Federally Mandated Rules

CHAPTER 9

1. Religious Land Uses

In a world where we are getting used to the federal government's involvement in many areas of our lives, we must accommodate an increasing interest from Washington, D.C., in local land use management. An example of this is the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)[1], a bill co-sponsored by Utah's own former U. S. Senator Orrin Hatch and his friend the late Senator Ted Kennedy.

RLUIPA basically provides that if the user of land is a church, then no land use regulation can be applied which imposes a "substantial burden" on the religious exercises unless the local government demonstrates two things:

1. the regulation furthers a "compelling" government interest; and
2. the regulation is the "least restrictive" means of achieving the end desired.[2]

The property user must establish the regulation is a substantial burden. Once that is accomplished, the government entity imposing the burden must establish the compelling need and demonstrate that there is no less restrictive means of accomplishing the legitimate goal of the regulation.[3]

The local regulator also bears a burden in showing its regulations treat a religious use no more harshly than non-religious uses;[4] the rules do not discriminate against any particular religious uses;[5] no rule acts to eliminate religious uses from a municipality or county;[6] and no rule "unreasonably limits religious assemblies, institutions, or structures within a jurisdiction."[7]

The law also provides these rules are to be interpreted broadly to protect religious freedom.[8]

The Utah State Legislature enacted a similar statute in 2005, guaranteeing the right to use land for religious purposes would be protected by state, as well as federal law.[9]

These burdens are no small thing. As we discussed in Chapter 5, local regulations typically will be upheld if it is "reasonably debatable" they advance some public good. But under RLUIPA, religious uses can only be substantially burdened by regulation if the need for the regulation is "compelling," which means the city or county must prove the issue involves a significant matter of public safety and health.

The U.S. Supreme Court said that the duty to show a "compelling state interest" to justify a local regulation is "the most demanding test known to constitutional law."[10]

So, for example, critical issues of health and safety such as occupancy and adequate exits from an auditorium probably could be regulated, but building color, height, materials, design, and setbacks probably could not. Purely aesthetic rules might be suspended for religious uses if they impose "substantial" burdens.

This, of course, raises some interesting questions:

- What is a "church" anyway?
- What is "religious exercise?"

How Can Religious Uses Be Regulated?

Case Law — Martin v. The Church of Jesus Christ of Latter-day Saints

A case well-known to some Utahns illustrates the point. In 2000 in Belmont, a suburb of Boston, MA, the Church of Jesus Christ of Latter-day Saints dedicated a temple which did not have a steeple. The house of worship was built on a five-acre site in a residential zone. Churches are an allowed use in the zone, but architectural controls limit the height of buildings there. The Church of Jesus Christ of Latter-day Saints modified the plan to propose a lower steeple, but one that still exceeded the limit significantly. In the trial that some neighbors brought against the church, the local judge ruled that the height of the steeple was not "essential to the worship" of the church. The Massachusetts Supreme Judicial Court (the highest court in the commonwealth) ruled the trial court was wrong:

After months of delay, the steeple is placed onto the temple of the Church of Jesus Christ of Latter-day Saints near Boston, Massachusetts. This only occurred after the state's highest court ruled that religious uses were exempt from the local building height restrictions. Photo courtesy Deseret Morning News.

> It is not for judges to determine whether the inclusion of a particular architectural feature is "necessary" for a particular religion. A rose window at Notre Dame Cathedral, a balcony at St. Peters Basilica, are judges to decide whether these architectural elements are "necessary" to the faith served by these buildings? The judge found, as she was compelled to do in the face of overwhelming and uncontradicted testimony that temples "are places where Mormons conduct their sacred ceremonies." No further inquiry as to the applicability of the law [granting religious structures exemptions from local land use regulations] was warranted.[11]

The law apparently does not apply to the non-religious uses of a church, but only the religious ones. A church that operated a cannery would be regulated just like any other cannery, but a house of worship would be exempt from many controls.

