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July 9, 2024

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Dear Clark,

In our last meeting, you asked for references to some of the most relevant RLUIPA cases. We provide them below. We also write to reemphasize the strength of the Church's position under the Texas Religious Freedom Restoration Act ("TRFRA") and RLUIPA—especially now that we better understand the Town of Fairview's concerns. Those concerns are purely aesthetic and subjective and do not defeat the Church's rights under these religious freedom laws.

I. History of TRFRA and RLUIPA

The U.S. Supreme Court traditionally interpreted the First Amendment to give *preferential* treatment to religious conduct. Even a law or regulation "neutral on its face" could not burden the exercise of religion unless the government was pursuing a "compelling interest" in the narrowest possible way. Wisconsin v. Yoder, 406 U.S. 205, 220 (1972). That changed when the Supreme Court held in Employment Division v. Smith, 494 U.S. 872 (1990), that neutral, generally applicable laws could be applied to religious practices even when not supported by a compelling governmental interest.

Congress responded with RLUIPA and Texas responded with TRFRA, both of which restored "strict scrutiny" to laws that burden religious conduct. Both also broadened the definition of "religious exercise." "By passing RLUIPA, Congress conclusively determined the national public policy that religious land uses are to be guarded from interference by local governments to the maximum extent permitted by the Constitution." Cottonwood Christian Center v. Cypress Redev. Agency, 218 F. Supp. 2d 1203, 1230-31 (C.D. Cal. 2002). The same is true of TRFRA. See Barr v. Stinson, 295 S.W.3d 287, 296 (Tex. 2009) (noting that TRFRA and RLUIPA were both "enacted in response to *Smith*" and have a "common history, language, and purpose").

II. TRFRA BROADLY PROTECTS RELIGIOUS LAND USE.

We start with TRFRA, which provides even "broader" protection than RLUIPA. See Vallejo v. City of Del Rio, 2012 WL 13072121, at *7 (W.D. Tex. Sept. 20, 2012). In Barr v. City of Sinton, 295 S.W.3d

287 (Tex. 2009), the Texas Supreme Court established a four-part test for applying TRFRA: (1) whether the government's regulations burden the plaintiff's free exercise of religion; (2) whether the burden is substantial; (3) whether the regulations further a compelling governmental interest; and (4) whether the regulations are the least restrictive means of furthering that interest. See Barr, 295 S.W.3d at 299.

A. TEMPLE BUILDING IS RELIGIOUS EXERCISE.

TRFRA defines "free exercise of religion" broadly as any "act or refusal to act that is substantially motivated by religious belief." TEX. CIV. PRAC. & REM. CODE § 110.001(a)(1). Religious motivation is all that matters. Merced v. Kasson, 577 F.3d 578, 588 (5th Cir. 2009). The Texas Supreme Court's decision in Barr shows how broad "religious exercise" is under TRFRA. In Barr, the plaintiff pastor wanted to operate a halfway house out of two homes he owned. The trial court held this was not "religious exercise" because halfway houses are often operated for secular purposes. "The trial court appears to have been troubled that an operation which can be and often is conducted for purely secular purposes could be entitled to increased protection from government regulation if conducted for religious reasons." But the Texas Supreme Court concluded that "TRFRA guarantees just such protection." Barr, 295 S.W.3d at 300.

There is no question that the Church and its members are motivated by religious belief to build temples. But there are three key details of those beliefs that especially matter here.

1. Easy access to the temple is a key doctrine of the Church.

Church President Russell M. Nelson has repeatedly declared that God "want[s] to bring temples closer to the expanding membership of the Church."[1] Convenient access to the temple is critical to the Church and its members for at least three reasons:

- First, God's highest blessings are available only to those who receive the ordinances of the temple. The Church wants every Church member to have access to these blessings.
- Second, after receiving these ordinances for themselves, Church members return to the temple as frequently as possible to perform these ordinances vicariously on behalf of deceased ancestors so they too can receive God's highest blessings. Faithful Church members feel an urgency to go to the temple as often as they can to do this work. Convenient access to temples is necessary for this work of salvation to move forward as fast as possible.
- Third, Church President Russell M. Nelson has repeatedly implored Church members to spend "more time in the temple."[2] He has promised Church members that if they spend more time in the temple, they will feel closer to God and be able to draw upon His power, receive answers to their prayers, and overcome the world. "That is why we are doing all within out power, under the direction of the Lord, to make temple blessings more accessible to members of the Church."[3]

[1] President Russell M. Nelson, "Let Us All Press On," April 2018 General Conference.

