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Land Use Litigation: Current Issues

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James A. Windholz, Esq., has emphasized local government and municipal law in his practice since 1971. Mr. Windholz serves as the City Attorney for Golden, Federal Heights and Sheridan, as well as represents redevelopment and urban renewal authorities in five municipalities.

LAND USE LITIGATION: CURRENT ISSUES
By
James A. Windholz and J. Thomas Macdonald

I. First Amendment—*Z.J. Gifts*

A. The Supreme Court has granted certiorari in a case involving an adult-business licensing ordinance of the City of Littleton, Colorado. *City of Littleton v. Z.J. Gifts D—4, L.L.C.*, 124 S.Ct. 383 (2003).

B. The ordinance in question requires businesses that specialize in adult entertainment or merchandise to obtain licenses, and restricts such businesses to certain areas. The Tenth Circuit ruled that the pre-application requirements and judicial review procedures of the ordinance violated the First Amendment. *Z.J. Gifts D—4, L.L.C. v. City of Littleton*, 311 F.3d 1220 (2002), *cert. granted* 124 S.Ct. 383 (2003).

C. The issue on which certiorari has been granted is: Whether the requirement of prompt judicial review imposed by *FW/PBS, Inc. v. Dallas*, 493 U.S. 215 (1990) entails a prompt judicial determination or a prompt commencement of judicial proceedings in question.

D. The ordinance at issue contains the following pertinent provisions:

1. Licensing requirement for businesses specializing in adult entertainment or merchandise.

2. Restriction of such businesses to certain areas.

   a. Adult business may not operate within 1,000 feet of each other or of a state-regulated massage parlor.

   b. Adult business may not operate within 500 feet of a church, school, child-care facility, public park, locally regulated massage parlor or community correctional facility.

3. License application must provide:

   a. Names of all owners, managers, and employees of business;

   b. Information about whether an applicant has had an adult-business license denied, revoked, or suspended by any jurisdiction;

   c. Information about licenses held by the applicant in other jurisdictions;

   d. The address, driver's license number, and social security number of the applicant and all owners, managers, and employees;

e. Floor plan;

f. A written statement from the city's zoning officer that the proposed location is in compliance with the ordinance; and

g. A statement of whether an owner, manager, or employee of the business has been convicted of specified criminal acts.

4. The City Clerk must act upon the application within thirty days.

5. The City Clerk may deny an application for specified reasons.

6. An applicant may appeal a denial to the City Manager, who must hold a hearing within thirty days.

7. If the appeal is denied, the applicant may seek judicial review pursuant to C.R.C.P. § 106(a)(4).

E. The Tenth Circuit determined:

1. Because the ordinance did not require the zoning officer to act upon a request for zoning certification within a specified time, the ordinance violated the requirement that any restraint upon expression prior to judicial review can be imposed only for a specified brief period. *Id.* at 1234.

2. Because the ordinance does not specify a time limit within a court must determine any challenge, the ordinance violated the requirement for prompt judicial review. *Id.* 1238.

a. The court noted a split within the jurisdictions as to whether the requirement for prompt judicial review required only prompt access to the courts or a prompt determination. *Id.* at 1235.

b. Because review is worthless without a decision, the court determined that a prompt determination was required. *Id.* at 1236.

II. **Substantive Due Process—*Cuyahoga Falls***

A. In *Buckeye Community Hope Foundation v. City of Cuyahoga Falls*, 538 U.S. 188, 123 S.Ct. 1389 (2003), the Court revisited the concept of substantive due process in the land use context.

B. The facts are as follows:

1. The plaintiff, a nonprofit corporation dedicated to developing affordable housing through low-income tax credits, purchased land zoned for apartments and submitted a site plan for a housing complex. *Id., 123 S.Ct.* at 1392-93.

2. In the face of public opposition, both the planning commission and city council approved the site plan because it met all requirements. *Id.*

3. During the process, the mayor had attended several gathering and expressed his opposition. *Id.*

4. Much of the public opposition was based on the belief that the project would attract a population similar "to the one on Prange Drive, the City's only African-American neighborhood." *Id.*

5. A citizens group then submitted a referendum petition which had the effect of staying the site plan. *Id.* at 1393.

6. Although the plaintiff objected that the referendum was not permitted on administrative matters, the trial court denied its request for injunction.

7. The voters passed the referendum, and two years later the Ohio Supreme Court determined that the referendum was unconstitutional. *Id.*

C. Plaintiff alleged violation of its rights to equal protection and substantive due process and violation of substantive due process and violation of the Fair Housing Act.

D. The Supreme Court determined that the trial court had properly granted summary judgment dismissing the equal protection and substantive due process claims.

1. As to equal protection, the Court stated that evidence of discriminatory voter sentiment did not constitute state action, and the city's submission of the referendum petition to voters and refusal to issue building permits during the process did not reflect discriminatory intent.

