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When Religion Becomes a Nuisance: Balancing Land Use and Religious Freedom When Activities of Religious Institutions Bring Outsiders into the Neighborhood

BY SHELLEY ROSS SAXER*

If a person is righteous and does what is lawful and right . . . and gives his bread to the hungry and covers the naked with a garment . . . he is righteous, he shall surely live, says the Lord God.1

INTRODUCTION

Proponents have hailed zoning as an effective use of the state's delegated police power to regulate for the health, safety, morals, and general welfare of local communities.2 Land use legislation "allocates land uses throughout the community to prevent conflicts between incompatible uses that might otherwise locate adjacent to each other."3 Zoning not only segregates incompatible uses to avoid nuisance conflicts, it also preserves property values4 and promotes social values by "lay[ing]...
out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." In the landmark zoning decision, *Village of Euclid v. Ambler Realty Co.*, the United States Supreme Court upheld the constitutionality of comprehensive and restrictive zoning used to protect residential areas from nonresidential uses. The Court supported its decision by reference to nuisance law which bases the acceptability of land use on "the circumstances and the locality," not necessarily the use itself.

Religious land uses, although nonresidential in nature, have typically been located in residential areas. Such residential locations have been justified by the need to locate religious uses close to the people they serve — that is, generally within walking distance of homes. Religious institutions have also enjoyed special treatment when legislative land use restrictions are applied to religious activities. This special status has been conferred because of the religious institutions' unique contribution to the public welfare and because of the First Amendment's Free Exercise

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(3d ed. 1986) (citing Standard Zoning Enabling Act § 3 (1926) (stating that local zoning regulations shall be made "with a view to conserving the value of buildings")).


6 272 U.S. 365 (1926).

7 Mandelker, supra note 2, § 2.17, at 34.


10 Grace Community Church v. Planning & Zoning Comm'n, 615 A.2d 1092, 1102-03 (Conn. Super. Ct. 1992) (citing Anderson, supra note 9, § 12.22 and following the majority rule that churches may not be completely excluded from residential zones but may be subject to reasonable regulation); Family Christian Fellowship v. County of Winnebago, 503 N.E.2d 367, 371 (Ill. App. Ct. 1986) (holding that a strong presumption in favor of the validity of zoning restrictions is diminished when the impact limits free exercise of religion), appeal denied, 511 N.E.2d 427 (Ill. 1987); Lakewood Residents Ass'n v. Congregation Zichron Schneur, 570 A.2d 1032, 1035 (N.J. Super. Ct. Law Div. 1989) ("[C]ourts have held that religious activity itself is in furtherance of public morals and the general welfare, and that religious institutions enjoy a highly-favored and protected status, which severely curtails the permissible extent of governmental regulation in this area."); State ex rel. Lake Drive Baptist Church v. Village Bd. of Trustees, 108 N.W.2d 288, 293 (Wis. 1961) (explaining that a majority of courts hold that exclusion of churches by zoning is unconstitutional).
Balancing Land Use

Clause. Nevertheless, religious uses in residential neighborhoods can create a multitude of land use conflicts due to increased traffic, noise, and litter; an increased tax burden to neighbors due to the religious use exemption from taxes; and the influx of people from outside the local residential community. When religious uses serve people from outside the local community, one of the reasons for favoring religious land use — accessible and convenient service to the religious organization’s members — disappears. Because of these anticipated conflicts, communities may be hesitant to welcome new religious uses into their neighborhoods. However, First Amendment constitutional concerns require that local government zoning actions be subject to closer scrutiny than legislative actions involving secular uses. Therefore, “judicial zoning” through

11 ANDERSON, supra note 9, § 12.21, at 538; see also Congregation Dovid Ben Nuchim v. City of Oak Park, 199 N.W.2d 557, 559 (Mich. Ct. App. 1972) (holding that “use of land for a church is recognized as bearing a real, substantial, and beneficial relationship to the public health, safety, and general welfare so as to be accorded a preferred status”); Lakewood Residents Ass’n, 570 A.2d at 1035 (“[C]ourts have held that religious activity is itself in furtherance of public morals and general welfare and that religious institutions enjoy a highly-favored and protected status.”).


nuisance concepts may be the appropriate way for neighborhoods to control the use of land by religious institutions in their community.\textsuperscript{14}

This Article examines the escalating conflict between homeowners and religious institutions when a religious use located inside a residential community serves people from outside the community.\textsuperscript{15} Current

\textsuperscript{14} \textit{Western Presbyterian Church}, 862 F. Supp. at 546 (holding that church may provide feeding program for homeless so long as it does not constitute a nuisance); Rodrigue v. Copeland, 475 So. 2d 1071, 1080 (La. 1985) (holding that restrictions imposed on defendant’s Christmas display placed reasonable restrictions on size so as not to create a nuisance, but still gave deference to the constitutional right to express religious beliefs), \textit{cert. denied}, 475 U.S. 1046 (1986).