[2] President Russell M. Nelson, "Sisters' Participation in the Gathering of Israel," October 2018 General Conference.

[3] President Russell M. Nelson, "Rejoice in the Gift of Priesthood Keys," April 2024 General Conference.

These are the primary reasons the Church is building temples faster than ever and bringing them closer and closer to Church members.

2. Selecting a temple site is the "free exercise of religion" under TRFRA.

Critically, for the Church and its members, the *location* of a temple is also religious exercise. As one more example of this, in addition to what's in the RLUIPA submission we previously sent you—in the October 1997 General Conference of the Church, senior Church leader Russell M. Nelson (now Church president) told this story:

> One of our most memorable experiences occurred when we visited the temple construction site in Guayaquil, Ecuador. There President Hinckley recounted to us how that property was selected. On a prior visit, he had been shown several possible locations, but none seemed to satisfy him. While prayerfully searching, he asked about ground on a hill not far from the airport. But it was said to be *not* for sale. President Hinckley directed that they visit that property anyway. There he received inspiration from the Almighty that this was the right place for the temple. Now we were privileged to stand on that spot reserved by the Lord and then procured for this sacred purpose.[4]

Choosing a temple site is not simply a matter of selecting a convenient location, it is a matter of determining God's will. Real estate agents and Church employees help identify *possible* locations; but the Presiding Bishopric and First Presidency of the Church—senior ecclesiastical officials—make the final determination under the Lord's direction.

3. Temple architecture, including size, height, and steeple, are matters of religious exercise under TRFRA.

The First Amendment radiates "a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94, 116 (1952). This constitutional command gives churches "autonomy" to do things like "select their own leaders, define their own doctrines, and run their own institutions." Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 341 (1987) (Brennan J., concurring). "[A]ny attempt by [the] government to dictate or even influence such matters" would violate the First Amendment. Our Lady of Guadalupe Sch. v. Morrisey-Berru, 140 S. Ct. 2049, 2060 (2020).

TRFRA and RLUIPA extend the same kind of autonomy to churches in matters of religious architecture, which are also part of a religious community's "process of self-definition." Amos, 483 U.S. at 343-44 (Brennan J., concurring). For a religious community, a house of worship "is not just a piece of real estate," it is "the outward symbol of a religious faith." Kedroff, 344 U.S. at 121 (Frankfurter J. concurring).

[4] Elder Russell M. Nelson, "Spiritual Capacity," October 1997 General Conference.

> Ecclesiastical architecture has always been inextricably linked with basic religious choices made by worshipping communities. In both its functional and visual aspects, the house of worship reflects and influences all dimensions of a religious community's life—its primary theological principles, its liturgical practices, its faith renewal movements, its doctrinal development, its missional goals, and its identity. The purpose of the structure is a religious one; religious choices are embodied in it ….

Angela C. Carmella, *Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review*, 36 Vill. L. Rev. 401, 404-05 (1991).

For the Church and its members, a temple's architecture is inextricably intertwined with its doctrines and teachings in at least five ways.

- First, the architecture—exterior and interior—reflects the sincere belief that a temple is "literally the house of the Lord."[5] President Nelson taught, "When you look at the temple, you should realize it is a symbol of Jesus Christ, as He is our Mediator with the Father. Only by Him can we reach our Heavenly Father."[6]
- Second, the architecture is itself an act of worship and should give Church members the feeling that they are entering God's presence.
- Third, the architecture reflects the importance of what occurs inside the temple and the peace promised to all who worthily enter the temple.
- Fourth, the architecture reflects the belief that God still speaks to prophets. Thus, each temple's design is approved by the Church's highest leaders who seek God's guidance and direction.
- Fifth, the temple is about ascending to God's presence, and the architecture—the steeple in particular—reflects that theological belief.