2. As to the substantive due process claim, the Court said that the refusal to issue building permits while the petition was pending "in no sense constituted egregious or arbitrary government conduct." *Id.* at 1396.

a. "[O]nly the most egregious conduct can be said to be 'arbitrary in the constitutional sense.'" *Id.*

b. The Court also rejected plaintiff's argument that submission of an administrative land-use determination to the referendum process constituted *per se* arbitrary conduct. *Id.*

III. **Recent Colorado Land Use Decisions**

A. *Black Canyon Citizens Coalition, Inc. v. Bd. of County Comm'rs of Montrose County*, 80 P.3d 932 (Colo. App. 2003). Landowners formed an unincorporated association to oppose a special use application. After the permit was issued, a complaint seeking review of the decision under C.R.C.P. 106(a)(4) was filed in

the name of a corporation, which had not yet been incorporated. The complaint was filed within 30 days of the final decision, but the corporation was not actually formed until the 31st day following the final decision. The court dismissed the complaint, and the appellate court affirmed. An action filed in the name of a nonexistent person is a nullity. Because jurisdiction was not acquired by the court within the 30-day period, the defect could not be cured after expiration of the period.

B. *Droste v. Bd. of County Comm'rs of Pitkin County*, 2003 WL 22020269 (Colo. App.) (not released for publication as of Jan. 30 2004).

1. This case considered the interplay between two land use statutes adopted by the Colorado General Assembly in 1974.

a. The first, the Areas and Activities of State Interest Act (the "AASIA"), § 24-65.1-101 *et seq.*, 7B C.R.S. (2003), designates certain areas and activities as matters of state interest and authorizes local governments to establish a permit system regulating development in and around such areas and activities. The AASIA contains an exemption for development on land zoned for such development prior to adoption of the Act.

(1) In 1975, Pitkin County designated certain areas and activities under the AAISA and established a permit system for new development.

(2) One of the designations was natural resource areas, which included significant wildlife habitats.

(3) The 1975 resolution was later modified and codified in the Pitkin County Land Use Code ("PCLUC").

b. The second statute is the Local Government Land use Control Enabling Act (the "Enabling Act"), § 29-20-101 *et seq.*, 9 C.R.S. (2003).

(1) It authorizes local governments to "regulate the use of land by . . . . [p]rotecting land from activities which would cause immediate or foreseeable material danger to significant wildlife habitat."

(2) The Enabling Act also provides that "where other procedural or substantive requirements for the planning for or regulation of the use of land are provided by law, such requirements shall control." Section 29-20-102(1).

2. Plaintiffs challenged Pitkin County's denial of a development application for a 15,000-square-foot single-family residence on 500 acres and of a

development application for an access road to the proposed residence. The property had been zoned residential in 1974, and, therefore, the development application was exempt from regulation under the AAISA.

3. The Court of Appeals ruled that the zoned-land exemption of the AAISA was not a substantive requirement of another law for the regulation of land use within the meaning of Section 29-20-102(1), and, therefore, it did not control over the provisions of the Enabling Act.

4. Interestingly, the court did not mention *Penobscot, Inc. v. Bd. of County Comm'rs*, 642 P.2d 915 (Colo. 1982), in which the Colorado Supreme Court held that Pitkin County had exceeded its jurisdiction under the Enabling Act when it attempted to regulate the subdivision of parcels larger than 35 acres.

C. *Friends of Black Forest Regional Park, Inc. v. Bd. of County Comm'rs*, 80 P.3d 871 (Colo. App. 2003), *cert. denied* 2003 WL 22838742 (Dec. 1 2003). In this case, the court explored the issue of when a plaintiff challenging a quasi-judicial action pursuant to C.R.C.P. 106(a)(4) may also assert a declaratory judgment claim.

1. The county approved a large development application and granted a sixty-foot road easement across county-owned property used as a park and which the county had acquired from the U.S. Forest Service.

2. In addition to challenging the approval, the plaintiff sued for a declaratory judgment that the county's grant of an easement was prohibited by the Sisk Act, 16 U.S.C. § 484a (2002), which requires that lands conveyed to a state by the forest service under its land exchange program be used only for the purposes for which they were being used prior to conveyance.

3. The court rejected the county's argument that the C.R.C.P. 106(a)(4) claim was plaintiff's sole remedy.

   a. "With respect to a land use decision, the county's jurisdiction extends only to the construction and application of its own ordinances, regulations, and procedures and such matters as may be specifically delegated to it by the state or federal governments." *Id.* at 876.

   b. Its jurisdiction does not extend to "the construction and applicability of other statutes, regulations, procedures, covenants, reservations, or conditions that may impact the use of land."

   c. Therefore, the trial court's review of the zoning decision would not resolve the Sisk Act or easement issues.

d. Query whether the court's rationale is inconsistent with *Sundheim v. Bd. of County Comm'rs of Douglas County*, 926 P.2d 545 (Colo. 1996), which held that all of a landowner's claims under the Colorado Constitution must be included within a C.R.C.P. 106(a)(4) complaint. Is there any delegation of authority to the county to apply constitutional provisions?

4. The court also held that a nonprofit corporation organized to preserve and enhance a park and protect its neighbors had standing to challenge the validity of a road easement across public land. *Id.* at 877-78.

D. *Baum v. Town of Frisco*, 74 P.3d 427 (Colo. App. 2003) *cert. granted* 2003 WL 21958367 (2003).

1. The Colorado Supreme Court has granted certiorari as to the following issues:

a. Whether a home rule municipality, pursuant to an express constitutional authorization to regulate and define the jurisdiction of its municipal court in local matters, may provide that its municipal court has exclusive original jurisdiction over a matter that arises under the charter, ordinances or other enactments of the municipality.

b. Whether the court of appeals erred in failing to construe the Colorado Constitution as a whole and harmonize the provisions of article XX, section 6, concerning the authority of a home rule municipality to define the jurisdiction of its municipal court, with the provisions of article VI, concerning the vestment of judicial authority of the state in the state courts.

