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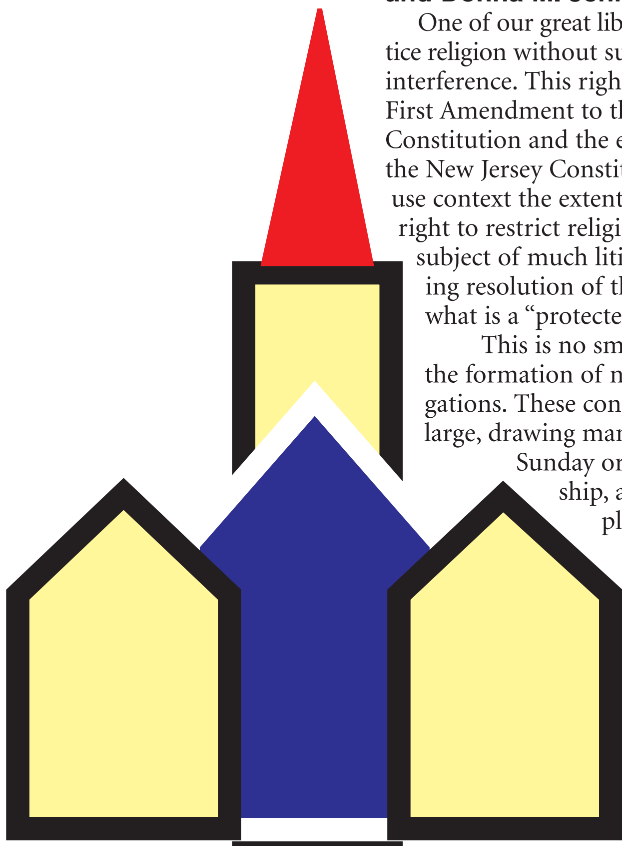
Fundamental rights and neighborhoods

Municipal regulation of religious activities

Looking to build or expand a religious facility? Show how a regulation substantially burdens religious expression and the burden shifts to the government to prove why the regulation should be applied.

By Stephen E. Barcan and Donna M. Jennings



One of our great liberties is the right to practice religion without substantial governmental interference. This right is embodied in the First Amendment to the United States Constitution and the equivalent provision of the New Jersey Constitution. Yet in the land use context the extent of the government's right to restrict religious activity has been the subject of much litigation — often involving resolution of the threshold issue of what is a "protected religious activity."

This is no small task, especially given the formation of non-mainstream congregations. These congregations are often large, drawing many people for Saturday or Sunday or even weeknight worship, and increasing, for example, noise and traffic in the surrounding neighborhoods. The scope of what constitutes a protected religious activity has also expanded as religious institutions seek to attract new congregants by offering an array of activities. A land use application for a religious institution can include not only the church, synagogue or mosque but also a school and/or summer camp, "cultural center," bookstore or gymnasium.

Direct regulation

Our courts have found that a municipality may not directly regulate religious activity. For example, in *Farhi v. Deal Bor. Comm'rs.*, 204 N.J. Super. 575 (Law Div. 1985), plaintiff was a religious educator and rabbi employed at a local religious school. He hosted brief daily prayers in his home as well as prayers on Saturday and Holy Days. After a summons was issued because houses of worship were not allowed in the zone, an application was made to the Board of Adjustment and denied. The record showed 15-25 worshippers attended on a given Saturday or holy day, all of whom walked; fewer worshippers attended the weekday morning prayers.

The Law Division held the New Jersey constitutional guarantee of freedom of worship forecloses municipal action to prohibit free exercise of religious activity in one's home. The court added that the borough had failed to "select the least restrictive means" to accommodate plaintiff's right to free exercise or to demonstrate any government interest which could "arguably be classified as overriding." The court also stated that municipalities retain the power to address

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local needs by ordinances dealing with parking or noise but not by an absolute prohibition of prayer with others at home.

A municipality may, however, exercise reasonable regulatory authority over a religious activity. *Macedonian Church v. Planning Bd.*, 269 N.J. Super. 562, 566-567, 571-573 (App. Div. 1994).

The issue of what constitutes a "reasonable" regulation is usually at the core of a claim brought by an individual or religious institution alleging freedom of religious exercise is being unduly restricted. A municipality is permitted to adopt an ordinance making a religious institution a conditional use or establishing standards with respect to setbacks, lot size, coverage, parking and lighting, as long as those standards are "neutral" and do not unduly infringe upon or prohibit the free exercise of religion.

