ZONING AND MOSQUES:
Understanding the Impact of the Religious Land Use and Institutionalized Persons Act

By Eric W. Treene

Zoning laws are sometimes used to discriminate against religious groups. The Religious Land Use and Institutionalized Persons Act (RLUIPA) was passed by unanimous consent and signed into law by President Clinton in September 2000. Designed to protect religious assemblies and institutions from discrimination in the land use regulation process—defined as landmarking and zoning—the law also protects against unjustifiably burdensome land use regulation. In the 14 years since its passage, RLUIPA has helped thousands of people secure their right to practice their religion freely and without discrimination, including those in the Muslim community.

RLUIPA contains a provision barring discrimination based on religion or religious denomination, and a separate provision requiring that religious assemblies and institutions be treated at least as well as nonreligious places of assembly and institutions. It also contains a provision requiring that any zoning or landmarking action that imposes a “substantial burden” on religious exercise be justified by a compelling government interest pursued through the least restrictive means. Finally, it contains a provision barring zoning codes from totally or unreasonably excluding religious uses from a jurisdiction. Although RLUIPA was not enacted specifically to protect Muslims, the legislation has, in fact, been successfully employed to safeguard the rights of Muslims in land use situations. This article discusses RLUIPA from the perspective of zoning and mosques.

Legislative History of RLUIPA

Mosques were only referenced twice in the voluminous legislative history of RLUIPA, in which Congress, through nine hearings over three years, cataloged the difficulties that places of worship had experienced in building and expanding facilities, or locating rented facilities, in communities throughout the country.

This is not to say that the sponsors of RLUIPA were indifferent to minority faiths. Indeed, both the House report and the joint statement of RLUIPA’s sponsors addressed the disproportionate representation of minority faiths in zoning disputes. For example, the sponsor cited a study showing that faith groups making up only nine percent of the population accounted for more than half of reported zoning decisions. The discussion leading up to RLUIPA’s passage covered evidence of discrimination against synagogues; places of worship of various minority religious groups; Christian churches with ethnic minority congregations; and “new, small, or unfamiliar churches” in obtaining zoning approval. But mosques were hardly mentioned.

History of Discrimination Against Muslims

The lack of focus on mosques was not that remarkable, however, in light of the generally low levels of discrimination against Muslims prior to 9/11. While there were certainly instances of discrimination and hate crimes against Muslims in the years leading up to 2000, the Muslim community at the time was largely under the civil rights radar. For example, there were 28 hate crimes reported against Muslims in 2000, compared to 1,109 reported against Jews the same year. Thus, it is not all that unusual that Congress, in enacting RLUIPA, was not focused on mosques.

Immediately after the terrorist attacks on September 11, 2001, a sharp rise in hate crimes occurred against Muslims and Arabs, as well as against those perceived to be Muslim or Arab, including Sikhs and South Asians. These ranged from arson and attempted arson of mosques, businesses and a Sikh gurdwara, as well as threats, assaults and at least one murder. In the first three months after 9/11, the U.S. Department of Justice (DOJ) investigated more than 300 crimes. In 2001, the total of hate crimes against Muslims jumped to 481 from 28 the prior year, according to FBI hate crime statistics.

The increase in bias was not limited to hate crimes. While Muslims make up an estimated one percent of the U.S. population, they now account for one quarter of the religious discrimination claims filed with the U.S. Equal Employment Opportunity Commission.
Commission. Likewise, Muslims account for one-quarter of the religious-discrimination-in-housing claims filed with the U.S. Department of Housing and Urban Development.

In the area of RLUIPA enforcement, the Civil Rights Division of DOJ has seen a disproportionate number of cases involving mosques and Islamic schools. While RLUIPA provides a private cause of action for aggrieved parties to file suit, it also empowers the Attorney General to bring suit for injunctive relief to enforce its provisions. That authority has been delegated to the Housing and Civil Enforcement Section of the Civil Rights Division. During the first 10 years of RLUIPA, from 2000 to 2010, a DOJ study found that 14 percent of the RLUIPA investigations opened by the Civil Rights Division involved mosques or Muslim schools. Since RLUIPA was enacted one year before 9/11, there is no pre-9/11 baseline with which to compare these numbers, but this 14 percent represents a number many times the estimated one percent of the population that Muslims represent.