2. The plaintiff challenged a zoning decisions of the town by filing a C.R.C.P. 106(a)(4) proceeding in district court. The trial court granted the town's motion to dismiss on the grounds that the town charter vested its municipal court with "exclusive original jurisdiction over all matters arising under this Charter, the ordinances, and other enactments of the Town."

3. The Court of Appeals reversed.

a. Jurisdiction of state courts of is statewide concern. *Id.* at 428 *citing City and County of Denver v. Bridwell*, 224 P.2d 217 (Colo. 1950).

b. Unless the constitution or a state statute authorizes a town to confer exclusive jurisdiction upon its municipal courts, the town may not do so. *Id.*

c. Article VI, § 1 of the Colorado Constitution vests the judicial power of the state in the supreme court, district courts and certain other specified courts, and then states: "provided, however, that nothing herein contained shall be construed to restrict or diminish the powers of home rule cities and towns granted under article XX, section 6 of this constitution to create municipal and police courts."

(1) The court of appeals held that the proviso is not intended to authorize home rule cities to limit the jurisdiction of district courts. *Id.* at 428-29.

(2) It reasoned that to so hold would conflict with the rest of the section which grants such authority to the General Assembly. *Id.*

E. *Eason v. Bd. of County Comm'rs of Boulder County*, 70 P.3d 600 (Colo. App. 2003). In this case, the Court of Appeals determined that the county had violated a landowner's right to procedural due process by unilaterally changing its interpretation of its zoning ordinance without notice and hearing. Therefore, it upheld a money judgment under 42 U.S.C. § 1983. The case is notable for several of its holdings.

1. The court followed several other jurisdictions in holding that a landowner has a protected property interest in a zoning classification if the landowner has acted in reliance upon such classification. *Id.* at 605.

2. It also held that a significant change in the interpretation of a zoning ordinance can have the same effect as a formal amendment. *Id.* at 608.

3. Even though the county did not implement its decision requiring the landowner to cease operating a self-storage unit on the property during the pendency of the litigation, the court held that a deprivation had occurred because he was deprived of the "legal" use of his land, required to incur legal costs and suffered emotional distress. *Id.* at 607.

4. The change in interpretation of the zoning ordinance was official policy, and, therefore, the post-deprivation remedy of appealing to the Board of Adjustment was not adequate. *Id.* at 608.

5. An agency's denial of due process in its exercise of quasi-judicial functions may amount to an abuse of discretion. *Id.* at 609.

6. An agency's reinterpretation of its own regulation is due no deference. *Id.* at 610.

7. The right to prejudgment interest in a Section 1983 claim is determined by federal law as opposed to state law. *Id.* at 611.

F. *Whatley v. Bd. of County Comm'rs of Summit County*, 77 P.3d 793 (Colo. App. 2003), *cert. denied* 2003 WL 22283858 (Oct. 6 2003).

1. The Planned Use Development Act of 1972 (the "PUD Act"), § 24-67-101 through –108 7B C.R.S. (2003), requires consent of all landowners to create PUD, but only requires notice and hearing to landowners for a modification. *Id.* at 800.

2. Failure to provide proper notice rendered amendments void. *Id.* "When legislative authority is delegated to an inferior body with a restriction that it is to be exercised after notice to persons whose interests are affected, compliance with those notice requirements is a prerequisite to the lawful exercise of the delegated authority. *Id.* at 801, *citing Holly Dev., Inc. v. Bd. of County Comm'rs*, 342 P.2d 1032 (1959).

3. Failure to follow statutorily mandated procedures did not violate landowners' right to procedural due process because no property interest exists in procedures. *Id.* at 798-99, *citing Hillside Community Church v. Olson*, 58 P.3d 1021 (Colo. 2002).

G. *Branch v. Colorado Dep't of Corrections*, __ P.3d __, 2003 WL 22965074 (Colo. App. 2003). Although arising in prisoner lawsuit, this case will have an impact on land use litigation. The Court of Appeals held that costs may be recovered from the state, its officers or agencies in a certiorari proceeding under C.R.C.P. § 106(a)(4).

IV. **Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc, *et seq.***

A. Historical Background.

1. In 1990, the United States Supreme Court held that the First Amendment does not require a government to have compelling state interest in order to enact a law of general applicability that incidentally burdens the exercise of religion. *Employment Div., Dep't. of Human Res. v. Smith*, 494 U.S. 872 (1990) (First Amendment did not prohibit application of drug laws to ceremonial ingestion of peyote and, therefore, unemployment benefits could be denied for work-related misconduct based on use of drug). The Court, however, indicated that the legislature was free to provide greater protection to religious practices. *Id.* at 890.

2. Congress responded by adopting Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb to 2000bb-4, which required that any governmental attempt to substantially burden the exercise of religion must be the least restrictive means of furthering a compelling state interest.

3. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court held that RFRA was unconstitutional as applied to states and localities because

Congress had exceeded its authority under the Section 5 of the Fourteenth Amendment, which authorizes Congress to adopt legislation to enforce the amendment.

4. Congress then enacted RLUIPA under the authority granted to it under the Spending Clause, Commerce Clause and Fourteenth Amendment.