Human experience teaches us that public officials, when faced with pressure to bar church uses by those residing in a residential neighborhood, tend to avoid any appearance of an antireligious stance and temper their decision by carefully couching their grounds for refusal to permit such use in terms of traffic dangers, fire hazards and noise and disturbance, rather than on such crasser grounds as lessening of property values or loss of open space or entry of strangers into the neighborhood or undue crowding of the area. \textit{Id.}; Marsden v. Board of Zoning Appeals, No. 01-A-01-9012-CH-00455, 1991 Tenn. App. LEXIS 326, at *6 (1991) (recognizing “the natural and understandable dismay with which some of the close neighbors view the demolition of residences in their vicinity to be replaced by a large place of meeting for numerous individuals from outside the immediate vicinity”); Robert E. Pierre, \textit{Bill Would Limit Houses of Worship in Residential Areas}, WASH. POST, Mar. 11, 1993, at M1 (involving county council consideration of a bill that would make it more difficult for religious institutions to locate in residential neighborhoods, in response to residents’ complaints about resultant noise and parking problems); Otto Strong, \textit{Familiar Issues in District 19 Primary: Noise, Youths Top Concerns}, NEWSDAY, Sept. 3, 1993, at 31, 31 (explaining that where religious groups have renovated or used houses for their activities, “[t]he community gets upset because it brings in traffic”); Elizabeth Wiener, \textit{Nonresidential Use of “Gold Coast” Homes Prompts Zoning Battle}, WASH. POST, May 21, 1992, at J1 (discussing complaints by civic leaders that church houses are diminishing the sense of community by “bringing in more cars, outsiders, noise, trash and Sunday parking problems”); Larry Witham, \textit{Churches Find Growing Friction Dealing with Local Governments}, WASH. TIMES, July 6, 1995, at A3 (“[H]ouses of worship . . . [are] increasingly at odds with zoning laws, tax-conscious governments
controversial uses addressed in this Article include drug counseling centers run by religious groups\textsuperscript{16} and the feeding and sheltering of the homeless.\textsuperscript{17} Part I discusses what constitutes a religious use or accessory use\textsuperscript{18} for purposes of applying zoning ordinances and actions to such uses.\textsuperscript{19} Part II examines how current constitutional analysis under the Free Exercise Clause affects zoning decisions that burden religious freedom and includes a discussion of the newly enacted Religious Freedom Restoration Act of 1993 ("RFRA").\textsuperscript{20} Part III observes the role that nuisance litigation should play in resolving conflicts between land use restrictions and religious uses.\textsuperscript{21} The Article concludes by suggesting that religious uses be given great deference when zoning regulations are applied to such uses because of their contribution to the general welfare of our country and because of First Amendment protection. Controlling religious uses of land in advance with zoning regulation may constitute an invalid prior restraint on the free exercise of religion. Additionally, RFRA requires that any substantial burden on religion, justified by a...
compelling government interest, be accomplished by the least restrictive means. Nuisance litigation provides a possible remedy to landowners who are actually damaged by an unreasonable interference with the quiet enjoyment of their property. Nuisance litigation also provides a less restrictive means than zoning for regulating religious land uses and avoids the problem of prior restraint that is inherent in proactive zoning regulation. However, even when nuisance law is used and the court balances the gravity of the harm to the residential landowner with the utility of the conduct of the religious institution, a heavy thumb should be placed on the scale of a religious use which serves a greater social purpose — helping those in need.22

I. RELIGIOUS USES AND ACCESSORY USES

Courts and legislatures have historically protected religious institutions to some degree from the application of zoning regulations.23 The majority of jurisdictions have concluded that religious uses may not be excluded from areas zoned for residential use only.24 This majority rule is, at times, supported by an application of the Free Exercise Clause, but many cases have upheld the rule based on state constitutional grounds or a finding that the exercise of the local government’s police power was arbitrary and in violation of due process.25 Although religious uses may not be excluded in most jurisdictions, they may be subject to reasonable regulation for purposes such as public health and safety.26

Many zoning regulations accommodate religious uses in residential areas by providing that religious uses, and possibly also educational or philanthropic uses, be either exempted entirely from the regulation or

22See infra notes 315-17 and accompanying text.
23Anderson, supra note 9, § 12.21, at 538.
25Scott D. Godshall, Note, Land Use Regulation and the Free Exercise Clause, 84 Colum. L. Rev. 1562, 1569 n.42 (1984); State ex rel. Wenatchee Congregation of Jehovah's Witnesses v. City of Wenatchee, 312 P.2d 195, 199 (Wash. 1957) (holding that refusal by city officials to issue a special permit was an arbitrary and unreasonable action, not in furtherance of health, safety, morals, or general welfare).
26Anderson, supra note 9, § 12.23, at 546.
allowed to apply for special or conditional use permits to locate in an otherwise residential neighborhood. Nevertheless, interpretation problems and potential constitutional concerns arise in at least two situations. The first situation is when local communities evaluate these applications for issuance of a special or conditional permit, and the second is when they decide whether a particular activity of a religious institution already established in a residential neighborhood is an "accessory use" and allowed as a matter of right. This section will focus on those cases dealing with the issue of whether a controversial religious activity, which brings "outsiders" into a residential neighborhood, is considered a "religious use" deserving of a special permit or is an "accessory use" to an existing religious use.

A. What Constitutes a Religious Use?

Because religious uses are protected by the First Amendment Free Exercise Clause, it is likely that local government officials will encounter a constitutional challenge if they attempt to exclude a particular use from deferential treatment by determining that the use is not religious in nature. Zoning officials have not, in reported case law, been faced with the issue of whether the group proposing a particular use is actually a bona fide religion. The more common issue is whether a particular use is religious, not because of its members' beliefs, but because of the use

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28 See supra note 18.

29 "The right to establish and maintain a religious use includes the right to establish and maintain uses which are accessory to it." Id.

30 See Goldberg, supra note 27, at 88 (citing Cantwell v. Connecticut, 310 U.S. 296, 303 (1940)).

31 See ANDERSON, supra note 9, § 12.21, at 539 (explaining that courts have invoked federal and state constitutional guarantees of freedom of religion to limit municipal power to impose zoning restrictions on religious uses).