The number of RLUIPA cases involving Muslims increased markedly in 2010, around the same time that the “Ground Zero” mosque controversy in New York City garnered widespread media coverage. Of the 40 RLUIPA matters that the Civil Rights Division has opened involving mosques or Islamic schools since the passage of RLUIPA, 29 were opened since 2010. In fact, in the first 10 years of RLUIPA, 15 percent of the Civil Rights Division’s RLUIPA cases involved mosques or Islamic schools; in the last four years, more than 25 percent of RLUIPA investigations have involved mosques or Islamic schools. Former Assistant Attorney General for the Civil Rights Division Thomas E. Perez, now U.S. Secretary of Labor, testified before the U.S. Senate in March 2011 on the increase in RLUIPA cases involving mosques, noting that “[w]e believe this reflects a regrettable increase in anti-Muslim sentiment.”

Similarly, a study by the Pew Forum on Religious and Public Life identified 37 mosque zoning disputes around the country from 2008 to 2011. One report in 2010 noted that it was not just an increase in the number of cases, but a change in the tone of the cases:

Resistance to mosque proposals over the last decade was tame by comparison to what we see today. Protest, even if bruising, at least took place in the controlled environment of public sessions and within the framework of public debate — Muslim American applicants had the opportunity to respond to accusations and counter speculation with facts. Now, however, a vocal and organized opposition is in the streets with placards and bullhorns. This is consistent with what we in the Civil Rights Division have heard anecdotally from community groups and have seen in our cases and in our tracking of trends in press reports.

Public Opposition: U.S. v. Rutherford County

One of the most striking examples of anti-Muslim sentiment in land use matters is U.S. v. Rutherford County, a RLUIPA case that the United States brought in the U.S. District Court for the Middle District of Tennessee to protect the right of the Islamic Center of Murfreesboro (Islamic Center) to move into a new mosque.

Background to Controversy

The Muslim community in Murfreesboro, which had been worshipping in rented commercial space for more than 20 years, purchased land in nearby Rutherford County in a zone where places of worship are permitted by right. The Islamic Center erected a sign stating that this was the “Future Site of the Islamic Center of Murfreesboro.” Someone vandalized the sign by spray painting “Not Welcome” on the sign, a harbinger of things to come.

The Rutherford County Planning Commission followed the law and treated the mosque the same way it would have treated any other religious assembly, approving the site use plan at the end of May 2010. However, in July, a rally by several hundred mosque opponents in the Murfreesboro square called for the construction of the mosque to be stopped. The public opposition made it difficult for the Islamic Center to find contractors to work on the new mosque. Then, in late August of that year, a large construction vehicle was set on fire, an arson that remains unsolved.

Opponents’ Suit in Chancery Court

In September 2010, four county residents sued in state chancery court to try to stop construction of the mosque. Among the allegations were claims that there had been inadequate notice to the public under the Tennessee Open Meetings Act for the meeting that approved the mosque, that
the mosque would promote terrorism and seek to overthrow the U.S. government, and that the mosque thereby posed a risk to the safety of the community. An evidentiary hearing held over a two-month period in the fall of 2010 was dominated by efforts to introduce evidence linking Islam to terrorism. Mosque opponents introduced evidence that a mosque “frequently becomes a weapons compound” and that the new mosque would be a “regional training center” for terrorism. They also made the claim that Islam was, in fact, not a religion at all but rather a political ideology and that the mosque was not entitled to be treated like a church under the zoning code. This prompted the United States to submit an amicus brief in the chancery court detailing what should have been the uncontroversial position that the federal courts, Congress, and the executive branch had consistently recognized that Islam is, indeed, a religion.18

The court dismissed many of the mosque opponents’ claims in May 2011 but permitted the inadequate notice claim to move forward. In September 2011, the Islamic Center received a bomb threat, which was eventually prosecuted as a hate crime by DOJ.