Religious uses vs. others

Religious uses unquestionably have advantages over other applicants. When an individual or religious institution claims a municipal land use regulation substantially interferes with the free exercise of religion that individual or religious institution can — in addition to the constitutional claim — also bring an action claiming the regulation and/or its application is arbitrary, capricious and unreasonable.

Alternatively and/or additionally, a plaintiff may allege a violation of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). 42 U.S.C. § 2000c *et. seq.* As set forth below, however, neither approach is certain to be successful for an individual or religious entity challenging the application of land use regulations which either prohibit a religious institution in certain areas of the municipality and/or contain conditions infringing to some extent upon the exercise of religious beliefs. As shall be discussed, courts also consider municipal land use goals and balance the religious rights against the governmental interest and the impact of the religious activity.

A. *Sica* balancing test – inherently beneficial use doctrine

Challenges to a local municipal board's denial of a religious institution's application to construct a new house of worship or expand an existing facility most often occur when (1) the use is either not permitted in the zone and/or permitted as a conditional use, and (2) the application violates one of the enumerated conditions in the zoning ordinance. In both instances, the religious institution is required to apply for a "d" variance and proceed before the zoning board of adjustment. Such boards have broad discretion in reviewing variance applications and their decisions are presumptively valid. The decision to grant or deny a variance, however, can be set aside if it is arbitrary, capricious or unreasonable, or not supported by the evidence in the record. *Macedonian, supra*, 269 N.J. Super. at 572.

In order to be granted a "d" variance, the religious institution must demonstrate that the proposed application meets both the positive and negative criteria in accordance with New Jersey's Municipal Land Use Law ("MLUL"). N.J.S.A. 40:55D-70d.

Positive criteria

The positive criteria are established if an applicant can demonstrate there are "special reasons" for granting a variance. The negative criteria are met if the applicant can show such deviation will not be a substantial detriment to the public good nor substantially impair the intent or purpose of the zone plan and zoning ordinance. *Medici v. BPR Co.*, 107 N.J. 1 (1987).

With respect to the positive criteria, New Jersey courts have distinguished "inherently beneficial" uses from other uses:

"If the use for which a variance is sought is not one that inherently serves the public good, the applicant must prove and the board must specifically find that the use promotes the general welfare because the proposed site is particularly suited for the proposed use." *Medici, supra,* 107 N.J. at 4.

But, if the proposed use is "inherently beneficial," the positive criteria are deemed satisfied as a matter of law. *Smart SMR of New York, Inc. v. Fair Lawn, Bd. of Adj.*, 152 N.J. 309, 323 (1998).

The types of uses that the New Jersey courts have recognized as being "inherently beneficial" include schools, child care centers, medical facilities, nursing homes, public housing, community shelters and religious institutions. *Sica v. Board of Adjustment of Tp. of Wall*, 127 N.J. 152, 164 (1992); *House of Fire v. Zoning Bd.*, 379 N.J. Super. 526, 535 (App. Div. 2005).

Negative criteria

Even with that hurdle met, a religious institution must show the application meets the negative criteria by establishing requested relief can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance. In assessing whether an inherently beneficial use satisfies the negative criteria, the New Jersey Supreme Court in *Sica* adopted a four part balancing test. The board's task on such an application is to: (1) identify the public interest or benefit at stake; (2) identify the detrimental effect; (3) ameliorate or mitigate any detrimental effect by imposing reasonable conditions; and (4) weigh the benefits against the ameliorated negative effects to determine, on balance, whether the variance would cause a "substantial" detriment to the public good. Denial of a variance is then justified only if the use would create a substantial detriment.

The "balance" test was created because otherwise the finding negative criteria are not met "would always defeat an inherently beneficial use." *Sica, supra*, 127 N.J. at 184.

New Jersey courts, for the most part, have followed the *Sica* analysis and routinely set aside denials of inherently beneficial uses. This is consistent with the view expressed by Justice Hall over forty years ago that inherently beneficial uses "should have a right to locate on any appropriate site where the physical impact of their operations can be alleviated to a reasonable extent by the imposition of suitable conditions and restrictions." *Roman Catholic Diocese of Newark v. Borough of Ho-Ho-Kus*, 47 N.J. 211, 222 (concurring opinion)(1966).