While this case in Massachusetts was not under RLUIPA, the state statute that was the basis for the church's defense was worded in a similar manner to the federal statute and the Utah law. As these laws are interpreted by the courts, we can expect similar results. A federal circuit court of appeals also held in 2003 that members of a local city council could be personally liable for their actions in denying an individual application for permission for religious assembly.[12]

Attorneys' fees are allowed as if any violation of RLUIPA were a civil rights act violation.[13] So, if the user of property in your community is a church, be prepared to suspend the normal rules. The real potency of the act is that it gives a religious institution that feels "put upon" by a local land use regulation an immediate appeal to federal court.

This is a very powerful tool, since normal land use claims must go through the state court system only, and never receive what some consider the more sophisticated and unbiased services of a federal judge.

The best advice to all involved in the review and approval of religious land uses is, of course, to engage in an earnest discussion of what can be accommodated without resorting to legal wrangling and court action. Once RLUIPA is understood by all, the issues should be much easier to resolve. Those working to resolve problems in good will can save time, hassle, and money, including the often-limited resources of a church.[14]

2. Group Homes—Fair Housing Act

As with religious uses, the U.S. Congress has entered the arena of local land use regulation when housing for those with disabilities is involved.

The federal Fair Housing Act[15] provides that it is unlawful to discriminate in the sale or rental, or to otherwise make unavailable or deny a dwelling to any buyer or renter because of race, color, religion, sex, familial status, national origin, and disability.[16]

A person is disabled if he or she has a mental or physical impairment.[17] This could include a wide range of limitations on a person's life and health, including the effects of recovering from drug and alcohol addiction.[18]

Local regulation of residential facilities for persons with disabilities must comply with federal law.[19] A local regulation may be found in violation of the act if it is shown to have a "disparate impact" on a particular group of people that the act was enacted to protect.[20] Another standard in the act is that local rules are in violation if they fail to make "reasonable accommodations," in allowing people with disabilities an equal opportunity to live in a dwelling such as other citizens are allowed to occupy.

When these rules are applied, the local government must balance the interests of the person with a disability against the demands of public health, safety, and welfare. It is forbidden for local policies or practices to have a discriminatory effect. A group which claims discrimination must establish that others in a similar situation are treated differently even if that discrimination is unintentional.[21]

St. Stephen's Church is located beside Truman Elementary School in West Valley City. A case decided some years ago involved a proposal to locate a group home for those recovering from substance addictions next to the church and school.

If all homes in a community are treated the same, then no violation of the Fair Housing Act might occur. But if homes for recovering substance abusers are not given the same allowances as other housing, for example, then the red flags of the act may be triggered.[22]

The other issue is whether the community is making a reasonable accommodation of a proposed group home use. "Reasonable accommodation" has been interpreted to mean that the city or county must change any rule that is not justified by a compelling state interest so that the rule does not place onerous burdens on handicapped individuals.[23]

Remember, of course, that the word "reasonable" is used here. The community must only adjust the rules if to do so is reasonable under the circumstances. Factors such as traffic, congestion, and cost may be used to review what is reasonable, but they may only be applied to limit dwelling units for the disabled if there are no less burdensome options available to offset the impact of group living.

Keep in mind that when deciding which characteristics of a proposed group home are to be reviewed for reasonable accommodations, those characteristics which are unique to the proposed group home must be narrowly chosen. They cannot include characteristics which would only apply to a group home for the disabled.[24]

Of course, the analysis involved in these cases is usually an administrative one so any conclusions drawn must be based on substantial evidence on the record. To deny or overly burden a proposed group home with only the complaints of neighbors as a basis will surely run afoul of the act.[25]

The act also has been interpreted to impose the burden of making accommodations on the local government, and not on the applicant. If the community determines the use does not empirically fit in a certain area, the community may still bear the burden of suggesting other location options for the group home. In a Utah case, the court held "the responsibility rested with the city to *initiate* and *make* the accommodation."[26]

The obvious discomfort placed on local political office holders is predictable. There could hardly be anything in the land use arena more unpleasant than to tell the neighbors rallying against a home for those recovering from substance abuse that they must not only endure the placement of the home in their neighborhood but

"accommodate" it. Despite the belief of this author that many of the negatives associated with some land uses are more perceived than real, it would be unrealistic to discount the strong reaction that neighbors have when such uses are proposed in their own back yards.

How Can We Regulate Group Homes?