Steeples serve no purpose except to express religious belief. Some opponents claim steeples are not *required* by the Church's beliefs. But that is not the test. Under TRFRA, the religious exercise need not be "a central part or central requirement of the person's sincere religious belief." TEX. CIV. PRAC. & REM. CODE § 110.001(a)(1). "'Not only is such a determination unnecessary, it is impossible for the judiciary.'" A.A. v. Needville Indep. Sch. Dist., 611 F.3d 248, 260 (5th Cir. 2010) (quoting Barr, 295 S.W.3d at 300). Courts "lack any license to decide the relative value of a particular exercise to a religion." Yellowbear v. Lambert, 741 F.3d 48, 54 (10th Cir. 2014). Likewise, "it isn't for judges to decide whether a claimant who seeks to pursue a particular religious exercise has correctly perceived the commands of his faith or to become arbiters of scriptural interpretation." Id. at 54-55 (cleaned up).

Some opponents and one Town Council member quoted Church leaders saying what occurs inside the temple is more important than the size or design of the temple. No one disputes that. That is true of every house of worship. But that does not mean religious architecture is unprotected. With temples, the

[5] Elder Neil L. Andersen, "Temples, Houses of the Lord Dotting the Earth," April 2024 General Conference.
[6] Spiritual Doors Will Open: Messages about the Temple from President Nelson, Liahona January 2023.

architecture is critical because it reflects the singular importance of what happens inside. In any case, all that matters under TRFRA is that the temple's location and design are "motivated by religious belief." TEX. CIV. PRAC. & REM. CODE § 110.001(a)(1).

In sum, with temples, "[t]he architecture … is the result of religious choice; it structures the life and worship of the religious community; it is inseparable from its religious meaning and purpose; the structure is 'pervasively sectarian.'" Carmella, supra, at 481.

B. DENIAL OF THE CHURCH'S APPLICATION, OR APPROVAL WITH CONDITIONS ON THE TEMPLE'S ARCHITECTURE, WOULD IMPOSE A SUBSTANTIAL BURDEN UNDER TRFRA.

TRFRA does not define "substantial burden." The Texas Supreme Court rejected tests that "focus[ ] on the burden on the person's religious *beliefs* rather than the burden on his *conduct*." Barr, 295 S.W.3d at 301. The question, therefore, is "the degree to which a person's religious conduct is curtailed and the resulting impact on his religious expression." Id. The burden "is measured … from the person's perspective, not from the government's." Id.

Case law applying TRFRA has broadly applied the "substantial burden" test to all kinds of religious exercise:

In Merced v. City of Euless, 577 F.3d 578 (5th Cir. 2009), the court held that a city ordinance forbidding the slaughter of four-legged animals within the city's borders imposed a substantial burden on practitioners of the Santeria faith.

In Big Hart Ministries Assoc., Inc. v. City of Dallas, 2013 WL 12304552 (N.D. Tex. March 25, 2013), the court held that city ordinances regulating organizations that feed the homeless—requiring them to have bathroom facilities, for example—imposed a substantial burden on religious ministries organized to feed the homeless. "The fact that alternative methods for feeding the homeless exist does not mean the burden on Plaintiff's religious expression is not substantial." Id. at *13.

In A.A. v. Needville Indep. Sch. Dist., 611 F.3d 248, 264 n.55 (5th Cir. 2010), the court concluded that requiring a Native American student to wear his hair up at school imposed a substantial burden on his religious beliefs. The fact that the burden only existed a few hours a day did not make it insubstantial.

In Gonzales v. Mathis Indep. Sch. Dist., 2018 WL 6804595 (S.D. Tex. Dec. 27, 2018), as a sign of their personal religious devotion as Catholics, the plaintiff parents had left locks of hair on the back of their children's head uncut since birth. The plaintiffs acknowledged this was not taught in the Catholic faith; it was a personal commitment they made to God. The court held that a school policy requiring short hair substantially burdened their religious practice even though they were free to practice their Catholic faith in every other way. "While their promesa is only one expression of their religious beliefs, it is an important one for their entire family. That burden is real and significant; it is thus substantial." Id. at *5.

1. Denying the Church's application to build at the chosen site would substantially burden religious exercise.

The Church and its members believe that temple locations are chosen by Church leaders not as a matter of cost or convenience, but under the Lord's direction. Denial of the Church's application to build at this location would substantially burden that belief.