As the mosque neared completion at the end of May in 2012, the chancery court ruled that there had been inadequate notice of the meeting at which the site use plan was approved, and therefore the Tennessee Open Meetings Act had been violated. The county had followed the same process it had followed for at least 20 churches that had in the past submitted a site use plan: the plans were reviewed at regularly scheduled meetings of the planning commission, which were advertised in the print and online editions of the Murfreesboro Post. However, the court held that the mosque site approval “was in fact a matter of great public importance and a matter of tremendous public interest,” and thus additional notice was required. The court declared the site use plan invalid and ordered the county not to issue a certificate of occupancy to the mosque.

The county appealed the chancery court decision to the Tennessee Court of Appeals, but the chancery court denied the county’s application to stay enforcement of its decision.

The Islamic Center’s goal had been to complete construction in time to hold Ramadan services in the new mosque by the start of Ramadan on July 20, 2012. The mosque was completed on July 13, but the county informed the mosque that it was bound by the chancery court order not to issue a certificate of occupancy.

U.S. Suit Under RLUIPA

The United States filed suit under RLUIPA in federal district court on July 18, 2012, and sought a temporary restraining order (TRO) to require the county to disregard the chancery court order and process the certificate of occupancy application. The United States alleged that denial of the certificate of occupancy imposed a substantial burden under RLUIPA because it effectively barred the Islamic Center from using the property for religious exercise; and the Islamic Center desperately needed the space to accommodate its congregation, which had long outgrown its current space. The United States’ complaint argued that the chancery court order imposed a heightened notice requirement for mosques and that compliance with such a notice requirement could not be a compelling government interest.

The federal court agreed and entered a TRO, finding that “[c]ompliance with the State Court’s Orders imposes a heightened notice requirement regarding the mosque which substantially burdens the Islamic Center’s free exercise of religion without a compelling governmental justification.”19 After the court entered the TRO, the mosque obtained the certificate of occupancy and moved into the new space before the end of Ramadan.

A group of mosque opponents intervened in the United States’ RLUIPA suit, which the district court then stayed as the county pursued its appeal of the notice issue in state court. The Tennessee Court of Appeals reversed the chancery court in May 2013, finding that the notice for the mosque project had been adequate, and the Tennessee Supreme Court denied review in October 2013. The mosque opponents sought certiorari in the U.S. Supreme Court on various grounds, which was denied on June 2, 2014.

Zoning Denial: U.S. v. Lilburn

In the Rutherford County case, the county planning commission had acted properly in granting the permit and treating the mosque as it would have treated a church. The suit was necessitated by the intervention of county residents. However, the Civil Rights Division has more commonly been involved in suits alleging that counties themselves have discriminatorily denied zoning approval to mosques.

In U.S. v. Lilburn, the United States brought suit against a Georgia city over its denial of zoning approval necessary for a Shia Muslim congregation to build a new mosque. The congregation was worshipping in a small mosque on a one-acre site but sought to buy two and a half adjacent acres and build a larger mosque. The suit alleged that the denial was based on anti-Muslim animus of city officials and a desire to appease residents who had expressed anti-Muslim bias. The suit also alleged that Christian churches with similarly scaled projects on similar roads had been granted rezoning or special use permits. The suit was resolved by a consent order in September 2011 permitting construction of the mosque, along with various remedial measures including training, DOJ monitoring, record keeping and other requirements.20

“Substantial Burden” Provision

Not all zoning cases where a mosque is denied a permit involve overt discrimination, and not all denials can be redressed through RLUIPA. But Congress, in enacting the substantial burden section of RLUIPA, provided a means to address situations where the government is posing a particularly severe burden on a congregation’s exercise of religion and does not have a
good reason for doing so.