Case Law — Episcopal Church v. West Valley City

An example of this comes from West Valley City. The Episcopal Church of Utah is affiliated with a residential treatment facility for recovering drug addicts and alcoholics known as "The Haven". The proposal was to meet the increasing need for such a facility by using the vacant lot adjacent to St. Stephen's Church at 4615 South 3200 West in West Valley City for an additional residential facility.

The work of the Episcopal Church in Utah is legendary, and there is no way to really over-praise the tremendous efforts made for the homeless and disadvantaged in our state that the church has achieved. But when they proposed a group home next door to the playground at Harry S Truman Elementary School, local residents objected. They objected strongly. Ironically, there was no formal forum for them to voice that objection because the prospective group home, as

Stephen's Episcopal Church as seen behind a playground at Truman Elementary School in West Valley City. A proposed group home would have been constructed on the right side of the church in this photograph.

proposed under the West Valley zoning ordinances, did not need any approvals that required a public hearing.

The premises were zoned R-1-8, which allowed residential uses. The group home is a residential use, and, under the Fair Housing Act, it must be allowed in any residential zone just like a single-family home. The group home only needed to receive a building permit, because a building permit is all that is required to build a single-family home.

West Valley City was understandably reluctant to grant the approval as casually as a building permit for a home. A lawsuit resulted from such reluctance. The federal court in Salt Lake City held that the church had not established that the denial of the permit was discriminatory, because no evidence was offered by the church that other group homes were treated differently than theirs. But the church won on the "reasonable accommodations" test.

While the city claimed to have offered help in the location of the group home, the court held that:

> In the present case, no evidence whatsoever has been established other than the complaints of neighbors. Regardless of who bears the burden here, it is clear that the City has made no attempt to accommodate this facility. In fact, a decision was made to deny the permit for the facility before the application was even received."[27]
>
> On the other hand (the church) has asserted that there is a great need for Haven West to be a group facility located in a residential neighborhood. Those recovering from addiction have been shown to benefit from living with others in similar situations, and their presence in residential neighborhoods allows the recovering individuals to re-integrate into the community at large. It thus appears that there is currently no other way for recovering addicts who require this facility to receive housing in West Valley City[28]

The church won the case but the facility was not constructed, due to factors beyond the issues in the litigation.

Like the federal act related to religious uses, the Fair Housing Act has teeth, allows for immediate access to federal courts, and for legal fees for successful plaintiffs. Those who must deal with proposed group homes in a community would do well to understand the broad provisions of the Fair Housing Act as they make the "reasonable accommodations" necessary to allow such uses and comply with the act.

3. Cellular Towers and Communications Facilities

The federal Telecommunications Act of 1996 (TCA) was passed with the clear intent to "preempt certain areas of local zoning control."[29] The justification for doing this was that there was a national need to provide "a framework designed to accelerate rapidly private sector deployment of advanced telecommunications services to all Americans."[30]

The TCA basically provides that local regulation must not play favorites between different providers of wireless services and should allow personal wireless services to be provided.[31] The law also states that local land use regulators may not cite "environmental effects of radio frequency emissions" as a basis for regulation if the facilities comply with the rules of the Federal Communications Commission.[32]

A wireless company who wishes to complain about inappropriate regulation has direct access to state court, federal court, or even the FCC with its complaints.[33]

The theme here, if not already apparent, is that the hands of local governments will be tied by Congress when enough anecdotes about irrational or discriminatory land use decisions make it to the ears of powerful legislators. In the case of the wireless rules, it is obvious that influential lobbyists convinced a few federal legislators that the competitive nature of the marketplace depends on federal preemption of local law. They argue that such dependence is caused by NIMBYs and small-town politicians making irrational decisions based on rumors of health problems near radio towers.

The resulting solution to the problem was a federal law that put an end to such local excesses and tied the hands of local regulators from sea to shining sea.

On the other hand, local regulation of communication towers has been upheld where they relate to some proper zoning purpose. Restrictions on location, placement, height, fencing, minimum land area, setback, screening, painting, landscaping, or

even disguises are likely to be upheld if they do not so burden the use as to be unreasonable.[34]

Subsequently, as participants in the land use arena, we must understand these federal rules resulted from what Congress determined was excessive regulation by local government. If we exercise self-restraint in our tendency to regulate, such heavy-handed federal regulations will often be unnecessary.