The fact that the Church *might* be able to build the temple somewhere in the surrounding area does not lessen that burden. In Barr, the court concluded that an ordinance prohibiting Barr from operating a halfway house in a residential neighborhood imposed a substantial burden. The district court said Barr was free to provide his religious ministry to parolees and probationers "in other facilities in Sinton" or "outside the City …." Id. at 302. The Texas Supreme Court rejected this argument because there was no evidence that Barr could operate his halfway house as a matter of right anywhere in the City. Id.

Further, the court said a municipality cannot avoid TRFRA by simply pointing to other places where the religious conduct might be allowed. "[E]vidence of *some* possible alternative [location], irrespective of the difficulties presented, does not, standing alone, disprove substantial burden…. [O]ne is not to have the exercise of his liberty … in appropriate places abridged on the plea that it may be exercised in some other place." Id. (quotation marks omitted).

The court placed emphasized the fact that Barr could not locate his ministry anywhere in Sinton. The City argued that this was not a substantial burden "because the City is so small that excluding the ministry from inside the city limits was inconsequential." Id. The court related that argument to a U.S. Supreme Court case in which a small city had prohibited all adult-themed businesses. "The Supreme Court did not consider the small size of the municipality to be important and specifically rejected the argument that the adult entertainment business at issue could simply move elsewhere." Id. at 303 (citing Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981)).

As two prominent religious-freedom scholars have noted, the go-elsewhere argument would "force churches into a guessing game, in which they have to acquire a site, or acquire a lengthy option on a site, and then seek permission to use it in a political process that … is often hostile to their interests." Douglas Laycock & Luke W. Goodrich, *RLUIPA: Necessary, Modest, and Under-enforced,* 39 Fordham Urb. L.J. 1021, 1047 (2012). "The process can turn into a game of gotcha, in which the available site is always some other site, but never the site the church has actually purchased …." Id.

In this case, as in Barr, the Town cannot avoid TRFRA by claiming the Church can build its temple somewhere else. The chosen location is appropriate. The Town Council approved a 154-foot bell tower on a church at a nearby property.[7] Indeed, that bell tower caused no controversy at all. That is one reason the Church fully expected approval. "When a religious organization buys property reasonably expecting to build a church, governmental action impeding the building of that church may impose a substantial burden. This is so even though other suitable properties might be available, because the delay, uncertainty, and

[7] In our previous meeting, you questioned whether the Town Council actually approved the 150-foot bell tower. A resident raised the same question at the public hearing. We believe the record is undeniable. We also just located a Memorandum dated August 1, 2017, from Israel Roberts to the Town Council and Town Manager regarding a 2017 application by Creekwood United Methodist Church for a conditional use permit to expand its existing campus. In that memo Mr. Roberts wrote, "In 2006, Creekwood UMS *received a CUP for a building expansion that included the installation of a 154' tall digital bell tower*. The bell tower is no longer in the developments plans for the church and will not be installed." In short, the Council approved the bell tower. Creekwood UMC chose not to build it.

expense of selling the current property and finding a new one are themselves burdensome." Bethel World Outreach Ministries v. Montgomery County Council, 706 F.3d 548, 557 (4th Cir. 2013).

There is no reasonable location in the Town of Fairview for the Church to go where the Church's needs could be met —the Town Council was clear that the temple (with its current design) would not be approved anywhere in Fairview. Nor is there any suitable location in the surrounding area of Fairview where the Church could build the temple as a matter of right. Under the Fairview Town ordinances, the Church would have to go through this same process with no guarantee of approval. Surrounding communities could reject the Church's application for the same reasons Fairview threatens to do so. The cost, uncertainty, and delay caused by a denial clearly imposes a substantial burden.

Moreover, we reiterate again that for the Church and its members, the selection of a temple site is itself a matter of religious exercise. Temple sites are chosen by prayer and inspiration, not because of cost or convenience. Forcing the Church to abandon the chosen site—even if some alternative site was readily available—would substantially burden the Church's religious practices.