32 Laurie Reynolds, Zoning the Church: The Police Power Versus the First Amendment, 64 B.U. L. REV. 767, 771-72 & n.28 (1984) ("The Court has recognized that non-traditional religious sects clearly qualify under a zoning ordinance's provision for churches.").
This issue of what constitutes a religious use is to be resolved as a question of fact. Jurisdictions vary in their treatment of this issue and evaluate the use with several different approaches.

One commentator has identified at least four different approaches that may be used to define a religious use. The first approach is a restrictive one that narrowly construes the meaning of religious use. The second approach looks at the use's purpose to determine whether the use is religious or secular in nature, and declares that the religious identity of the owner does not make the use religious. The third approach focuses on the type of structure used for the proposed activity, and the fourth views religious use broadly as "activity related to the purpose of a religious organization." Depending upon which approach is used, certain value judgments may need to be made by government officials or judges who have been influenced by traditional views of what constitutes religious use.

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33 Id. at 773; see, e.g., Diakonian Soc’y v. City of Chicago Zoning Bd. of Appeals, 380 N.E.2d 843, 844, 846-47 (Ill. App. Ct. 1978) (holding that religious society housing 13 unrelated men in a single-family residential zone qualifies as a monastery even though men were laymen and not religious professionals); Schueller v. Board of Adjustment, 95 N.W.2d 731, 735 (Iowa 1959) (holding that married students’ dormitory was permitted in a residential district as religious use). But see Association for Educ. Dev. v. Hayward, 533 S.W.2d 579, 580, 589 (Mo. 1976) (en banc) (explaining that a group of men living together as members of a religious society do not receive constitutional protection because their primary vocation is not religious life or ministry).

34 ANDERSON, supra note 9, § 12.29, at 558; Goldberg, supra note 27, at 90 (arguing that cases involving an alleged religious use “are fact-specific and based on local ordinances and state judicial interpretation”).

35 See Goldberg, supra note 27, at 90-97.

36 Id. at 96.

37 Id. at 90-91 (discussing the approach of Texas courts).

38 Id. at 91-92 (discussing the approach of Pennsylvania courts); see also Vermont Baptist Convention v. Burlington Zoning Bd., 613 A.2d 710, 711 (Vt. 1992) (holding that a zoning ordinance must be construed according to the use of the land and that “[a] distinction based upon the identity of the owner rather than the public health, safety, morals or general welfare would be invalid”).

39 State v. Cameron, 498 A.2d 1217, 1222 (N.J. 1985) (stating that the interpretation of term “church” should recognize the relevance of architectural structure); ANDERSON, supra note 9, § 12.29, at 561 (pointing out that limitation on religious use definition may be based on the kind of structure used); Goldberg, supra note 27, at 92-93.

40 Goldberg, supra note 27, at 94 (examining New York’s inclusive view of religious uses).
"religion." Certainly the first three approaches will require some judgment as to what constitutes a religious use, purpose, or structure. Because traditional views of religion may influence these zoning decisions and impact nontraditional religious uses, deferential treatment of requests for religious uses, as exemplified by the fourth approach, is necessary to protect the First Amendment guarantee of freedom of worship. Indeed, it was "historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause."

41 Cohen v. City of Des Plaines, 8 F.3d 484, 490-91 (7th Cir. 1993) (explaining that there is no bright line for predicting which activities a secular court will consider religious and "an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission") (citing Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 336 (1987)), cert. denied, 114 S. Ct. 2741 (1994); Cameron, 498 A.2d at 1223 ("[V]agueness attendant upon an interpretation [of the term church] that relies primarily on an assumed common understanding of religion creates a real and substantial risk of the ordinance being enforced against innocuous or protected conduct."); see also Lubavitch Chabad House, Inc. v. City of Evanston, 445 N.E.2d 343 (Ill. App. Ct. 1982), cert. denied, 464 U.S. 992 (1983).

The only apparent difference between plaintiff's proposed use and the uses made by the other religious associations is that plaintiff would use its facility to practice and teach strict orthodox observance of Hasidic practices and customs, and the other religious associations are using their facilities to practice and teach what the community may view as more palatable practices and customs.

Id.; Douglas Laycock, The Remnants of Free Exercise, 1990 Sup. Ct. Rev. 1, 14 [hereinafter Laycock, Remnants of Free Exercise] ("[J]udges are more likely to respond sympathetically to religious claims that are familiar, easily understood, and unthreatening.").

42 State ex rel. Lake Drive Baptist Church v. Village Bd. of Trustees, 108 N.W.2d 288, 297 (Wis. 1961) (pointing out that "over-generous reliance upon the presumption of validity [of a zoning decision] may cloak discriminatory action against a religious group which is too small a minority in the community to have an effective voice"); Reynolds, supra note 32, at 768 ("[I]ncrease in and added visibility of nontraditional religious groups, with practices and beliefs different from those of the Judeo-Christian majority, have prompted public opposition to many of those groups' activities.").

The focus of this Article is not on those religious practices such as animal sacrifice,\textsuperscript{44} snake handling,\textsuperscript{45} or the religious use of peyote\textsuperscript{46} or cannabis,\textsuperscript{47} which do not fit within traditional Judeo-Christian beliefs. Instead, this Article examines legislative and judicial reaction to the active role that some religious institutions have taken in response to social problems such as homelessness, drug abuse, and the AIDS epidemic. Recent social activism by religious groups has created "land use consequences that are more severe than those of the traditional, white steepled building used for weekly prayer and occasional social gatherings."\textsuperscript{48} Activities such as feeding or sheltering the homeless, or even such innocuous actions as allowing Alcoholics Anonymous\textsuperscript{49} or the Boy Scouts to meet in church facilities may bring "outsiders" into the residential community, generating additional noise and congestion.

