of this writing, the settlement has yet to receive final approval. *See* Abdou, *Hindu Temple Close to Settling Lawsuit Over Expansion Plans*, *supra* note 184, at 29.

194. Complaint at 6-9, Christ Church N.J. v. Rockaway Twp., No. 05-cv-02022 (D.N.J. Aug. 2, 2005).

195. Paula Saha, *Law Firm Takes up Church's Cause; Relocation Sought to Rockaway Twp.*, THE STAR-LEDGER (Newark, N.J.), Jan. 22, 2004, at 21.

196. Paula Saha, *Growth Projections for Church Sought*, THE STAR-LEDGER (Newark, N.J.), Jan. 27, 2004, at 51.

Christ Church enlisted the help of the Becket Fund, a Washington, D.C.-based religious interest group specializing in religious land use issues, whose representatives proceeded to send the town's planning board a letter advising of potential RLUIPA violations.[197] Local press described the letter as "'threatening' in nature," and reported that the board adjourned into a closed session to discuss the matter shortly after receiving it.[198]

In 2005, after the approval process had lingered for over a year, Christ Church filed a federal lawsuit claiming violations of RLUIPA, even while their application was still pending before the township.[199] Soon after, the U.S. Department of Justice opened an investigation into the town's actions.[200]

In October 2006, after a private meeting to discuss the pending RLUIPA lawsuit, the town planning board voted 7-0 to approve Christ Church's application despite significant local opposition.[201] Nevertheless, Christ Church believed that several conditions placed on the township's approval to mitigate local concerns (including requiring a two-hour interval between Sunday services and decreasing the number of parking spaces) still violated RLUIPA, and Christ Church continued to pursue its lawsuit.[202] Within a few months, Rockaway relented on many of its conditions and the lawsuit was ultimately dismissed.[203]

In each of these examples, the presence of RLUIPA helped the religious landowner achieve a favorable settlement. In each, there is also evidence of local resistance to large-scale religious land use by a non-mainstream religion. Whether the final results amount to an unwarranted inconvenience on these townships likely depends on the

197. *See* Saha, *supra* note 195, at 21.

198. *See* Saha, *supra* note 196, at 51. Soon thereafter, the town considered hiring its own religious land use expert, Marci Hamilton, a professor at Benjamin N. Cardozo School of Law in New York City and noted RLUIPA critic. Paula Saha, *Rockaway Twp. Could Hire Adviser on Church Proposal*, THE STAR-LEDGER (Newark, N.J.), Mar. 4, 2004, at 27.

199. Complaint at 6, 108-18, *Christ Church N.J..*, No. 05-cv-02022.

200. Paula Saha, *Federal Probe's Merits Debated; Church Plan at Issue in Rockaway Twp.*, THE STAR-LEDGER (Newark, N.J.), Oct. 2, 2005, at 37.

201. Paula Saha, *Board Clears Plan by Montclair Church*, THE STAR-LEDGER (Newark, N.J.), Oct. 17, 2006, at 20.

202. Paula Saha, *Church Sees Bias Behind Rockaway Twp. Limitations*, THE STAR-LEDGER (Newark, N.J.), Nov. 10, 2006, at 32.

203. Paula Saha, *Lawsuit by Christ Church is Ended; Plans Were Approved in Rockaway Twp.*, THE STAR-LEDGER (Newark, N.J.), Feb. 9, 2007, at 29. Incidentally, the controversy over this issue in Rockaway Township is still lingering, as Christ Church is now engaged in a dispute with the township over the state's waiver of environmental regulations for the site. Paula Saha, *Rockaway Township Again Appeals Church Plan; Says Highlands Exemption Criteria Isn't Met*, THE STAR-LEDGER (Newark, N.J.), Mar. 11, 2008, at 36.

facts of each case and may ultimately be irrelevant in assessing the impact of RLUIPA. Right or wrong, RLUIPA forces local governments to make certain accommodations for religion that they would not otherwise be required to make—and indeed would not make for other residential or commercial land users—despite legitimate local concerns about traffic, noise, and the environment. RLUIPA creates a process that is heavily tilted in favor of religious land use, and that process, regardless of the validity of the outcome, appears to be fostering the very hostility towards religious land users that RLUIPA intended to eliminate.

4. RLUIPA's Potential Encroachment into Regional and Local Planning Efforts

It appears that RLUIPA's impact may be spreading into regional and local planning efforts within the state. RLUIPA may have a palpable impact in this context, though presently, it is unclear what that impact will be. Nevertheless, it is an issue worth monitoring.