2. Compelling the Church to change the temple's design would substantially burden religious conduct.

The Town of Fairview may contend that it would approve the Church's application if the Church would substantially reduce the size of the temple and lower the steeple to no more than 68 feet. But "a conditional denial … represent[s] a substantial burden if the condition itself is a burden on free exercise …." Westchester Day Sch. v. Village of Mamaroneck, 504 F.3d 338, 349 (2d Cir. 2007). It is critical to consider the nature of the burden imposed by requiring the Church to change the temple's design to gain approval. In most RLUIPA and TRFRA cases, the substantial burden is based on an *incidental* burden on religion—e.g., increased cost or mere inconvenience. In contrast, restrictions on religious architecture directly burden religious conduct. A church that cannot practice its religious beliefs through religious architecture is more than "merely inconvenienced" by monetary or logistical burdens. Marianist Province of United States v. City of Kirkwood, 944 F.3d 996, 1001 (8th Cir. 2019). Such conditions *compel* the church to modify its religious practice.

A good example of such direct interference with religious practice is Cottonwood Christian Center v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203 (C.D. Cal. 2002). In that RLUIPA case, Cottonwood Christian bought property hoping to build a church facility that included a 4,700-seat auditorium where all its members could worship together. Meeting together "as a single body" was part of its beliefs. Its members were not merely inconvenienced by having to meet separately; they were prevented from practicing their beliefs. "Thus, beyond the need to have a church, Cottonwood has shown a religious need to have a large and multi-faceted church." Id. at 1227. Accordingly, the court concluded that approval conditioned on reducing the size of the facility would impose a substantial burden.

Here, as in Cottonwood Christian, conditioning approval on modifications to religious architecture would directly coerce religious conduct, not merely inconvenience it. That is a substantial burden.

Some opponents may also contend that conditions on the height of the building or the steeple would impose no burden on the religious exercise that occurs inside the temple. In analyzing "substantial burden,"

however, courts look only at the religious conduct in question. In Holt v. Hobbs, 574 U.S. 352 (2015), a Muslim inmate challenged a prison's policy against inmates growing beards. The Supreme Court concluded that this policy imposed a substantial burden on the inmate's religious conduct—the ability to grow a beard. The prison argued that the inmate had been accommodated in every other way. He had been given a prayer rug, for example. The Supreme Court explained that "RLUIPA's 'substantial burden' inquiry asks whether the government has substantially burdened religious exercise … not whether the RLUIPA claimant is able to engage in other forms of religious exercise." Id. at 361-62. In other words, a substantial burden on one aspect of a person's religious conduct is still a substantial burden, even if the person is free in all other respects to practice his religion.

Here, even if Church members can worship inside the temple without any burden, a restriction on the temple's architecture is still a substantial burden on religious conduct. As one commentator explains, "RLUIPA does not require that churches prove that their specific building plans are central to their beliefs, only that they constitute religious exercise." Lisa A. Matthews, *Hobby Lobby and Hobbs to the Rescue: Clarifying RLUIPA's Confusing Substantial Burden Test for Land-use Cases*, 24 GEO. MASON L. REV. 1025, 1052 (2017).

> When courts require churches to prove that a particular design is central to its religion, the burden placed on the church is too high. For example, most churches cannot produce a scripture or religious canon that indicates a particular building size is required by core religious beliefs…. Not all building designs are the same, but that does not negate their importance to the congregation that wishes to build them…. Similarly, ***a church may not be able to demonstrate how its religion demands a particular building design or geographic location, and yet the church's desire to construct that building as it wishes is still protected religious exercise under RLUIPA***.

Id. at 1052-53 (emphasis added).

A court cannot question the importance of a temple's design or of a steeple's height. In Int'l Church of the Foursquare Gospel v. City of San Leandro, 673 F.3d 1059 (9th Cir. 2011), the Ninth Circuit called out the district court's "improper scrutiny" of a church's beliefs. Id. at 1069. A court can address "the sincerity of an individual's religious beliefs" but cannot question the truth, falsity, reasonableness, or importance of religious beliefs. Id. A court cannot say that a steeple is not religiously important, or that a shorter steeple adequately serves its religious purposes. Would a 20-foot decrease in steeple height impose a "substantial burden"? What about a 40-foot decrease? Courts have neither the capability nor the authority to answer such questions. Also, as the Texas Supreme Court said in Barr, the substantial burden is measured "from the person's perspective, not the government's." Barr, 295 S.W.3d at 301-02. Thus, the Town's perspective or a judge's perspective about how tall a steeple needs to be to serve its purpose is irrelevant.