4. Sexually-Oriented Businesses

SOBs, as they are unaffectionately known in local land use circles, are as volatile a subject as there is in this corner of the law. Few are willing to admit to frequenting them, but they generate tens of billions of dollars in revenues nationwide. The major advantage is that the U.S. Supreme Court has declared the services and products of these institutions to be protected "free speech" under the Bill of Rights.

This means that when those who wish to promote adult entertainment—bookstores, cable channels, novelty and lingerie stores, and other similar uses—go to court to challenge local land use regulations, they often win.

Adult businesses are more common and more profitable than ever. While they may be regulated, communities seeking to totally eliminate them will run into the free speech protections of the First Amendment.

There are abundant provisions in state law that are designed to allow local government to regulate SOBs.[35] But the preemptive power of the federal courts makes regulation very tricky in actual practice. Basically, there are some ways that SOBs can be regulated if done carefully, and some that are just simply off-limits.

The most effective way most communities have found to limit the negative effects of SOBs has been through licensing rather than implementing land use restrictions. A discussion of this option is beyond the scope of this book, but those interested would do well to investigate licensing as well as land use rules to design the kind of regulation that is most likely to be upheld.[36]

The general guidelines that apply to SOB regulations are:

1. When a municipality attempts to regulate speech, the normal deference extended by the courts is lost, and there is no presumption of constitutionality. The burden shifts to local government to justify the regulations imposed.
2. The regulations must be shown to flow from external effects of the business and not from local political pressures. They must be carefully drafted (this is no place for amateurs). The consequences of violating someone's free speech under the Civil Rights Act can be significant and personal.
3. A community cannot eliminate all SOBs within the city limits, either by attempting to do so outright or through the back door by imposing burdens that no businessperson can meet. There must be enough locations identified as being available for adult uses in the community that those wishing to establish an SOB can do so reasonably.
4. Ordinances can be upheld if they address undesirable secondary effects of SOBs and do so with sufficient evidence supporting such regulations. The rules should be "content-neutral" and apply to all situations where similar secondary effects may apply and not just to SOBs. Distance limitations to churches, schools, and other SOBs have been upheld. A ban on total nudity also has been upheld, although several cases involved in this specific issue are making their way through the Utah courts as this publication is being written.

5. Sign Ordinances

Regulation of business signs raises the issue of free speech because signs communicate "commercial speech" or other "speech" to the public. Some object to them as much as they do to adult uses because they consider signs ugly in any form. Others, including just about every mom and pop in business for themselves, consider their signs as one of their most significant business assets.

A growing inclination to heavily regulate signs has caused considerable give and take in the land use arena in the past. Much of the discussion is about local options and discretion. Extensive regulation of signs will be upheld as legal, but there are some bedrock rules that must be considered first if sign regulations are to be appropriately enacted.

First of all, this is a free speech issue, and the U.S. Supreme Court has laid down the base rules. Regulations cannot be arbitrary or unreasonable. They must be content neutral.[37] For example, the author recently read a local ordinance that prohibited all signs in residential areas except those related to "seasonal sales of locally produced fruit and vegetables." Such an Ordinance would be stricken since the ordinance cannot delve into content. A reasonable distinction between "commercial" and "non-commercial" signs can be upheld so that large directional signs can be used on the freeways without allowing similar overhead signs advertising businesses at each interchange.

But whenever the content of a sign must be read to determine if the sign is legal, as in a highway directional sign, the courts will apply "strict scrutiny" and only allow an ordinance regulating the content of signs if it advances a compelling public interest.[38]

Thus, if commercial signs are allowed, then noncommercial signs also must be allowed. Some signs, such as those offering a property "for sale" or expressing a political view, cannot be banned in any neighborhood, although the size, quantity, and number of signs can be reasonably restricted. Signs can be banned on utility poles, trees, sidewalks and wires, but not on private lawns or in the window of a home.[39]

An ordinance cannot ban all signs. Sometimes off-premises signs can be restricted more than the signs that advertise a business located on the same site as the sign.