B. Land Use Provisions of RLUIPA.

1. RLUIPA prohibits governments from enforcing a land use regulation that imposes a substantial burden on religious exercise, unless the regulation:

   a. Is in furtherance of a compelling government interest, and

   b. Is the least restrictive means of furthering the compelling interest. 42 U.S.C. § 2000cc (a)(1).

2. The restriction set forth above applies only:

   a. To any program receiving federal financial assistance;

   b. If the substantial burden affects, or its removal would affect, interstate commerce; or

   c. The substantial burden is imposed in a situation in which the government makes an individualized assessment. 42 U.S.C. § 2000cc (a)(1).

3. RLUIPA also prohibits land use regulations in any context that:

   a. Treats religious assembly or institutions on less than equal terms with nonreligious assembly or institutions. 42 U.S.C. § 2000cc (b)(1).

   b. Discriminates against religious assembly or institutions. 42 U.S.C. § 2000cc (b)(2).

   c. Totally excludes religious assemblies from a jurisdiction or unreasonably limits religious assemblies within a jurisdiction. 42 U.S.C. § 2000cc (b)(3).

4. Religious exercise includes the "use, building or conversion of real property for the purpose of religious exercise. 42 U.S.C. § 2000cc-5 (7)(b).

   a. "We therefore hold that, in the context of RLUIPA's broad definition of religious exercise, a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily

bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—effectively impracticable." *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003)

b. Costs, procedural requirements and inherent political aspects of special use, map amendment and planned development processes are incidental to any high density urban land use and do not amount to a substantial burden on religious exercise. *Id.*

5. Government bears burden of persuasion on all elements except whether the regulation substantially burdens the plaintiff's exercise of religion. 42 U.S.C. § 2000cc-2 (b).

6. State court adjudication not entitled to full faith and credit unless the claimant has had a full and fair adjudication. 42 U.S.C. § 2000cc-2 (c).

7. Government includes a state, county, municipality or other governmental entity and any branch, department, agency, instrumentality or official of any of the foregoing. 42 U.S.C. § 2000cc-5 (4).

C. Does RLUIPA Violate the Establishment Clause?

1. The three-part test for whether a statute violates the Establishment Clause of the First Amendment was first articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

a. The statute must have a secular legislative purpose. *Id.*

b. The principal or primary effect of the statute must be one that neither advances nor inhibits religion. *Id.*

c. The statute must not foster excessive governmental entanglement with religion. *Id.*

2. At least in the context of aid to parochial schools, the Court has modified this test by analyzing the entanglement issue under the effect prong rather than as a separate factor. *Agostini v. Felton*, 521 U.S. 203, 232-35 (1997).

3. Three Circuits, in cases involving prisoner challenges, have held that RLUIPA does not violate the Establishment Clause.

a. *Madison v. Riter*, ___ F.3d ___, 2003 WL 22883620 (4th Cir. Dec. 8, 2003).

b. *Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003). (RLUIPA does not advance religion merely because it lifts a regulation that

burdens free exercise without offering benefits to nonreligious inmates); *see also Lindell v. McCallum*, 353 F.3d 1107 (7th Cir. 2003) (prisoner stated claim under RLUIPA).

c. *Mayweathers v. Newland*, 314 F.3d 1062, 1068-69 (9th Cir. 2002), *cert. denied*, 124 S.Ct. 66 (2003).

4. The Sixth Circuit, also in a prisoner case, held RLUIPA unconstitutional as a violation of the Establishment Clause. *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003).

a. "RLUIPA violates the Establishment Clause because it favors religious rights over other fundamental rights without any showing that religious rights are at any greater risk of deprivation." *Id.* at 262. Other fundamental rights of inmates are subject only to a rational relationship review. *Id.* at 264.

b. RLUIPA's broad scope suggests that its actual purpose is to advance religion relative to other constitutionally protected conduct. *Id.* But even if there is a proper purpose, RLUIPA violates the Establishment Clause because its primary effect is to advance religion. *Id.*

c. The court noted that although the Supreme Court had not yet considered the constitutionality of RLUIPA, Justice Stevens in his concurring opinion in *Boerne*, stated his opinion that RFRA violated the Establishment Clause because it provided religious organizations with "a legal weapon that no atheist or agnostic can obtain." *Id.* at 261 *quoting Boerne*, 521 U.S. at 536-37 (Stevens, J., concurring).

5. The crux of the dispute between the circuits is whether RLUIPA merely accommodates the free exercise of religion or whether it advances religious as opposed to nonreligious activity.

a. Government may, and sometimes must, accommodate the free exercise of religion by lifting government-imposed burdens on the free exercise of religion. *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987) (upholding exemption granted to secular activities of religious organization from Title VII's prohibition against religious discrimination in employment).

b. The *Cutter* court distinguished *Amos* on the ground that the exemption at issue in that case was necessary to avoid violation of the Establishment Clause. *Cutter*, 349 F.3d at 263. Without the exemption at issue in *Amos*, Title VII would have required courts to interfere with the internal workings of religious organizations.

Id. The court stated that enacting RLUIPA was not "even arguably necessary to avoid a violation of the Establishment Clause." *Id.* The other circuits do not read *Amos* so narrowly. *See, e.g., Madison*, 2003 WL 22883620 at 4-5 (a broad range of statutory religious accommodations have been upheld against Establishment Clause challenge).