\textsuperscript{44} \textit{Lukumi}, 113 S. Ct. at 2231 (holding ordinance prohibiting animal sacrifice by Santeria worshippers invalid because intended to suppress religion).


\textsuperscript{46} Employment Div., Dep't of Human Resources \textit{v.} Smith, 494 U.S. 872, 873 (1990) (holding that Oregon could deny claimants unemployment compensation for work-related misconduct based on use of peyote because the Free Exercise Clause did not prohibit application of Oregon drug laws to ceremonial ingestion of the drug).

\textsuperscript{47} Town \textit{v. State} \textit{ex rel.} Reno, 377 So. 2d 648, 650-51 (Fla. 1979) (involving a prohibition of the religious use of cannabis), \textit{appeal dismissed and cert. denied}, 449 U.S. 803 (1980).

\textsuperscript{48} Reynolds, supra note 32, at 768; Michael Beebe, \textit{Neighbors Challenge Ministry for Homeless, Drug Abusers}, BUFF. NEWS, Mar. 26, 1995, at A1 (involving residential neighborhood objections to church ministry for homeless men which buses in crack-cocaine addicts from New York City); Hector Castro, \textit{Church that Houses Homeless Sparks a Call for Regulations}, NEWS TRIB., Mar. 7, 1995, at B1 ("'Churches are being called upon to be social service providers in our community,' [Tacoma City Councilman Steve Kirby] said at a council meeting last week. 'It is way beyond what you ordinarily would have expected decades ago.'").

\textsuperscript{49} Karen De Witt, \textit{Cold Shoulder to Churches that Practice Preachings}, N.Y. TIMES, Mar. 27, 1994, at A1 (involving neighbors who object to meetings of Alcoholics Anonymous and Narcotics Anonymous held at church).
When socially responsible activities sponsored by religious groups conflict with land use regulation, these challenged activities are generally analyzed as accessory uses to religious worship which require deference.\textsuperscript{50} However, some cases have approached such disputes as an issue of whether the activity constitutes a religious use.\textsuperscript{51} In \textit{First Assembly of God v. Collier County},\textsuperscript{52} the church sought to enjoin the county from enforcing zoning ordinances after the county Code Enforcement Board found that a church’s homeless shelter was not a “customary accessory use” of church property permitted under applicable zoning and housing codes.\textsuperscript{53} The court found there to be no distinction between a homeless shelter involving a religious interest and a secular rooming house or apartment house.\textsuperscript{54} Although the court did not frame the issue as a question of whether a religious use existed, its finding was tantamount to a decision that the homeless shelter was not a religious use entitled to a religious-based exception.\textsuperscript{55} In justifying its decision to uphold the zoning ordinance against a free exercise challenge, the court noted that the church did not demonstrate that its religious beliefs required “having a homeless shelter on the grounds of their church.”\textsuperscript{56} The court’s grant of a summary judgment in favor of the county was upheld by the appellate court, which found that the ordinance was facially neutral and not intended to “inhibit or oppress any religion”\textsuperscript{57} because it regulated the homeless shelter as a group home, not as a religious use.\textsuperscript{58}

\textsuperscript{50} \textit{See infra} notes 72-82 and accompanying text.


\textsuperscript{52} 775 F. Supp. 383 (M.D. Fla. 1991).

\textsuperscript{53} \textit{Id.} at 384.

\textsuperscript{54} \textit{Id.} at 387.

\textsuperscript{55} \textit{Id.} (holding that church could not “articulate a meaningful distinction” and that “[t]he imposition of a religious based exception . . . would effectively prevent the county from enforcement of the zoning code”).

\textsuperscript{56} \textit{Id.}


\textsuperscript{58} \textit{Id.}
A broader approach to defining a religious use was taken by the court in *Slevin v. Long Island Jewish Medical Center*, where the court aptly explained that because the "essential moral alienation of drug abuse seems most directly a religious problem," a drug center is a religious use of church property. The court rejected the neighbors' argument that "religious uses must be conducted by the church itself for the benefit of its own members." In addressing the unspoken concern that "outsiders" would invade the residential neighborhood, the court rhetorically asked: "Is not the helping hand to others who have lost their way basic to divine tradition? And cannot the ministry and congregants of the church contribute their substance to this end and find contentment in their giving?" New Jersey courts have taken this broad approach to defining a religious use, as evidenced by the court's decision in *Saint John's Evangelical Lutheran Church v. City of Hoboken* that a homeless shelter operated by the church on its own property was a religious use. The court in *Burlington Assembly of God v. Zoning Board of Adjustment* also adopted the broad approach to defining religious uses. The court determined that a proposed radio station located within a parochial school with a program intended to "advance the religious beliefs of the church" was a religious use protected by the constitution.

Where a proposed use is not accessory to a structure's principal use as a place of worship, a narrower approach is taken in determining what constitutes a religious use. Land uses which cannot be considered accessory because there is not an established supporting religious use may, nevertheless, qualify as religious uses themselves subject to appropriate deference. However, when a particular activity is deemed

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60 Id. at 944.
61 Id. at 946.
62 Id.
64 Id. at 938.
66 Id. at 497 (citing ANDERSON, supra note 9, § 12.29).
67 Id. at 499.
68 Bright Horizon House, Inc. v. Zoning Bd. of Appeals, 469 N.Y.S.2d 851, 854, 857 (N.Y. Sup. Ct. 1983) (concluding that a Christian Science healing center not located on the same property as the church is not a religious use).
69 Id. at 856 ("[W]here the use itself is found to be religious, the same exemption from zoning restrictions afforded churches and other places of worship is applicable.").
accessory to an already permitted religious use, such an accessory use may be given more deference and courts may be more flexible in interpreting what constitutes a religious use under a local zoning ordinance. In fact, “the right to establish and maintain a religious use includes the right to establish and maintain accessory uses.”