Restrictions on the "time, place, and manner" of sign usage can survive challenge if they are shown to be reasonable and necessary in advancing a legitimate public purpose.[40]

Existing signs often are protected as "grandfathered" and known as "nonconforming." The Utah Legislature has provided special protection for some such signs.[41]

The attractive appearance of a community can be the basis for a sign ordinance, so long as all new signs are treated alike.[42] Certain death can be predicted for an ordinance that pretends to give local officials the ability to accept or reject signs based on subjective opinions without clear objective standards and guidelines for the issuance of permits. Valid ordinances must (1) be supported by evidence that they seek to further a compelling state interest, (2) directly advance that purpose, and (3) are narrowly drafted to be no more restrictive than needed to achieve the public good desired.[43]

Once these basic, constitutional standards are accommodated, local sign ordinances become a matter of local discretion. Remember that the highly restrictive sign controls in Scottsdale, AZ; Monterrey, CA; or Charleston, SC exist under the same federal constitution and free speech rules that apply in Utah. The most significant aspects of a local sign ordinance are likely to remain political questions decided by majority vote, not the constitutional limits that can be accommodated by skillful draftsmanship.[44]

6. Billboards

A brief discussion of billboards as distinctly regulated is justified because of the unique status granted them under Utah state law. Such ordinances routinely differentiate between "on premise" signs and "off premise" signs. The off-premises signs are usually defined as billboards.[45] On premise signs are generally allowed with much more flexibility and acceptance than those located off-premises. At the local level, the sign that a "mom and pop" want to install is usually looked upon with some favor, while the absentee corporate owners of the large billboard panels are sometimes not afforded the same hospitality.

At the state and federal level, however, the scale is tipped. The outdoor advertising industry has been very savvy and actively involved in political campaigns, lobbying, and influencing federal and state legislation.

The discretion of local municipal officials is limited by targeted state statutes, which provide that any billboard, whether it conforms to the current land use regulations or qualifies as a nonconforming billboard, cannot be amortized (phased out over time) like other nonconforming uses or terminated by fire or other causality.[46] Billboards can only be terminated through eminent domain or voluntary agreement with the sign owner.[47]

Outdoor advertising is regulated by state law as well, and the number, size, and location of signs can be regulated.[48] Special licenses and permits are required to install a billboard, but many existed before such laws came into effect. Under the Utah Outdoor Advertising Act, if a state highway project requires the removal of a sign, the owner has a statutory right to relocate it at the expense of the governmental entity funding the road project.[49]

Billboard owners also have the right to adjust the height of their signs if visibility is reduced by sound walls or other highway improvements.[50] Local government entities are directed by state statute to allow the relocation or height adjustment as a special exception to the zoning ordinance.[51]

These protections are not extended to the signs of local businesses. The definition of "Billboard" in the code refers specifically to signs that do not advertise a business located on the same premises as the sign.[52]

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1 42 U.S.C. §2000bb.
2 42 U.S.C. §2000cc 2(a)(1).
3 42 U.S.C. §2000cc 4(b).
4 42 U.S.C. §2000cc 2(b)(1).
5 42 U.S.C. §2000cc(2)(b)(2).
6 42 U.S.C. §2000cc(2)(b)(3).
7 42 U.S.C. §2000cc(2)(b)(3).
8 42 U.S.C. §2000cc(5)(g).
9 Utah Code Ann. §63-93-101 et seq.
10 *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

11 *Martin v. The Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints*, 747 N.E.2d 131 (Mass. 2001).

12 *Kaachumanu v. County of Maui*, 315 F. 3d 1215 (9th Cir. 2003) (Holding that whether a member of the legislative body is liable for religious discrimination turns on whether the decision itself was a legislative act).

13 42 U.S.C. §2000cc(4)(c); See also 42 U.S.C. §1983 and 42 U.S.C. §1988 (Attorneys fees are permitted in civil actions related to the deprivation of civil rights).

14 With thanks to Wendie L. Kellington, Esq. of Lake Oswego, OR, and her paper on RLUIPA presented to the Land Use Institute sponsored by the American Law Institute-American Bar Assn., August 12-23, 2003.