For example, RLUIPA may be an obstacle to the ability of towns in New Jersey to preserve open space through eminent domain. One recent case in particular, *Albanian Associated Fund v. Township of Wayne,* held that a town's use of eminent domain to condemn property sought to be developed by a religious landowner was a "land use regulation" within the meaning of RLUIPA, though the Act's definition of the term does not so specify.[204] In making this determination, the court presumed that the RLUIPA challenge went not to the "taking" itself but rather to the "implementation of the open space plan."[205] As the court noted, "[t]he taking is merely a method of implementation. The open space plan . . . is clearly a 'land use regulation' within the meaning of the statute."[206]

With this argument, the court distinguished itself from other courts, including the Seventh Circuit, that have held condemnation or eminent domain proceedings were not "land use regulations" within the meaning of RLUIPA.[207] It may, however, be a distinction

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204. Albanian Associated Fund v. Twp. of Wayne, Civ. No. 06-cv-3217, 2007 WL 2904194, at *7-8 (D.N.J. Oct. 1, 2007). RLUIPA defines a "land use regulation" as:

> a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (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) (2006).

205. *Albanian Associated Fund.*, 2007 WL 2904194, at *8.

206. *Id.*

207. *See, e.g.*, Saint John's United Church of Christ v. City of Chicago, 502 F.3d 616, 641 (7th Cir. 2007) ("Given the importance of eminent domain as a governmental power affecting land use, we think that if Congress had wanted to include eminent

without a difference; it is unclear how an eminent domain proceeding as a means to implement an open space plan is any different from an eminent domain proceeding for any other purpose. Nevertheless, the court's opinion in *Albanian Associated Fund* should put cities and towns throughout New Jersey on alert when considering the use of eminent domain, for any reason, on land owned by a religious organization.

RLUIPA may also impact statewide planning efforts. As of this writing, at least two RLUIPA suits were filed in federal court against the state Department of Environmental Protection alleging that the state's Highlands Water Protection and Planning Act (Highlands Act)[208] infringes on the free exercise of religion.[209] The Highlands Act is a state-level effort to protect the drinking water supply for 5,000,000 New Jersey residents; it is premised on the notion that protection of this resource requires "coordinated land use planning and regulation" of matters that are "not best left to exclusive local decision making[.]"[210]

The Highlands Act sets development rules within a defined area, but it exempts improvements to places of worship "in existence on the date of the enactment of th[e] act."[211] These lawsuits essentially challenge the denial of this statutory exemption to two separate religious organizations seeking to develop property within the Highlands Act's preservation area.[212] One of these lawsuits has settled.[213] Although the outcome of the second suit is unclear, should RLUIPA be found to override state-level planning efforts, it could open a new front in the controversy surrounding the law.

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domain within RLUIPA, it would have said something."); *see also* Faith Temple Church v. Town of Brighton, 405 F. Supp. 2d 250, 254-55 (W.D.N.Y. 2005) ("Given the[] differences between zoning and eminent domain, it seems very unlikely that Congress assumed that courts would interpret RLUIPA's reference to zoning laws as including eminent domain proceedings as well.").

208. N.J. STAT. ANN. § 13:20-1 (West Supp. 2008).

209. Complaint For Declaratory And Injunctive Relief at 10-11, Pompton Plains Reformed Bible Church v. Jackson, No. 07-cv-02702, 2007 WL 2605323 (D.N.J. June 11, 2007); Complaint For Declaratory And Injunctive Relief at 1-4, 10, The Gospel Tabernacle of the Christian & Missionary Alliance of Phillipsburg, Inc. v. Jackson, No. 07-cv-00132 (D.N.J. Jan. 9, 2007).

210. Thomas A. Borden, *Using Regional Planning to Protect Public Trust Resources*, 237 N.J. LAW. 31, 31 (2005).

211. N.J. STAT. ANN. § 13:20-28(a)(6) (West Supp. 2008).

212. Complaint For Declaratory And Injunctive Relief at 10-11, *Pompton Plains Reformed Bible Church*, No. 07-cv-02702; Complaint For Declaratory And Injunctive Relief at 10-11, *Gospel Tabernacle of the Christian & Missionary Alliance of Phillipsburg, Inc.*, No. 07-cv-00132.

213. Order Administratively Terminating Matter, *Gospel Tabernacle of the Christian and Missionary Alliance of Phillipsburg, Inc.*, No. 07-cv-00132.

III. THE FUTURE OF RLUIPA

Having seen the impact that RLUIPA has levied on New Jersey zoning practices and the controversy that the law has stirred, one might wonder whether the law will soon change; the prospect at this point, however, appears dubious.

RLUIPA enjoys widespread bipartisan support in Congress. As noted, a unique coalition of conservative and liberal members of Congress sponsored the law, it passed both chambers of Congress without even a recorded vote, a Democratic president signed it into law, and a Republican administration vigorously enforced it.[214] Some commentators have suggested legislative changes to RLUIPA that would help to refine the law's focus.[215] While change is undoubtedly warranted, sufficient grassroots pressure from RLUIPA's opponents seems far off from spurring legislative change in the near future.[216]

A scholarly debate is also unfolding regarding the constitutionality of RLUIPA's land use provisions, focusing on whether the law is a constitutional exercise of congressional power.[217] While RLUIPA certainly raises legitimate constitutional questions, courts that have considered the law's constitutionality have overwhelmingly upheld it.[218] Although the Supreme Court has not yet ruled on RLUIPA's land use provisions, the Court has

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214. *See* BAKER, *supra* note 3, at 100-01.