B. What Constitutes an Accessory Use?

Religious institutions may generally use their property for “accessory uses and activities which go beyond just prayer and worship.” An accessory use is a use that is considered “customarily incidental” to a property’s primary use. Typical accessory uses to a religious use include parking and educational facilities. However, the home of a

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70 Cohen v. City of Des Plaines, 8 F.3d 484, 492 (7th Cir. 1993) (upholding an ordinance exempting church-operated nursery schools and day-care centers from special use requirement), cert. denied, 114 S. Ct. 2741 (1994); Yeshiva & Mesivta Toras Chaim v. Rose, 523 N.Y.S.2d 907, 908 (N.Y. App. Div. 1988) (holding that a private school for Jewish children is educational, not religious, because it is not an accessory use to a preexisting religious use and “[a]ffiliation with or supervision by religious organizations does not, per se, transform institutions into religious ones”).

71 City of Las Cruces v. Huerta, 692 P.2d 1331, 1333 (N.M. Ct. App.) (holding that a parochial school is not an accessory use), cert. denied, 693 P.2d 591 (N.M. 1984).


73 ANDERSON, supra note 9, § 12.30, at 563.

clergyman, a lighted recreational field, and even a coffeehouse for college students have qualified in some cases as valid accessory uses. The issue of what constitutes an accessory use arises when an area zoned for residential use only specifically excepts churches. This exception allows a residential property to be used for religious worship, as well as for any activities that are determined to be "accessory" to religious worship. When a religious institution has obtained a special permit or exception allowing operation of a main religious use, an accessory use may later arise which generates additional noise, traffic, congestion, or the influx of people from "outside" the neighborhood. Local residents may then seek to challenge the validity of the religious exception from the zoning regulations as to the accessory use. These disputes over the allowance of accessory uses tend to be resolved in one of two ways.

First, courts may permit an accessory use as long as it is supported by some religious purpose. Second, a court may refuse to allow an accessory use as long as it is supported by some religious purpose. Second, a court may refuse to allow an accessory use as long as it is supported by some religious purpose.
exception for an accessory use that is not “traditionally” church-related.\(^8\)

An accessory use is sheltered under the “cloak of immunity which traditionally has been extended”\(^8\) to churches so long as this additional activity is “customary with and subordinate to”\(^8\) the primary use as a house of worship.\(^8\) In *Havurah v. Zoning Board of Appeals*, “churches and other places of worship and related accessory uses” were permitted uses in a residential district and did not require a special use permit.\(^8\) A Jewish synagogue was thus a permitted use, but the issue was whether it could provide unrestricted overnight accommodations to fulfill its religious mission.\(^7\) The nontraditional synagogue provided “a place for devout persons to spend several days together for the purpose of prayer, celebration of festivals and religious events, Jewish study, and meals satisfying religious requirements.”\(^8\) The Connecticut Supreme Court found that sleeping accommodations were essential to the synagogue’s religious fellowship and that the lower court finding that such accommodations were not related as an accessory use to the synagogue’s right to worship was erroneous.\(^9\) The court noted that deciding what is customary for “nontraditional religious practices cannot depend upon what is customary among more traditional religious groups” and that such a decision about “the particular tenets of a recognized religious group is not a matter for secular decision.”\(^9\)

Although a majority of jurisdictions accept as valid a wide variety of accessory uses attached to established religious primary uses,\(^9\) some

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N.E.2d 681, 685 (Ind. Ct. App. 1980) (dormitory for teachers)).


\(^84\) *Id.*

\(^85\) *Id.*

\(^86\) *Id.* at 84.

\(^87\) *Id.*

\(^88\) *Id.* at 84 n.1.

\(^89\) *Id.* at 87.

\(^90\) *Id.*

\(^91\) *City of Minneapolis v. Church Universal & Triumphant*, 339 N.W.2d 880,
courts have held that certain activities related to established religious uses do not qualify as accessory uses. For example, in *Seward Chapel, Inc. v. City of Seward*, the Supreme Court of Alaska determined that a parochial school could be legislatively excluded as an accessory use without violating constitutional principles. The court affirmed the lower court findings that other zones in the city permitted churches and schools in the same building and that "[t]here is no religious belief relating to the location of the school building itself." Trial testimony established that "providing a Christian education for children is an integral aspect of the church members' religious beliefs," but the court held that the city was not required by the First Amendment to accommodate these beliefs by abandoning its zoning restriction. Because there was no showing that a religious belief required members of Seward Chapel to locate in the particular residential area which excluded schools, the court found that the zoning ordinance did not interfere with the members' religious beliefs.

A legislative definition of what qualifies as an accessory use was also at issue in *Daytona Rescue Mission, Inc. v. City of Daytona Beach*. In this case, the City legislatively declared that "[h]omeless shelters and food banks are not customarily related activities" to avoid having to treat such uses with constitutional deference. The court upheld this

888-89 (Minn. 1983) (holding that residential use of church property is an accessory use because monastery "furthers the purposes of the church in extending its teachings and ministry to the community"); Goldberg, supra note 27, at 97-98 (citing *City of Minneapolis*, 339 N.W.2d at 889).