15 42 U.S.C. §3601, et. seq.

16 42 U.S.C. §3601-19.

17 42 U.S.C. §3602(h).

18 *Episcopal Church of Utah v. West Valley City*, 119 F. Supp. 2d 1215 (D. Utah 2000) (Holding that a person recovering from drug and alcohol addiction should be given a reasonable accommodation under the Americans with Disabilities Act).

19 Utah Code Ann. §10-9a-516 (a municipality may only regulate a residential facility to the extent allowed by (i) the Utah Fair Housing Act, Utah Code Ann. §57-21-101 et seq., (ii) the Fair Housing Amendments Act of 1988, 42 U.S.C. Sec 3601 et seq., and (iii) Section 504 of the Rehabilitation Act of 1973) (All statutes cited also include any applicable jurisprudence involving that statute); See also Utah Code Ann. §57-21-2.5 (The Utah Fair Housing Act in its text supersedes and preempts any local ordinance or regulation with regard to the prohibition of discrimination in housing); See Also Utah Code Ann. §10-9a-520 (municipalities) and Utah Code Ann. §17-27a-520 (counties) (Residences for persons with a disability may be licensed, but only by state agencies, who bear the sole burden of monitoring their provision of adequate services to persons residing in those facilities).

20 42 U.S.C. 3604(f)(3)(B).

21 *Episcopal Church of Utah,* 119 F. Supp. 2d 1215 at 1220.

22 *Id.*

23 *Id.*

24 *Id.* at 1221.

25 *Id.*

26 *Id.* at 1222.

27 *Id.* at 1217.

28 *Id.* at 1222.

29 *Patterson v. Omnipoint Comm., Inc.*, 122 F. Supp. 2d 222, 229 (D. Mass., 2000)

30 *Id.*

31 47 U.S.C. §322(c)(7)(B)(i).

32 47 U.S.C. §322(c)(7)(B)(iv).

33 47 U.S.C. §322(c)(7)(B)(v).

34 For an excellent general discussion of federal telecommunications regulations, see Ziegler Rathkopf's The Law of Zoning and Planning (2003), at Chapter 79, or see 81 A.L.R. 3d 1086.

35 See E.G., Utah Code Ann. §10-8-41.5 (related to adult business licensing).

36 For an excellent general discussion of regulations related to sex businesses, bars, and cabarets, see Ziegler, *supra*, note 34 at Chapter 24.

37 *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1984) (A city cannot limit the content of a billboard to commercial messages).
38 *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015) (Holding that a town may only impose content-based restrictions on speech if they survive a strict scrutiny test).
39 *Los Angeles City Council v. Taxpayers for Vincent*, 466 U.S. 789, 808 (1984). (Holding that incidental restriction of free speech resulting from a city's interest may be a justified regulation of the time, place or manner of expression.)
40 *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994).
41 Utah Code Ann. §10-9a-512 (municipalities) and §17-27a-511 (counties) (Stating that billboards can only be removed with the voluntary consent of the billboard owner or by the use of eminent domain (where the government entity would have to pay just compensation for the fair market value of the sign)).
42 *Los Angeles City Council,* 466 U.S. 789 at 808.
43 *Central Hudson Gas & Elec. v. Public Service Comm'n*, 447 U.S. 557, 566 (1980).
44 For an excellent general discussion of regulations related to signs and free speech, see Ziegler, *supra,* note 33, at Chapter 17.
45 Utah Code Ann. §10-9a-103(6) (municipalities) and §17-27a-103(6) (counties).
46 Utah Code Ann. §§10-9a-511(2)(b), 512, (municipalities), §§17-27a-510(2)(b), 511 (counties).
47 §10-9a-513 (municipalities) and §17-27a-512 (counties) (Special rules exist related to the acquisition of a billboard by eminent domain).
48 Utah Code Ann. §§72-7-501 et seq.
49 Utah Code Ann. §§72-7-510(6).
50 Utah Code Ann. §72-7-510.5.
51 Utah Code Ann. §§72-7-510(6)(c), 510.5(3).
52 Utah Code Ann. §10-9a-103(3)(a), (municipalities), §17-27a-103(3)(a) (counties).