C. THE TOWN DOES NOT HAVE A "COMPELLING INTEREST" IN LIMITING THE SIZE OF THE TEMPLE OR THE HEIGHT OF THE STEEPLE.

Under TRFRA, if a substantial burden exists, the government must show that a "compelling interest" justifies the burden and it must pursue that interest in the manner that imposes the least possible burden on the religious practice at issue. Barr, 295 S.W.3d at 306-08. The Supreme Court calls this the

"most demanding test known to constitutional law." City of Boerne v. Flores, 521 U.S. 507, 534 (1997). That is why RLUIPA and TRFRA claims inevitably turn on "substantial burden." Houses of worship simply do not pose the kinds of threat to public safety, peace, or order that justify burdening religious belief.

D. TRFRA'S REMEDIES.

A prevailing party under TRFRA is entitled to declaratory and injunctive relief, compensatory damages for pecuniary and nonpecuniary losses, and reasonable attorney's fees and costs. TEX. CIV. PRAC. & REM. CODE § 110.005(a).

E. THE MASSACHUSETTS SUPREME COURT RULED FOR THE CHURCH IN A SIMILAR CASE.

The case most on point is Martin v. Corp. of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints, 747 N.E.2d 131 (Mass. 2001). A Massachusetts law called the "Dover Amendment" prohibits zoning ordinances that "unreasonably impede [religious] use without appreciably advancing critical municipal goals." Id. at 137. In the 1990s, the Church constructed a temple in Belmont, Massachusetts, a Boston suburb. The proposed steeple extended 83 feet above the temple's roof—71 feet higher than allowed by Belmont's ordinances. The Church applied for a special permit to exceed the height limit. After numerous public hearings, the board of appeals granted the permit. "It found that that there is 'no grave municipal concern in controlling steeple height on churches,' and that it was 'hardly accommodating to a protected use to limit the Church to a 12 foot projection.'" Id. at 134.

The plaintiffs sued. The trial court ruled that the Dover Amendment "did not apply to the church's application for zoning relief because 'neither the presence nor the height' of the steeple represents a 'necessary element of the Mormon religion.'" Id. at 135. The Church appealed and the Massachusetts Supreme Court reversed.

The court began its opinion by correctly describing the religious practice at stake. It is the same religious practice at issue here: "*The construction of a temple … is a matter of deep religious significance to the church and its members, who believe that the location and design of temples are revealed by God to the presidency of the Church*." Id. at 133 (emphasis added).

The court explained that it "is clearly part of Mormon theology to reflect, in their buildings, the belief of an ascension towards heaven" and that "steeples, by pointing heavenward, serve the purpose of lifting" the eyes towards heaven. Id. at 137. Because "the steeple served a religious purpose," it was protected by the Dover Amendment and the heigh restriction was "an unreasonable regulation of a religious use." Id. Regarding the trial court's conclusion that while a steeple may "have inspirational value" it "is not a matter of religious doctrine," the Massachusetts Supreme Court explained: "It is not for judges to determine whether the inclusion of a particular architectural feature is 'necessary' for a particular religion." Id. at 138. Courts have "repeatedly … warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." Id. "It is not permissible for a judge to determine what is or is not a matter of religious doctrine." Id. at 140. In a footnote, the court added: "Catholic or Protestant religious services may be conducted in buildings that do not bear an exterior sign of a cross; that would not support a finding that a cross is 'not in any way related to the religious use' of the building." Id. at 139 n. 20.

The trial court said limiting the steeple's height would not "prevent or significantly impede the religious use of the temple or substantially diminish or detract from its usefulness." Id. at 139. The Massachusetts Supreme Court rejected that reasoning: "By considering only whether the height restriction prevented or diminished the temple's religious 'usefulness,' the judge's focus was again too narrow…. The judge should have considered whether compliance with Belmont's height restrictions would have impaired the character of the temple, while taking into account the special characteristics of its exempt use." Id. The court also rejected the suggestion that municipalities could limit the height of steeples because they are purely aesthetic.