Subsequent to *Sica*, in *Kali Bari Temple v. Board of Adj. of Readington*, 271 N.J. Super 241 (App. Div. 1994), the board denied a use variance to permit religious activities in a clergymen's residence; since the residential use predominated the church use could only be ancillary to it and was, therefore, not inherently beneficial. The court found the church use to be inherently beneficial, weighed the inherent benefits against the perceived public detriments and ruled in favor of the religious assembly. The court reasoned that a small congregation could not possibly be a substantial detriment considering the "full range of police powers to impose conditions aimed at avoidance of detrimental effects," such as traffic and noise.

On its face, the *Sica* balancing test was a major victory for all inherently beneficial uses because it restricts a municipality's ability to exclude such uses. The enhanced burden of proof as to negative criteria under *Medici, supra*, is not required. Boards have an affirmative obligation to attempt to find conditions to mitigate impacts. However, as subsequent case law has shown, when the impact is clearly substantial, variance denials have been sustained.

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In the unreported decision *Muslim Center of Somerset Cty., Inc. v. Borough of Somerville Zoning, Bd. of Adjustment*, No. 1313-04, 2006 WL 1344323 (N.J. Super. Law Div. May 16, 2006), the plaintiff religious group wished to construct a house of worship in a residential neighborhood; variances for some conditional use standards were required. The board denied the application; on appeal, the Law Division remanded for the board to conduct a *Sica* balancing test.

The board again denied the application, finding the proposed ameliorative conditions were not sufficient to solve the problems caused by the plaintiff's very active use of what had been a two family home. The court upheld the denial finding that under the *Sica* balancing test concerns regarding noise, traffic, and parking problems as well as the undersized lot would constitute a substantial detriment to the public good. Notably, the court distinguished this two family structure from the smaller *Kali Bari* home temple, finding that "the potential traffic, noise, and parking problems, along with other detrimental impacts … could create much more of a detrimental impact than in *Kali Bari*." *See also Jehovah's Witnesses v. Woolwich Tp.*, 223 N.J. Super. 55 (App. Div. 1988) which held a case-by-case analysis is required of ordinances barring religious uses from residential zones, including impact on religious activities and availability of reasonable alternatives; *Hindu Temple and Cultural Society v. Bridgewater Bd. of Adjustment*, No. 486-05, 2007 WL 1228028 (N.J. Super. Law Div. Apr. 25, 2007) where a Temple was approved and a cultural center denied based on neighborhood impact; and *Lakewood Res. v. Cong. Zichron Schneuer*, 239 N.J. Super. 89 (Law Div. 1989), where the court sustained an ordinance with disparate treatment of houses of worship in various zones in a case brought by neighbors attacking a land use approval.

Sica exceptions

While most recent decisions include a proper *Sica* balancing, this pattern is not always followed. In *St. Joseph's Korean Catholic Church v. Zoning Bd. of Adjustment of Rockleigh*, No. 6860-03T2, 2006 WL 1320089 (N.J. Super. App. Div. 2006), *cert. granted*, 188 N.J. 352 (2006), *appeal dismissed,* 191 N.J. 308 (2007)), the Appellate Division purported to describe and analyze the *Sica* balancing test but in actuality appears to have deferred to the board. The church's proposed building would occupy the entire business transitional ("BT") Zone in the small town of Rockleigh. The church use was only permitted in the public zone. The court upheld the board's findings the church would substantially impair the town's "master plan goal" to develop the BT Zone with an office building primarily open on weekday hours, and that no ameliorating conditions were available. The *Sica* balance test was intended to prevent use variance denials simply because variances are required. The Appellate Division focused on the impact on the town's BT Zone, even though it may have more properly reached the same conclusion based on apparent traffic and parking impacts.

B. Religious Land Use and Institutionalized Persons Act

Another avenue a plaintiff can utilize to contest land use disputes involving religious institutions is the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). 42 U.S.C. § 2000cc *et. seq.* This Act also protects prisoners' religious rights, but that issue will not be discussed here.

In 1993, Congress enacted the Religious Freedom Restoration Act (RFRA) as a response to *Employment Division v. Smith*, 494 U.S. 872 (1990), where the Supreme Court upheld a state law criminalizing the possession of peyote for religious ceremonies. The purpose of the RFRA was to prevent the government from enacting any laws that substantially burdened the right to free exercise of religion, including neutral laws of general applicability. However, when the court partially overturned the rather broadly-tailored RFRA in *City of Boerne v. Flores*, 521 U.S. 507 (1997), Congress countered with the narrower RLUIPA.