215. For example, one author suggested that RLUIPA's land use provisions be modified to draw a better distinction between accessory land uses directly related to religious purposes and those only tangentially related. *See* Galvan, *supra* note 39, at 235-38. Another author has proposed a remodeling of RLUIPA's land use section so that it more closely resembles the burden-shifting framework that courts typically use to handle claims in the context of race or employment discrimination. *See* Lennington, *supra* note 5, at 837-41.

216. *See* Salkin & Lavine, *supra* note 47, at 76 (noting the absence of a national organization "spearheading an educational and/or advocacy campaign against the negative effects of the statute").

217. A full analysis of the arguments for and against RLUIPA's constitutional underpinnings is beyond the scope of this Note. For well-constructed views on both sides of this debate, see Graff, *supra* note 5 (arguing that RLUIPA is an unconstitutional exercise of congressional authority under Section Five of the Fourteenth Amendment) and Roman P. Storzer & Anthony Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929 (2001) (arguing that RLUIPA is a constitutional exercise of congressional authority and does not violate the establishment clause).

218. *See, e.g.*, Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 353-56 (2d Cir. 2007); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1235-43 (11th Cir. 2004); Lighthouse Cmty. Church of God v. City of Southfield, No. 05-40220, 2007 WL 30280, at *10 (E.D. Mich. Jan. 3, 2007); Mintz v. Roman Catholic Bishop of Springfield, 424 F. Supp. 2d 309, 315-16 (D. Mass. 2006); United States v. Maui County, 298 F. Supp. 2d 1010, 1014-17 (D. Haw. 2003).

rejected the argument that the law's institutionalized persons provision violates the Establishment Clause.[219]

Still, RLUIPA may be here to stay. With such grim prospects for change in the near term, perhaps the best that can be hoped for is a deeper understanding by both sides of the law's true effect. The sooner it is acknowledged that the law does indeed tilt the scales of justice in favor of religious land users, the sooner the question of whether that result is warranted can be objectively tackled.

IV. CONCLUSION

The foregoing demonstrates that, without question, RLUIPA has fundamentally changed religious land use law in New Jersey. By giving religious groups de facto immunity from even neutral local regulations, RLUIPA has also markedly amplified community tension surrounding religious land use. Though state law was effective in the past at weeding out discrimination (overt or concealed) in the zoning process, RLUIPA has changed the rules. It encourages a new breed of legal challenge by providing for heightened judicial scrutiny of neutral and generally applicable laws, as well as by providing for the recovery of attorney's fees. It places religious landowners on different footing from any other landowner in the zoning process, and therefore sanctions inequality.

New Jersey state court judges appear slow to adapt to this change, demonstrating the differences between RLUIPA and state law. Nevertheless, RLUIPA plaintiffs have found a home in federal court, and their success has fundamentally changed the nature of the land use approval process.

Supporters of the law argue that the advantage it bestows upon religious property owners is necessary because of how easy it is for veiled discrimination to take hold in the zoning process. New Jersey is certainly not free from this problem, and given how difficult it is to prove discriminatory motive, the law may indeed serve a valid purpose.

Opposing views of RLUIPA may never be objectively resolved. The central question is ultimately whether the law is worth the change it mandates, especially given how favorable New Jersey law had been to religious landowners before RLUIPA. In other words, is there enough of a problem to justify the sweeping accommodations the law forces neighborhoods and towns to make, or have scales needlessly been tipped too far? As demonstrated, New Jersey law was effective at addressing concealed discrimination in the zoning process prior to RLUIPA, raising legitimate questions about whether the law is really needed in the state. The answer to that question,

219. Cutter v. Wilkinson, 544 U.S. 709, 720 (2005).

however, may ultimately be a value judgment, not a legal judgment. What is clear, though, is that at least in New Jersey, the process fostered by RLUIPA is provoking the very disaffection toward religious landowners that the law was intended to prevent.

While the prospects for legislative change or judicial rejection of RLUIPA appear slim, the law is in its infancy, and interpretation by the courts is still evolving. As courts continue to confront RLUIPA issues in the future, sensitivity to the balance that the law attempts to maintain is an absolute necessity—even if the law itself fails to keep the balance level. Courts must be true to the overall purpose of the law while being cognizant of local concerns. Though opposing sides in the RLUIPA debate may never agree, the conflict may ultimately be resolved if everyone agrees that the process itself is fair.