Preface

Religious Land Use Since Biblical Times

I have never had a religious institution as a client that has wanted to sue a municipality over a land use dispute. This is a rule without exception. In every situation, the religious entity will use all available means of resolving a dispute prior to entering into litigation that consumes two of the scarcest commodities—time and money. Only when there are no other available options will the religious organization begin to even consider litigation. This book discusses how to litigate such a religious land use case on behalf of a religious entity pursuant to the Religious Land Use and Institutionalized Persons Act (RLUIPA)\(^1\) and the First Amendment. While the First Amendment dates to the founding days of the United States, RLUIPA is a much more recent federal law that can serve as an effective tool to protect the property interests and creed of religious organizations.

Given that this book is much more focused on RLUIPA than on the First Amendment, I think more discussion of RLUIPA could be warranted here. In particular, I think the preface for a book intended to serve as a guide primarily for RLUIPA claims could include some note on how the protections RLUIPA provides are both in themselves significant but also necessary beyond liberties conferred under the First Amendment.

Religious land use issues go back to biblical times. In the Book of Ezra,\(^2\) found in the Old Testament of the Bible, there is a brief discussion of how religious land uses are particularly vulnerable—that they are governed by largely discretionary administrative proceedings prone to arbitrariness that can incentivize discriminatory treatment (intentional or not) in a way that

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2. The Bible (common English version), Ezra 4.
the First Amendment shield cannot necessarily block with the same ease. The concern with pretextual land use denials that provided one of the basis for the enactment of RLUIPA under the enforcement power interestingly parallels the controversy in the Book of Ezra over constructing the Second Temple.

In many ways the story of the Second Temple is symbolic of the enactment of RLUIPA: The temple was erected and decimated (RFRA, the Religious Freedom Restoration Act, was enacted and invalidated as applied to states). Cyrus the Great decreed Jewish exiles to rebuild it (any contemporary religious organization is called to pursue a religious mission involving land use). The locals do not like what is going on and hatch schemes to try to stop it, succeeding in arguing that allowing reconstruction to proceed would create problems (proposed contemporary religious land uses inconvenience or upset contemporary locals/localities, prompting them to give pretextual/ illegitimate reasons for denying the land use). The Jewish exiles are stopped but soon resume construction anyway, claiming they have legitimate authority from the decree to do so (religious organizations continue to claim that the First Amendment grants them religious liberty shielding them from discrimination in the land use context). This claim is scrutinized and, upon reflection, the then-king Darius recognized that it was legitimate and issued a new decree indicating that construction cannot rightfully be stopped (Congress reconsiders the issues facing religion in the land use context and makes the determination that religious liberty under the First Amendment needs better protection and restatement, spurring enactment of RLUIPA).

My goal for this book is to provide religious entities and practitioners alike with practical advice from my personal litigation experiences. I have represented religious institutions throughout the United States: from Catholic high schools in California to Hindu temples in Pennsylvania. This book is intended to afford sound instruction based on some of those matters, as well as other reported religious land use cases that have been litigated.
throughout the United States and the courts’ interpretation of the statutory protections offered to religious entities in an attempt to level the playing field. It is my hope that this book will serve as a useful guide for religious entities and the lawyers who represent them in navigating the challenges and uncertainties that inevitably surround a religious land use claim.