6. In several cases involving the land use provisions of RLUIPA, lower courts have found no violation of the Establishment Clause. *U.S. v. Maui County*, __ F.Supp.2d __, 2003 WL 23148864 (D. Hawaii Dec. 29, 2003); *Freedom Baptist Church of Delaware County v. Township of Middleton*, 204 F.Supp.2d 857, 863-65 (E.D. Pa. 2002).

D. Does RLUIPA Exceed Congressional Authority under the Spending Clause?

1. Congress may attach conditions to the receipt of federal money incident to its Spending Clause power. *Verhagen*, 348 F.3d at 606 *citing South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

2. Congress' power is subject to the following limitations.

   a. Use of spending power must be in pursuit of general welfare. *Id.*

   b. Condition must be unambiguously stated so state may make an informed choice. *Id.* at 607.

   c. Condition must be related to the federal interest. *Id.*

   d. Condition may not be barred by any other constitutional provision. *Id.*

3. RLUIPA satisfies *Dole* test for proper exercise of Spending Clause power. *Id.* at 611; *see also Mayweathers*, 314 F.3d at 1070.

E. Does RLUIPA Exceed Congressional Authority under the Commerce Clause?

1. It has long been the law that Congress may regulate intrastate activity under the Commerce Clause if such activity in the aggregate affects interstate commerce. *Wickard v. Fillmore*, 317 U.S. 111 (1942). Although the court restricted the reach of *Wickard* in *U.S. v. Lopez*, 514 U.S. 549 (1995), it has continued viability as long as the regulated activity is of a commercial character. *U.S. v. Morrison*, 529 U.S. 598, 611 n. 4 (2000).

2. Relying on *Wickard* and *Morrison*, the district court in *Freedom Baptist*, 204 F.Supp.2d at 866-68, held that RLUIPA was a proper exercise of congressional power under the Commerce Clause.

a. Subsection (a)(2)(B) of RLUIPA has an interstate commerce jurisdictional element because it applies in any circumstance in which the substantial burden affects, or its removal would affect, interstate commerce. *Freedom Baptist*, 204 F.Supp.2d at 867.

b. In any case in which the only jurisdictional basis is the affect on interstate commerce, Subsection 4(g) of RLUIPA also provides an affirmative defense if the government proves that the removal of all substantial burdens from similar religious exercise throughout the nation would not lead in the aggregate to a substantial effect on interstate commerce. *Id.*

c. Another court found that churches are major participants in interstate commerce and there activities have a major impact on interstate commerce. *Cottonwood Christian Ctr. V. Cypress Redevelopment Agency*, 218 F.Supp.2d 1203, 1221 (C.D. Cal. 2002).

d. Operating an orthodox Jewish day school is an economic activity within the meaning of the Commerce Clause. *Westchester Day School v. Village of Mamaroneck*, 280 F.Supp.2d 230, 238 (S.D. N.Y. 2003);

3. Relying on *Lopez*, the district court in *Elsinore Christian Center v. City of Lake Elsinore*, 291 F.Supp.2d 1083, 1104 (C.D. Cal. 2003), ruled that RLUIPA was not a proper exercise of Congress' power under the Commerce Clause. RLUIPA does not regulate commercial activity, but instead, it dictates how states must regulate private conduct. *Id.* at 1102-04. Therefore, the aggregation rule of *Wickard* does not apply. *Id.*

F. Does RLUIPA Exceed Congressional Authority under the Fourteenth Amendment?

1. Section 5 of the Fourteenth Amendment authorizes Congress to enforce the provisions of the amendment by appropriate legislation.

2. "[T] fundamental concept of liberty embodied in [the Fourteenth Amendment's Due Process Clause] embraces liberties guaranteed by the First Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Therefore, Congress has authority to enforce the Free Exercise Clause through appropriate legislation. *City of Boerne*, 521 U.S. at 519.

3. Congress exceeds its power, however, if it attempts to define or expand, as opposed to enforce, the rights guaranteed by the First Amendment. *Id.*

4. The line between measures that remedy or prevent constitutional violations and measures that make substantive changes is not easy to discern, and Congress is given wide latitude. *Id.* at 519-520.

Nevertheless, "[r]emedial legislation under § 5 should be adapted to the mischief and wrong which the [Fourteenth] Amendment was intended to provide against." *Id.* at 532.

5. RLUIPA attempts to remedy the defect of RFRA by limiting its application to certain governmental actions, including those in which the government has in place land use regulations under which the government makes, or has in place formal or informal procedures that permit the government to make, individualized assessments of the proposed use of land.

6. This provision is derived from *Sherbert v. Verner*, 374 U.S. 398 (1963), in which the Supreme Court held that South Carolina could not constitutionally withhold unemployment compensation from a member of the Seventh Day Adventist Church because she would not work on Saturday. *Id.* at 399. Because the statute permitted individual exemptions for good cause, the state could not refuse to accept a religious reason absent a compelling state interest that permitted such denials by the least restrict means available. *Id.; see also Church of Lukumi Babalu Aye, Inc. v City of Hialeah*, 508 U.S. 520, 537 (1993) (if regulatory scheme authorizes exemptions, government may not refuse to extend that system to religious hardship without compelling reason).