RLUIPA prohibits any government entity from enacting a land use regulation substantially burdening the exercise of religion unless that regulation is the least restrictive means of furthering a compelling government interest. RLUIPA further states it is applicable in any case where the substantial burden affects any program or activity receiving federal financial assistance; any commerce with foreign nations or among the states; or any implementation of land use regulations that provide the government with procedures to make individualized use assessments. Although the key to this provision is the meaning of "substantial burden," Congress refused to define it. Rather, "The term 'substantial burden' as used in this Act is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept…" 146 Cong. Rec. § 7774-75 (July 27, 2000).

Courts have held the RLUIPA was not intended to make religious institutions immune from land use regulations. One New Jersey federal court, in evaluating an ordinance which did not allow a church on the plaintiff's site, mentioned the Seventh Circuit's standard that a substantial burden is one that "necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise … effectively impractical." *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 406 F.Supp.2d 507, 515 (D.N.J. 2005) This matter is pending in the Third Circuit.

Another court has referenced a less rigid standard enunciated by the Eleventh Circuit — that a substantial burden must be more than just mere inconvenience, more like "significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly." *House of Fire* at 546.

In an unreported case the court, denying a motion to dismiss on the pleadings, disagreed with a board's assertion that a congregation as a matter of law was not substantially burdened by the fact that its members could not worship together in a single service. *Church of the Hills v. Twp. of Bedminster*, No. 05-3332, 2006 WL 462674 (D.N.J. Feb. 24, 2006). A substantial burden can occur when a significant tenet of faith is impeded. Under other cases prior to the enactment of RLUIPA, other expressions of religious activity would be protected under the "substantial burden" provision: Courts have held that prohibiting the operation of a homeless shelter and radio station both substantially burdened religious

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expression under the New Jersey Constitution. *See generally St. John's Evangelical Lutheran Church v. Hoboken*, 195 N.J. Super. 414 (Law Div. 1983); *Burlington Assem. of God v. Zoning Bd.*, 238 N.J. Super. 634 (Law Div. 1989).

RLUIPA also prohibits government from enacting any land use regulation treating a religious group on less than equal terms with a non-religious group or discriminating against any group on the basis of religion. This precludes regulations that totally exclude religious groups from a jurisdiction or "unreasonably limit religious assemblies, institutions, or structures within a jurisdiction." This provision is applicable to any discriminatory regulation, even where there is no "substantial burden" — although it would appear a substantial burden exists in these circumstances.

As in some of the *Sica* cases, courts applying RLUIPA have also been sensitive to serious physical impact. Cases such as *Rockleigh*, *Muslim Center*, and *Hindu Temple* involve denials of applications for new facilities where physical impacts were found and the communities allowed religious facilities in other zones. Such applicants are advised to be willing to scale back large proposals in residential neighborhoods, because courts have been willing to defer to boards concerned with traffic or other objective impacts on local residents.

Conclusion

A claim under RLUIPA provides a plaintiff able to show that a regulation substantially burdens religious expression with the substantial benefit of the burden shifting to the government to prove such regulation is the least restrictive means available in furtherance of a compelling government interest. 42 U.S.C. § 2000cc-2(b). This negates the presumption of validity otherwise existing under New Jersey common law. Moreover, a plaintiff may seek not only injunctive relief, but damages and attorney fees for a wrongful denial. These financial remedies are not available under state law.

In truth, when properly applied the *Sica* balance test is very similar to the RLUIPA analysis: It involves the public benefit (substantial burden) and ameliorating conditions (least restrictive means) to address impacts. Both doctrines are available in either state or federal court, and the practitioner will apply many factors in deciding where to file an appeal from a variance denial or other type of land use litigation.

No matter the forum, however, the record made before the board and the applicant's willingness to work with it to fashion reasonable ways to address real impacts are critical and will matter on appeal.

Stephen E. Barcan and Donna M. Jennings are shareholders on the land use team at Wilentz, Goldman & Spitzer in Woodbridge. They have represented a number of religious institutions before local municipal planning and/or zoning boards, and successfully litigated appeals on their behalf. ***They wish to thank Michael Galvin, a third-year student at Rutgers Law School-Newark and summer associate at Wilentz, for his assistance.***

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