> The "character" of the temple with its steeple surely encompasses both its architectural beauty, as well as its religious symbolism. The record is replete with evidence that the steeple is integral to the specific character of the contemplated use. The church's architect based his design on an approved church prototype. There was uncontradicted testimony that the church values an ascendancy of space for the religious ceremonies performed in temples…. There was evidence that all but three of the church's numerous temples located in countries around the world have steeples. The Mormon religion is hardly unique in this regard: churches have long built steeples to "express elevation toward the infinite, their spires soaring into the heavens." And a steeple is the precise architectural feature that most often makes the public identify the building as a religious structure.

Id. (cleaned up).

The Massachusetts Supreme Court also held that "no municipal concern" justified "controlling the steeple height of churches" and that approving the 83-foot steeple was necessary "in light of the function of a steeple, and the importance of proportionality of steeple height to building height." Id. at 140.

The trial court also suggested the Church could have built a smaller temple, noting that some of the rooms were not essential to religious worship but merely made such worship more convenient. The Massachusetts Supreme Court said municipalities and courts have no business saying what is and is not necessary for religious worship. "This is the sort of particularized inquiry into the use of discrete sections of a structure serving a protected religious use that is inappropriate." Id. at 138 n. 19.

The Martin case addresses all the issues the Church faces here. TRFRA would require the same outcome. The Martin case recognizes that there is a "symbiotic relationship … between theological choice and architectural design" and that by attempting to exercise "aesthetic control, the government becomes the codesigner of ecclesiastical architecture," which "interfer[es] with beliefs and the architectural expression of those beliefs." Carmella, supra, at 402. In short, government coercion in matters of religious architecture imposes a substantial burden.

III. RLUIPA BROADLY PROTECTS RELIGIOUS LAND USE.

The definition of "religious exercise" and the "compelling interest" test are identical in material respects between TRFRA and RLUIPA. We will briefly expand on what is necessary to show a "substantial burden" under RLUIPA. As noted, "substantial burden" under TRFRA appears to be a lower threshold for churches to meet. But in this matter, RLUIPA's "substantial burden" element would also be met.

The "substantial burden" test in RLUIPA cases originally grew out of prisoner lawsuits and focused on whether the prison regulation at issue compelled the prisoner to violate his religious beliefs. But "land-use regulations do not typically compel plaintiffs to 'violate their beliefs' in the way that, for example, prison rules might require an inmate to engage in conduct that goes against his or her religious tenets." Livingston Christian Schools, 858 F.3d at 1003-04. Thus, the circuit courts have adopted a "coercion" or "modified-behavior" test. "[W]hen there has been a denial of a religious institution's building application, courts appropriately speak of government action that directly *coerces* the religious institution to change its behavior, rather than government action that forces the religious entity to choose between religious precepts and government benefits." Westchester Day Sch., 504 F.3d at 348-49.

No circuit "has required a plaintiff asserting that a land use regulation imposes a substantial burden in violation of RLIUPA to prove that the regulation pressures the plaintiff to violate its beliefs." Bethel World Outreach Ministries, 706 F.3d at 556. Instead, "every one of our sister circuits to have considered the question has held that, in the land use context, a plaintiff can succeed on a substantial burden claim by establishing that a government regulation puts substantial pressure on it to modify its behavior." Id. See Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 898-900 (7th Cir.2005).

- Courts find a substantial burden when the denial or condition at issue directly coerces or modifies religious conduct. Cottonwood Christian Center v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203 (C.D. Cal. 2002).
- Courts find a substantial burden when "a religious organization buys property reasonably expecting to build a church" based on the applicable laws and ordinances only to be denied, even if "other suitable properties might be available …." Bethel World Outreach Ministries v. Montgomery County Council, 706 F.3d 548, 557 (4th Cir. 2013). This does not mean the necessary approvals were "guaranteed," only that the religious organization "had a reasonable expectation of being able to build a church." Id. at 558.
- Courts find a substantial burden where denial would result in "delay, uncertainty, and expense" in finding a new location. See Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 901 (7th Cir. 2005).
- Courts find a substantial burden where a municipality's "broad reasons given for its … denials could easily be applied to all future applications," meaning the religious organization faces the same uncertainty at any site it chooses in the municipality. Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter, 456 F.3d 978, 988 (9th Cir. 2006).
- Courts find a substantial burden where it appears the municipality is acting in "bad faith" (Saints Constantine, 396 F.3d at 901); or where the church "experienced outright hostility to its application, decisionmaking that is seemingly arbitrary or pretextual, and ignorance regarding controlling federal law regarding the application of land use laws to religious institutions"—i.e., ignorance and dismissal of RLUIPA (see Grace Church of North County v. City of San Diego, 555 F. Supp. 2d 1126, 1136 (S.D. Cal. 2008)).