7. The lower courts have split on the question.

8. *Freedom Baptist*, 204 F.Supp.2d 857 held that RLUIPA was within Congress' power under the Fourteenth Amendment.

   a. Because jurisdictional basis set forth in subsection (a)(2)(C) of RLUIPA "faithfully codifies the 'individual assessments' jurisprudence in the *Sherbert* through *Lukumi* line of cases," Congress has not exceeded its authority under the Fourteenth Amendment. *Freedom Baptist*, 204 F.Supp.2d at 869.

   b. The nondiscrimination provisions set forth in subsection (b)(2) and the nonexclusion provisions set forth in subsection (b)(3) of RLUIPA are consistent with existing jurisprudence and do not exceed Congress' authority under the Fourteenth Amendment. *Id.* at 870-71.

   c. A number of other lower courts have also reached the same conclusion as *Freedom Baptist*. *See, e.g., U.S. v. Maui County*, 2003 WL 23148864 at 4-5; *Murphy v. Zoning Comm'n of the Town of Mitford*, 289 F.Supp.2d 87 (D. Conn. 2003); *Westchester Day School*, 280 F.Supp.2d at 237; *Hale O Kaula Church v. The Maui Planning Comm'n*, 229 F.Supp.2d 1056, 1072 (D. Haw. 2002);

Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F.Supp.2d 1203, 1221 (C.D. Cal. 2002).

9. Once again, a contrary result was reached in *Elsinore Christian Center*, 291 F.Supp.2d at 1102.

   a. The *Elsinore* court rejected the argument that the provisions of RLUIPA merely codified existing jurisprudence for several reasons. *Id.* at 1097.

      (1) First, it noted that the Supreme Court has never invalidated a governmental action on the basis of *Sherbert's* compelling interest standard outside the context of unemployment compensation cases, and it has rarely applied the standard in other free exercise contexts. *Id.*

      (2) Second, by defining exercise of religion to include the use of land, and prohibiting any substantial burden thereon, Congress departed from existing jurisprudence. *Id.* at 1098. Under existing jurisprudence, courts have found a substantial burden only when the governmental conduct infringes upon a "central religious belief or practice." *Id.*

      (3) Finally, the court drew a distinction between land use permitting and the exemption procedures at issue in *Shebert* and *Lukumi.* *Id.* at 1098-99. In the court's view, governmental authorities, in determining whether to issue a zoning permit, do not exempt a user from an applicable law, but simply determine whether the applicable law applies to the facts before it. *Id.*, *but see Cottonwood Christian Ctr.*, 218 F.Supp.2d at 1222-23 (collecting circuit court cases in which strict scrutiny has been applied to land use decisions affecting churches).

   b. The *Elsinore* court also rejected the argument that RLUIPA could be upheld as a prophylactic enactment designed to prevent violations of the Fourteenth Amendment. *Id.* at 1099-1102.

      (1) The factors necessary to uphold a statute as a proper prophylactic measure are that "(1) Congress must have identified a 'widespread and persisting deprivation of constitutional rights' which it is acting to remedy or deter; and (2) there must be 'a congruence and proportionality between the injury to be prevented or remedied and the means adopted.'" *Id.* at 1100 *quoting City of Boerne*, 521 U.S. at 519-20

(2) The court found that RLUIPA's remedial procedures lacked congruence and proportionality to the perceived injury. *Id.* at 1102.

G. Other Issues.

1. Statute of Limitations. Federal four-year statute of limitations applies to claims under RLUIPA. *U.S. v. Maui County*, 2003 WL 23148864 at 2.

2. Substantial Burden.

a. To impose a substantial burden, a land use regulation must be one that "necessarily bears direct, primary and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction—effectively impracticable." *Civil Liberties for Urban Believers*, 342 F.3d at 761.

b. A religious school suffers a substantial burden if it is not "able, within reason, to accommodate the growing number of students who wish to pursue a Jewish education." *Westchester Day School*, 280 F.Supp.2d at 242.

c. Requirement that homeowner obtain a special exception before conducting religious services in his home is not a substantial burden. *Konikov v. Orange County*, ___ F.Supp.2d __, 2004 WL 213179, 10 (M.D. Fla. 2004).

3. Compelling State Interests.

a. Traffic concerns not a compelling state interest. *Westchester Day School*, 280 F.Supp.2d at 242.

b. Parking concerns not a compelling state interest. *Id*.

c. Enforcing zoning ordinance and protecting safety of residential neighborhoods are compelling state interests. *Murphy*, 289 F.Supp.2d at 108.

4. Least Restrictive Means.

a. Cease and desist order prohibiting regularly scheduled prayer meetings of more than 25 persons not the least restrictive means of protecting safety of residential neighborhood. *Id.* at 108-09 (town's primary concern was safety issues inherent in increased level of traffic, yet order regulates only the number of individuals in attendance).

b. A contrary result obtained in *Konikov*. In that case, an order directing a rabbi who conducted regularly scheduled religious services in his home to "[o]btain special exception approval or cease religious organization operations," was upheld. *Konikov*, 2004 WL 213179 at 10.

5. Injunctions.

a. RLUIPA authorizes federal courts to issues injunctions to enforce its provisions when appropriate. *Cottonwood Christian Ctr.*, 218 F.Supp.2d at 1217-18.

b. Neither the Anti-Injunction Act, 28 U.S.C. § 2283, nor the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), prohibited enjoining of state court condemnation proceeding as necessary to enforce RLUIPA. *Cottonwood Christian Ctr.*, 218 F.Supp.2d at 1217-18.

c. Standard test for preliminary injunction applied under RLUIPA. *Ventura County Christian High School v. City of San Buenaventura*, 233 F.Supp.2d 1241 (C.D. Cal. 2002).