One example of a RLUIPA substantial burden case involved an application to build a mosque on vacant land purchased in Wayne, New Jersey. There was no overt evidence of discrimination, but while the mosque’s zoning application was being processed, the township began eminent domain proceedings to take the congregation’s land for open space. In *Albanian Associated Fund v. Township of Wayne*, the mosque brought suit under RLUIPA and obtained a settlement after the court denied summary judgment to the township. The United States filed an amicus brief in the case, arguing that although eminent domain is not ordinarily a “land use regulation” for purposes of RLUIPA, it was in this case since it was used to short-circuit the zoning process.21

In *U.S. v. Lomita*, the Civil Rights Division successfully brought a case based solely on the substantial burden provision of RLUIPA. A congregation sought to replace the aging and inadequate structures that it had been using as a mosque for more than 25 years. The mosque complex included tarps and tents that were used as overflow for the prayer hall and various out-buildings used for offices, classrooms and a library. The congregation sought to take down the various buildings and tents and build a single two-story mosque building that would serve its needs. While it would not increase the total number of worshippers on the site, the project nonetheless met opposition from area residents. For example, a Methodist church that had been leasing its parking lot to the mosque was pressured by neighbors to revoke its lease. The city denied the rezoning of two of the lots comprising the mosque site and a conditional use permit necessary to undertake the project. After the United States brought suit against the city alleging that the denial imposed a substantial burden on the congregation, the U.S. district court order led to the approval of the mosque project. The order also required training for city officials on RLUIPA, notice to the public about RLUIPA’s provision, and reporting and record-keeping requirements on zoning applications by places of worship.22

**“Equal Terms” Provision**

Another important and frequently invoked section of RLUIPA is the equal terms provision, which requires that religious assemblies and institutions be treated at least as well as nonreligious assemblies and institutions. The Senate sponsors of RLUIPA observed thus:

> Zoning codes frequently exclude churches in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes. . . . Churches have been denied the right to meet in rented storefronts, in converted funeral homes, theaters and skating rinks — in all sorts of buildings that were permitted when they generated traffic for secular purposes.23

To address this problem, section 2(b)(1) of RLUIPA provides that “[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.”24

DOJ has successfully brought section 2(b)(1) claims involving a variety of religious communities, including a case in Waukegan, Illinois, involving several churches that had been excluded from a zone that permitted clubs, lodges and meeting halls;25 a case in Walnut, California, involving a Buddhist temple denied zoning approval in a district that permitted a senior center, a civic center and a teen center;26 and a case in Hollywood, Florida, involving a small synagogue seeking to locate in a residential district that permitted day care centers.27

On August 27, 2014, DOJ brought a suit alleging that the city of St. Anthony Village, Minnesota, violated section 2(b)(1) by denying a permit for a Muslim congregation to establish a prayer hall in the basement of an office building in a light industrial zone that permitted “assemblies, meeting lodges, and convention halls,” including a union lodge that had banquet facilities that it rented to the public. The suit also alleges violation of RLUIPA’s substantial burden provision.28 The case is currently pending.

The Muslim population in the United States has increased significantly since the passage of RLUIPA,29 and mosque growth has kept pace with that growth.30 Just as churches seeking to locate or expand have often sought to locate in vacant commercial space and small, startup churches without the budget to buy property and build have sought to locate in strip malls and storefronts where clubs, lodges, dance studios, theaters
and other assemblies are permitted.\textsuperscript{31} so, too, is this likely to be a feature of mosque expansion in the coming years.

Conclusion

Although RLUIPA was not enacted with the rights of Muslims as a principal concern, in the wake of 9/11 it has become a critical tool in protecting the rights of Muslim communities throughout the United States. RLUIPA reinforces the basic right of diverse religious communities to create places for worship and other forms of collective religious exercise. As Sheikh Ossama Bahloul, imam of the Islamic Center of Murfreesboro, said on the day that the U.S. district court granted the TRO allowing the Islamic Center to complete its mosque and take occupancy: “We are here to celebrate the freedom of religion and that the concept of liberty is a fact existing in this nation. The winner today is not an individual, the winner today is our nation and the fact that our Constitution prevailed.”\textsuperscript{32}

Endnotes

10. See Treene, supra note 2, at 344.
19 Rutherford Cnty., No. 3:12-0737.
30. Id.