- Courts find a substantial burden where the denial seems "arbitrary" or "capricious" as evidence, for example, by the standards being "inconsistently applied" to similar situations. Westchester Day Sch. v. Village of Mamaroneck, 504 F.3d 338, 350-51 (2d Cir. 2007). In this way, RLUIPA prevents both unintentional and intentional discrimination by preventing a municipality from denying one application but approving another for different religious organizations. "RLUIPA's substantial burden provision usefully 'backstops the explicit prohibition of religious discrimination in the later section of the Act." Id. at 351.

We note one more RLUIPA case because of its similarity to this situation. In The Church of the Hills of the Township of Bedminster v. The Township of Bedminster, 2:05-CV-03332 (D.N.J. Feb. 24, 2006), the plaintiff sought to build a megachurch complex and applied for multiple variances. The Township denied the application stating that "approval of this application with a facility of its magnitude would … change the entire character of the neighborhood from an essentially rural, quiet neighborhood to one of an entirely different character …." Id. at *2. The Township moved to dismiss. The court denied the motion. Quoting RLUIPA's congressional history, the court explained that "[t]he need for religious institutions to have the ability to develop 'a physical space adequate to their needs and consistent with their theological requirements' is at the heart of RLUIPA's land-use provisions." Id. at *5. Denial of the application could prevent the entire congregation from being able to worship together, which would impose a substantial burden. And the Township's concern about the character of the neighborhood was not a compelling interest. Id. at *6.

These are just some examples of situations where courts have concluded that implementation of a land use ordinance imposed a substantial burden under RLUIPA. For the reasons explained above, denying the Church's application, or conditioning approval on changes to the temple's architecture would not just put "pressure" on the Church "to modify its behavior," it would *compel* the Church to modify its behavior by directly regulating the religious conduct at issue. Such compulsion is a "substantial burden" on religious exercise.

IV. CONCLUSION

The Church appreciates the Town of Fairview's desire to "keep it country." We are confident the temple will not change the Town's character. In any case, RLUIPA requires more than undefined (1) "safeguards as are necessary to protect adjoining property," (2) "aesthetic appearance" of the use, or (3) "sensory effects" on the "established character of the neighborhood" or town."

Kirton McConkie

Justin W. Starr

Loyal Hulme
Justin W. Starr

Joy E. Thompson

From: Loyal Hulme
Sent: Wednesday, July 10, 2024 7:08 AM
To: cmcoy@wtmlaw.net
Cc: Richard Abernathy; Justin Starr
Subject: Information Relating to RLUIPA and TFRA you requested
Attachments: 2024.07.09 Ltr to Clark McCoy 4888-6570-8751 v.1-4871-4008-0335 ver. 1.pdf

Dear Clark,

During our last visit, you requested some additional information relating to TRFRA and RLUIPA. Attached please find a letter we trust you will find helpful.

Further, we look forward to our meeting tomorrow with you and the Mayor and remain hopeful other council members will be willing to meet with us during our time in Texas as well. As Richard has likely informed you, I will be in town by mid-afternoon today and will be staying through mid-day Friday. I would welcome the opportunity to meet with each council member individually at a time and location of their choosing all in an effort to answer questions and work toward a mutually agreeable solution for the temple application.

As you know, we do this type of land use work with clients throughout the United States and have found these individual meetings with council members to be some of the most helpful for them as they can ask questions important to them and we can seek to address their individual concerns in a comfortable setting for them. We have done these with or without counsel present, but of course welcome you to any of these meetings.

Please invite each council member to consider such a meeting. Thanks again and we look forward to a productive meeting with you tomorrow. My personal mobile is 801.450.3867 if you would like to reach out and set up such a meeting(s) or if you have questions on any of these issues.

Best,

Loyal

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