H. Types of Government Action Challenged.

1. Denial of variance to use rented property as church. *Freedom Baptist*, 204 F.Supp.2d 857.

2. Denial of variance to operate religious school in an area zoned office park. *Shepherd Montessori Center Milan v. Ann Arbor Charter Township*, ____ N.W.2d ____, 2003 WL 22520439 (Ct. App. Mich. 2003).

3. Denial of special use permit for religious school. *Westchester Day School*, 280 F.Supp.2d 230.

4. Denial of conditional use permit for large church. *Cottonwood Christian Ctr.*, 218 F.Supp.2d 1203.

5. Failure to have any zone district in which a church is a use by right. *Freedom Baptist*, 204 F.Supp.2d 857.

6. Provisions of zoning ordinance requiring a church to obtain a conditional use permit in some or all zone districts, *Freedom Baptist*, 204 F.Supp.2d 857.

7. Onerous requirements for obtaining special use ordinance, including minimum requirement of five acres and parking requirements. *Freedom Baptist*, 204 F.Supp.2d 857.

8. Eminent domain proceeding. *Cottonwood Christian Ctr.*, 218 F.Supp.2d 1203.

9. Denial of application to establish day-care facility at church. *Grace United Methodist Church v. City of Cheyenne*, 235 F.Supp.2d 1186 (D. Wyo. 2002).

10. Stop work order issued to religious school directing it to cease construction of modular units on property leased from public school district and which had been approved by school district. *Ventura County Christian*, 233 F.Supp.2d 1241.

11. Cease and desist order directing homeowners to cease conducting regularly scheduled prayer meetings of more than 25 attendees in homes. *Murphy*, 289 F.Supp.2d 87.

RMLUI'S 13TH ANNUAL LAND USE CONFERENCE – MARCH 11-12, 2004

Federal and State Preemption Issues

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I. Federal Preemption

A. The "three-tiered" preemption analysis:

Preemption may occur in **three** situations: **(1)** express preemption, which occurs when the language of the federal statute reveals an express congressional intent to preempt state law . . .; **(2)** field preemption, which occurs when the federal scheme leaves no room for a State to supplement it; and **(3)** conflict preemption, which occurs either when compliance with both the federal and state laws is a physical impossibility, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *See Mount Olivet Cemetery Ass'n v. Salt Lake*, 164 F.3d 480, 486 (10th Cir. 1998) (citing *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 31 (1996)); *United States v. City & County of Denver*, 100 F.3d 1509, 1512 (10th Cir. 1996).

1. "[T]he constitutionality of local ordinances is analyzed in the same way as that of statewide laws." *Hillsborough County v. Automated Med. Labs, Inc.*, 471 U.S. 707, 713 (1985).

2. Preemption of state law by federal statute is not to be presumed absent "persuasive reasons-either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakenly so ordained." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

3. When considering preemption, the court "will start with the assumption that the historic police powers of the States were not to be superceded . . .unless that was the clear and manifest purpose of Congress." *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 605 (1991) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947.)

4. Legislative intent is the "touchstone" of any preemption analysis. *Cipollone v. Liggett Group, Inc*, 505 U.S. 504, 516 (1992).

B. Counties may enact regulations over mineral activities on federal land to address environmental impacts of those activities. *California Coastal Commission v. Granite Rock*, 480 U.S. 572 (1986).

C. The Tenth Circuit has found "nothing in the statutes indicating Congressional intent to assert exclusive control of federal lands leased for oil and gas development." *Texas Oil & Gas Corp. v. Phillips Petroleum Co.,* 406 F. 3d 1303,1304 (10th Cir. 1969) (cert. denied) 396 U.S. 829 (1967).

D. By contrast, local regulations that ban uses authorized by Congress on federal lands are preempted. *See Brubaker v. Board of County Commissioners, El Paso County,* 652 P. 2d 1050 (Colo. 1982); *Ventura County v. Gulf Oil Corporation,* 601 F. 2d 1080 (9th Cir. 1979.) *See also Gulf Oil Corporation v. Wyoming Oil and Gas Conservation Commission*, 693 P.2d 227, 235 (Wyo. 1985) (Finding that Congress, "far from excluding state participation, has prescribed a significant role for local governments in the regulation of the environmental impact of mineral development on federal land," and holding that zoning ordinances that effect a ban on mineral development are preempted, while ordinances imposing permit requirements constitute legitimate means of guiding mineral development without prohibiting it.)

E. The federal test to determine whether local regulation is preempted because of conflict with federal law recently was set forth in *Mount Olivet Cemetary Association v. Salt Lake City,* 164 F.3d 480, 488 (10th Cir. 1998):

> [C]onflict preemption occurs when compliance with both federal and state laws is impossible or when state law stands as an obstacle to accomplishment and execution of the full purposes and objectives of Congress. [C]ompliance with federal and local law is not impossible where ordinance does not prohibit use authorized by federal law.

F. *See also California Coastal Commission v. Granite Rock,* 480 U.S. 572 (1987) (state can regulate but not prohibit mineral activity on federal land).