92 Abram v. City of Fayetteville, 661 S.W.2d 371, 373 (Ark. 1983) (concluding that "a conditional use permit for a church does not automatically authorize the operation of a full-time parochial school") (citing *Seward Chapel, Inc. v. City of Seward*, 655 P.2d 1293 (Alaska 1982)); Hull v. Miami Shores Village, 435 So. 2d 868, 869-70 (Fla. Dist. Ct. App. 1983) (holding that an administrative center located on church property is not a related or accessory use since less than one percent of services provided by center would be for benefit of the local church).

93 655 P.2d 1293 (Alaska 1982).

94 *Id.* at 1295, 1297.

95 *Id.* at 1297 n.11.

96 *Id.* at 1299.

97 *Id.* at 1300-01.

98 *Id.* at 1302.


100 *Id.* at 1556.
exclusion from the code definition of a "customary accessory use" of church or religious institution property because it found the code to be "neutral and of general applicability." Rather than explain why homeless shelters and food banks did not qualify as accessory uses, the court relied on a finding that the "City code regulates conduct, not religious belief" and determined that the code was not "aimed at impeding religion." Courts in California and Oregon have also justified a strict construction of the term accessory use by reference to the states' view that religious uses should be treated the same as any other land use when zoning regulations are applied.

Accessory uses that bring in people from outside the immediate residential community often generate controversy with local residents. In *Jacobi v. Zoning Board of Adjustment*, residents argued that a proposed parochial school would draw students from a county outside the county in which the school was physically located. The court interpreted this argument as a contention that "the general welfare is jeopardized when children and churchgoers from Philadelphia County attend school and church in Montgomery County" and dismissed it without comment.

The problem of keeping out people who are not members of the local residential community is especially acute when places of worship, located in affluent neighborhoods, seek to assist nonresidents from a different "walk of life." A prime example of this type of controversy occurred in *Western Presbyterian Church v. Board of Zoning Adjustment*.

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101 Id. at 1588.
102 Id. (citing First Assembly of God v. Collier County, 775 F. Supp. 383, 386 (M.D. Fla. 1991) (stating that "the zoning ordinance as applied ... regulate[d] housing the homeless on church property, [and] not one's belief in doing so").
106 Id. at 745-46.
107 Id. at 746.
case, where residents of an “outstanding neighborhood” in Washington, D.C. complained to the zoning administrator about a church’s program to feed the homeless. The residents contended that the feeding program would attract the homeless to the neighborhood, resulting in more crime and a decline in property values. Although the court was sensitive to the community’s concerns, it held that the church should be allowed to conduct its “very worthwhile program” unless it became a nuisance. This holding was based on a finding that “the Church’s feeding program in every respect is religious activity and a form of worship.” Because the court considered the feeding program to be an accessory use, it concluded that “[t]he Church may use its building for prayer and other religious services as a matter of right and should be able, as a matter of right, to use the building to minister to the needy.”

Legislatures and courts have continued to struggle with balancing zoning regulation against religious freedom. Some jurisdictions have handled this conflict by giving a broad interpretation to the term “religious use.” Others have strictly construed the term, treating land use issues involving religious groups the same as any other land use issue. Defining what constitutes an accessory use, allowed as a matter of right, has also been an area where courts have differed as to the level of deference given to a religious organization’s activities carried on in addition to its primary use as a place of worship. Court views have ranged from statements such as “[z]oning boards have no role to play in telling a religious organization how it may practice its religion” to “a church is to be treated just like any nonsectarian enterprise when determining the extent of its compliance with zoning legislation.”

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109 Id. at 546.
110 Id.
111 Id.
112 Id.
113 Id.
114 Id.
115 Id. at 547. See infra notes 122-51 and accompanying text, discussing constitutional issues involved in this decision.
116 Reynolds, supra note 32, at 776-77.
117 Id.
119 Lucas Valley Homeowners Ass’n v. County of Marin, 284 Cal. Rptr. 427,
Nevertheless, in the majority of jurisdictions,\(^{120}\) once the use has been
determined to be either religious or accessory to an existing and permitted
religious use, the First Amendment will protect such use against any law
that would "substantially burden" the free exercise of religion.\(^ {121}\)

II. FREE EXERCISE PRINCIPLES AFFECTING
ZONING REGULATION OF RELIGIOUS USES

A. Current Supreme Court Free Exercise Clause Analysis

The Free Exercise Clause found in the First Amendment to the
United States Constitution "bars government action aimed at suppressing
religious belief or practice."\(^ {122}\) But if a "neutral, generally applicable"
law has only the effect of prohibiting religious exercise, the rule
announced in *Employment Division, Department of Human Resources v. Smith*\(^ {123}\) will allow such a prohibition without violating the Free Exercise
Clause.\(^ {124}\) Not long after the *Smith* decision, the Court in *Church of
Lukumi Babalu Aye v. Hialeah*\(^ {125}\) found that the laws at issue were
"designed to persecute or oppress a religion or its practices" and were,
therefore, void.\(^ {126}\) The laws in question in the *Lukumi* case targeted the
animal sacrifice rituals of the Santeria religion.\(^ {127}\) Because the ordinances
"had as their object the suppression of religion"\(^ {128}\) and were not of
general applicability, the *Smith* requirements of neutrality or general
applicability were not met, and the Court subjected the ordinances

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\(^{120}\) Reynolds, supra note 32, at 777; Evan Gahr, *Communities and Churches Clash over Zoning Issues*, WASH. TIMES, Jan. 16, 1995, at 15 (National & World Affairs; Nation: Religion) ("Under the California rule, churches were treated just like any landowner. But the New York rule, which severely limited the powers of zoning boards over churches and synagogues, often prevailed . . . . "Historically, the New York rule has dominated in the United States, [but there] have been more courts swinging to California.").

