

Memorandum

City of Lawrence

Legal Services

TO: Toni Ramirez Wheeler, Director of Legal Services

FROM: John Jay Miller, Staff Attorney

Date: February, 4, 2009

RE: Overview of RLUIPA and Constitutional Challenge Information To Include In Planning Memorandum

You have requested information to include with material from the planning department to advise the City Commission on the Religious Land Use and Institutionalized Person Act and Constitutional challenges to proposed homeless text amendments.

Zoning decisions that affect religious institutions (*e.g.* synagogues, temples, mosques, churches, home-worship centers) implicate the United States Constitution, most notably the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, the Kansas Constitution, Bill of Rights Section 7, and the federal Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc *et seq.*

RLUIPA is a federal act that protects two types of religious freedom claims: those by religious institutions and those by institutionalized persons claiming that the government infringes on the rights to freely exercise their religion.

RLUIPA was enacted by Congress to protect religious institutions from unduly burdensome and discriminatory land use regulations. The land use provisions of RLUIPA protect individuals, houses of worship, and other religious institutions from discrimination in zoning and landmarking laws.

RLUIPA prevents the City from infringing on the free exercise of religion, bars the City from discriminating among religions, requires that religious institutions are treated as well as comparable secular institutions and prevents the City from imposing a land use regulation that excludes a religious assembly from the City or prevents the City from unreasonably limiting religious institutions within the City.

Whenever the City adopts a zoning regulation that could affect a religious institution the City must be cognizant of RLUIPA and the potential effects that the act may have on the regulation. The existing Development Code is also subject to RLUIPA claims.

RLUIPA (42 U.S.C. § 2000cc (a)) prohibits the City from imposing a "substantial burden" on the "religious exercise" of a person (religious institution) through a land use regulation unless the City can demonstrate that the substantial burden is in "furtherance of a compelling state interest" and is the "least restrictive means of furthering that compelling governmental interest." The compelling governmental interest test is the most stringent standard of judicial review of a government's action and means that the action of the city is recognized as a necessary government function such as protecting the public health, safety and welfare compared to something preferred by the government. The "least restrictive means" test requires the government to show that its interests could not be achieved by a more narrow regulatory action that burdens the plaintiff to a lesser degree.

For comparison, the rational basis test is the standard test for municipal zoning decisions and if a city's action does not constitute a substantial burden, then the rational basis standard of review is applied by the courts.

RLUIPA (42 U.S.C. § 2000cc (b)) also prohibits the City from imposing a land use regulation that "treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution" or "discriminates against any assembly or institution on the basis of religion or religious denomination." Unlike the substantial burden provision, these provisions may not be overcome by a showing of compelling state interest. The proposed code and the issues raised about the code do not implicate this section of RLUIPA.

Before a court would consider whether the city was imposing a "land use regulation in a manner that imposes a substantial burden on the religious exercise of a person" the person claiming a violation of RLUIPA bears the burden of persuasion and must produce prima facie evidence to support the claim they are alleging. If the Court determines that the plaintiff met their prima facie burden, then the burden shifts to the City to prove that the land use regulation is the least restrictive means of furthering a compelling state interest.

Whether an accessory use at a religious institution (school, day care, homeless or overnight shelter) constitutes a religious exercise under RLUIPA is still an unresolved issue. For example, in *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643 (10th Cir. 2006) the court upheld the jury's findings that the Church failed to prove it was engaged in a sincere exercise of religion in the Church's operation of a day care center.

Requiring a permitting process, whether administratively or legislatively, for homeless shelters at religious institutions is not generally considered a substantial burden on a religious institution. Having neutral, measurable and objective standards for considering and approving or denying the permits is the important element to the permitting process. The proposed code includes a variety of permits both administrative and legislative with some differing requirements depending upon the permit. Having a consistent permitting process with standard requirements is a safer approach for the City.

Compliance with 2006 International Fire Code is a concern that has been raised. It has been asserted that requiring religious institutions to comply with the building and fire codes imposes a substantial burden on their free exercise of religion. The concern of the proponents for homeless shelters at religious institutions is that existing religious institutions will need to comply with the current fire codes because providing an overnight shelter is a change of use or

occupancy pursuant to section 102.3 of the International Fire Code. The Fire Code would then require a sprinkler system or other form of compliance to meet the new use. Many of the neighborhood religious institutions would have to retrofit their facilities to comply with fire code requirements.

Generally, courts have determined that RLUIPA does not apply to measures like health and safety codes that protect the people using the facilities. They are not considered zoning or landmarking laws. Any claim would have to be made under constitutional grounds instead of RLUIPA although the substantial burden analysis is similar. Courts have held that complying with health and safety codes does not substantially burden the free exercise of religion. In instances when the courts have held that the health and safety codes were a substantial burden, they also conclude that the codes are the least restrictive means of furthering a compelling state interest.

Neither RLUIPA nor the Free Exercise Clause of the First Amendment grants religious institutions an unfettered ability to do whatever they want on their property. While the First Amendment provides absolute protection to religious thoughts and beliefs, the free exercise clause and RLUIPA do not prohibit Congress and local governments from regulating religious conduct. Numerous courts have determined that RLUIPA does not prevent municipalities from imposing reasonable land use regulations on properties owned by religious institutions. The City can adopt zoning regulations that do not substantially burden the free exercise of religion or if the regulations do substantially burden the free exercise of religion the City can do so as long as it is the least restrictive means of furthering a compelling state interest. Nonetheless, modifications to the proposed code as discussed in the Planning Department memorandum may be appropriate to reduce the risk of facing a legal challenge to the homeless text amendments.