II. State Preemption:

A. The Colorado Supreme Court has adopted essentially the same three-tiered preemption analysis used by federal courts. *See Board of County Commissioners, La Plata County v. Bowen/Edwards Associates, Inc.*, 830 P.2d 1045, 1056-57 (Colo. 1992) (en banc). **[F]irst**, the express language of the statute may indicate state preemption of all local authority over the subject matter [citations omitted]; **second**, preemption may be inferred if the state's statute impliedly evinces a legislative intent to completely occupy a given field by reason of a dominant state interest [citations omitted]; and **third**, a local law may be partially preempted where its operational effect would conflict with the application of state statute [citations omitted].

B. A County is prohibited from adopting an ordinance that "is in conflict with any state statute." C.R.S § 30-15-411. *See also Board of County Commissioners of Douglas County v. Bainbridge, Inc.*, 929 P.2d 691, 712 (1996) (authority of empowered state and local entities to be given effect unless local resolution contains express or implied conditions that are inconsistent and irreconcilable with statute.)

1. An ordinance and statute will both remain effective as long as they do not contain express or implied conditions that are irreconcilably in conflict with each other. . *Bowen/Edwards,* 830 P.2d 1055-1056.

2. For example, Colorado courts have consistently held that nothing in the Colorado Oil and Gas Conservation Act expressly or impliedly completely preempts local government authority to regulate oil and gas development. *See Bowen/Edwards; Voss v. Lundvall Brothers, Inc.,* 830 P. 2d 1061 (Colo. 1992); *Town of Frederick v. North American Resources Co.,* 60 P. 2d 758 (Colo. App. 2002) (cert. denied); *Board of County Commissioners of La Plata County, et al v. Colorado Oil and Gas Conservation Commission,* 81 P.3d 1119 (Colo. App. 2003).

3. *Bowen/Edwards* also found that the "state's interest in oil and gas activities is not so patently dominant over a county's interest in land-use control, nor are the respective interests of both the state and the county so irreconcilably in conflict, as to eliminate by necessary implication any prospect for harmonious application of both regulatory schemes." 830 P.2d at 1058.

4. Since *Bowen/Edwards,* the Colorado General Assembly has twice reconfirmed local government authority over oil and gas operations in amendments to the Oil and Gas Conservation Act. The legislative declaration at the beginning of S.B. 94-177 that amended the Oil and Gas Conservation Act in 1994 includes a statement that "nothing in this act shall be construed to affect the existing land use authority of local government entities." Colo. Sess. Law 1994, ch. 317 sec. 1 at 1978. Additionally, the General Assembly in 1996 reconfirmed the authority of local governments to issue permits and impose permit conditions on oil and gas operations by adding the following language: "*Nothing in this subsection (15) shall affect the ability of a local government to* charge a reasonable and nondiscriminatory fee for inspection and monitoring for road damage and *compliance* with local fire codes, *land use permit conditions* and building codes." C.R.S. § 34-60-106(5). Thus, these amendments have preserved the rule of *Bowen/Edwards* that the Oil and Gas Conservation Act neither expressly nor impliedly preempts all aspects of local regulation of all and gas. *See Town of Frederick,* 60 P. 2d at 763-64.

C. State preemption by reason of operational conflict can arise "where the effectuation of a local interest would materially impede or destroy the state interest." *Bowen/Edwards,* 830 P. 2d 1059. Under such circumstances, local regulations may be

partially or totally preempted to the extent that they may conflict with the achievement of a state interest. *Bowen/Edwards,* 830 P. 2d at 1059.

D. Local regulations that prohibit oil and gas activities are *per se* preempted by Colorado law as an impermissible interference with state interest. *Voss v. Lundvall Brothers, Inc.*, 830 P. 2d 1061, 1068-1069 (Colo. 1992).

E. In contrast to regulations that impose an outright ban, local permit requirements on aspects of oil and gas activities do not *per se* conflict with state law. *Town of Frederick v. North American Resources Co.*, 60 P.3d 758, 766-767. (Upholding the requirement in town ordinance that the oil and gas operator obtain a special use permit.)

F. Most recently, in *La Plata County v. COGCC, supra,* the Court of Appeals held that amended Rule 303(a) of the COGCC regulations was void because it preempted local government actions beyond those that materially impeded or destroyed the state interest, thereby eroding the delicate balance between local interests and state interests established by the Colorado Supreme Court. 81 P. 3d at 1125.

1. Amended Rule 303(a) stated: "The permit to drill shall be binding with respect to any conflicting local governmental permit or land use approval process." The rule making record in the case indicated that the COGCC amended the "to reduce uncertainty arising from local governments' enactment of oil and gas regulations in the exercise of their land use authority, which enactments had spawned several lawsuits." 81 P.3d at 1125.

2. Plaintiff counties claimed that on it face, Amended Rule 303(a) contradicts current case law and therefore exceeds the COGCC's statutory authority. A rule may not be adopted if it conflicts with other provisions of law and the court can invalidate such a rule. 81 P.3d at 1125.

3. The Court of Appeals focused on the language "any conflicting" in the amended rule and found that that these words have a much broader meaning than "operationally conflicting as discussed in *Bowen/Edwards* and *Lundvall Brothers*. Thus, the Court invalidated the amended rule.

4. The Court of Appeals declined to address the plaintiffs' additional contention that the division in the *Town of Frederick* incorrectly applied the operational conflict test because of its holding that the amended rule was invalid.

5. Judge Ney dissented on the ground that the plaintiffs lacked standing to file suit due to a lack of injury.