\(^{121}\) *Western Presbyterian Church*, 862 F. Supp. at 544.


\(^{124}\) *Lukumi*, 113 S. Ct. at 2240 (Souter, J., concurring).

\(^{125}\) Id.

\(^{126}\) Id. at 2234.

\(^{127}\) Id. at 2224.

\(^{128}\) Id. at 2231.
to a strict scrutiny analysis. The *Lukumi* Court applied a compelling interest standard and found that the government’s interests were not sufficiently compelling and that, even if those interests had been compelling, the ordinances were not narrowly drawn to meet them.

State and local governments rarely burden a religious practice intentionally. Although such intentional interference did occur in *Lukumi*, most land use regulation will typically be neutral and generally applicable to any regulated use, whether it be secular or religious in nature. The harder, and more typical, case is where a generally applicable zoning ordinance burdens the exercise of religious belief.

The *Smith* rule, according to Justice Souter, would allow such a burden under the Free Exercise Clause because the ordinance is a “neutral, generally applicable” law. Justice Souter, as well as many commentators, argues that the *Smith* rule should, at some point, be reexamined. Under Justice Souter’s analysis, the *Smith* rule only requires “formal neutrality” — laws which do not have the intent to discriminate against religion — while the Free Exercise Clause also requires “substantive neutrality,” which requires the government “to accommodate religious differences by exempting religious practices from formally applicable anticult laws.”

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129 Id. at 2223.
130 The interests asserted by the city were protecting the public health and preventing cruelty to animals. Id. at 2232.
131 Id. at 2233.
132 Id. at 2250 (Blackmun & O’Connor, JJ., concurring).
133 Id. (Blackmun & O’Connor, JJ., concurring) (emphasizing that government rarely “explicitly targets religion . . . for disfavored treatment”).
134 Id. at 2251-52 (Blackmun & O’Connor, JJ., concurring) (“A harder case would be presented if petitioners were requesting an exemption from a generally applicable anticult law.”).
135 Id. at 2240 (Souter, J., concurring) (quoting Employment Div., Dep’t of Human Resources v. Smith, 494 U.S. 872, 878-80 (1990)).
neutral laws." Thus, the current constitutional standard under the Free Exercise Clause, as expressed in Smith, requires only that a land use ordinance be neutral and generally applicable, and not be enacted for the purpose of prohibiting religion.


Although the Court views the Free Exercise Clause as just guaranteeing "formal neutrality," Congress spoke in favor of "substantive neutrality" when it enacted the Religious Freedom Restoration Act ("RFRA") in 1993. Congress found that in the Smith case, "the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." One of the stated purposes of RFRA, as set forth in § 2000bb(b)(1), is "to restore the compelling interest test as set forth in Sherbert v. Verner and Wisconsin v. Yoder and to guarantee its application in all cases where free exercise of religion is substantially burdened." RFRA "is an effort to enact the theory that the free exercise of religion is a substantive civil liberty, that the religious minorities among us get to practice their faith and not merely to think about it or to believe in it." Under RFRA, the constitutional standard to be applied to neutral and generally applicable land use ordinances that burden religious freedom is the rule from Sherbert v. Verner, which requires...
that laws imposing a burden on religious practice be narrowly tailored to advance a compelling state interest. 144 The Sherbert standard was strengthened by the Court’s later decision in Wisconsin v. Yoder, 145 which upheld the right of Amish parents to direct the education of their children in the face of a neutral compulsory school attendance law. 146

Assuming that RFRA withstands constitutional challenge, 147 most religious liberty litigation in the future will likely focus on the federal statute or a state constitution rather than the federal Constitution. 148 Nevertheless, judicial application of the resurrected Sherbert and Yoder compelling interest test will require reference to decisions interpreting this rule prior to its demise in Smith. 149 In addition to looking at recent cases decided under RFRA, this section will examine land use decisions prior to the development of the Smith rule in order to predict how conflicts between socially beneficial religious uses that bring outsiders into residential neighborhoods and facially neutral ordinances restricting such uses will likely be resolved under RFRA. Under RFRA, two key

144 Id. at 402-03.
146 Id. at 235-36. In Yoder, the Court clearly saw the issue as involving “‘conduct protected by the Free Exercise Clause’ even against enforcement of a ‘regulation of general applicability.’” Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2245 (1993) (Souter, J., concurring) (quoting Yoder, 406 U.S. at 220).
148 Laycock, Free Exercise and the RFRA, supra note 136, at 897 (stating this also “means that if an unpopular religion prevails in court and Congress gets excited enough about it, Congress can amend the statute to cut that religion out”).
elements must be analyzed. First, the court must decide whether the
government has substantially burdened the exercise of religion, even if
the law is of general applicability.\textsuperscript{150} Second, the court must determine
whether the government can justify such a burden because it furthers a
compelling governmental interest and whether it is the least restrictive
means of doing so.\textsuperscript{151}

1. What Constitutes a Substantial Burden?

When deciding whether a government regulation infringes upon
religious freedom, the court’s primary concern “must necessarily be the
cost, economic or otherwise, attached to religious observance.”\textsuperscript{152} A
financial burden created by government regulation does not necessarily
constitute an impermissible burden on religious freedom so long as such
a burden does not violate sincere religious beliefs.\textsuperscript{153} For example, in
\textit{Lakewood, Ohio Congregation of Jehovah’s Witnesses, Inc. v. City of
Lakewood},\textsuperscript{154} the Sixth Circuit identified the burdens on the church to
be “an indirect financial burden and a subjective aesthetic burden”
because the locations in the city where a church could be built were more
expensive and “less conducive to worship” than the location where the
church was requesting permission to build.\textsuperscript{155} The court held that the
ordinance’s “financial and aesthetical imposition” on the church did not
infringe the church’s freedom of religion because the ordinance “‘simply
regulates a secular activity and, as applied to the appellants, operates so
as to make the practice of their religious beliefs more expensive.’”\textsuperscript{156}

\textsuperscript{150} 42 U.S.C. § 2000bb-1(a).
\textsuperscript{151} \textit{Id.} § 2000bb-1(b).
\textsuperscript{152} \textit{Lakewood, Ohio Congregation of Jehovah’s Witnesses, Inc. v. City of
\textsuperscript{153} See Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378,
392 (1990) (“[C]ollection and payment of the generally applicable tax in this
case imposes no constitutionally significant burden on appellant’s religious
practices or beliefs . . . .”).
\textsuperscript{154} 699 F.2d 303 (6th Cir. 1983).
\textsuperscript{155} \textit{Id.} at 307.
\textsuperscript{156} \textit{Id.} at 307-08 (emphasis omitted) (quoting Braunfeld v. Brown, 366 U.S.
599, 605 (1961) (holding that a statute does not infringe upon religious freedom
by making religious observance more expensive)); \textit{see also} Messiah Baptist
Church v. County of Jefferson, 859 F.2d 820, 825 (10th Cir. 1988) (“[F]inancial
consequences to the church do not rise to infringement of religious freedom.”),
In a case quite similar to *Lakewood*, the Eleventh Circuit in *Grosz v. City of Miami Beach, Florida*\(^{157}\) found that zoning regulations which prohibited plaintiffs from holding religious services in their home did not substantially burden religious freedom since such religious uses were permitted in at least half of Miami Beach territory.\(^{158}\) The court noted that although there may be an impact on religious practice "in terms of convenience, dollars or aesthetics" by requiring the plaintiffs to relocate to a properly zoned area, the burden is lower than in previous free exercise cases since it "plainly does not rise to the level of criminal liability, loss of livelihood, or denial of a basic income sustaining public welfare benefit."\(^{159}\) In this case, the Eleventh Circuit developed a test to determine how to accommodate the conflicting constitutional values of free exercise rights and the state police power.\(^{160}\) During the balancing part of the test, the *Grosz* court weighed the burden on religion, which it found to be incidental, against the burden on the government interest in zoning objectives, which it found to be substantial.\(^{161}\) This *Grosz* test has been used by courts in other jurisdictions, as well as by Eleventh Circuit courts, when land use issues involving religious uses have arisen.\(^{162}\) The balancing portion of the test appears to be a method of


\(^{158}\) Id. at 740 (pointing in contrast to the *Lakewood* case where the City of Lakewood permitted church buildings on about 10% of its land).

\(^{159}\) Id. at 739 & n.9.

\(^{160}\) *Grosz*, 721 F.2d at 733 ("Before a court balances competing governmental and religious interest [sic], the challenged government action must pass two threshold tests.").

\(^{161}\) Id. at 741.

\(^{162}\) See, e.g., *First Assembly of God v. Collier County*, 20 F.3d 419, 424 (using *Grosz* test to hold burden placed on one county by allowing the violation outweighs the church's burden to conform or move to an appropriately zoned area), modified, 27 F.3d 526 (11th Cir. 1994), and cert. denied, 115 S. Ct. 730 (1995); *Islamic Ctr., Inc. v. City of Starkville*, 840 F.2d 293, 301-02 (5th Cir. 1988) (stating that the burden on religion is substantial where ordinance left no practical alternatives); *Daytona Rescue Mission, Inc. v. City of Daytona Beach*, 885 F. Supp. 1554, 1558 (M.D. Fla. 1995) (using *Grosz* to hold a zoning ordinance prohibiting the plaintiffs from building a homeless shelter valid); *Church of Jesus Christ of Latter-Day Saints v. Jefferson County*, 741 F. Supp. 1522, 1535 (N.D. Ala. 1990) (using the *Grosz* test to conclude that ordinance violated First and Fourteenth Amendments to the U.S. Constitution); *Bethel Evangelical Lutheran Church v. Village of Morton*, 559 N.E.2d 533, 538 (Ill. 1990).
constitutional analysis that converts the Sherbert compelling interest test into a balancing exercise, and one author has observed that

[The recent federal appellate court decisions [Lakewood and Grosz] clearly stand for the proposition that zoning ordinances which serve a legitimate public purpose by excluding from certain residential areas church buildings or regular worship services in homes do not violate the First Amendment where such ordinances place only an “incidental economic burden” on religious freedom and where alternative channels and opportunities are left open for religious conduct.]

As observed above, most courts have found there to be no substantial burden on religious freedom when a church is not allowed to operate at a particular location, so long as other locations are available in the general community. The Ninth Circuit in Christian Gospel Church, Inc. v. City of San Francisco found there to be no significant burden on religious practice where a church was denied a special permit to allow it to conduct worship services in a residential neighborhood. The court noted that the church did not make a showing as to why it was important to worship in the particular house for which it was requesting a special permit, especially considering that the church had previously worshipped in a hotel banquet room. Similarly, the Fourth Circuit in

App. Ct.) (holding that an enrollment cap on parochial school attendance is not unconstitutional under the balancing test in Grosz), appeal denied, 564 N.E.2d 835 (Ill. 1990).

163 Islamic Ctr., Inc., 840 F.2d at 302 (quoting Edward H. Ziegler, Jr., Local Land Control of Religious Uses and Symbols, in 1985 ZONING AND PLANNING LAW HANDBOOK 344 (J. Gailey ed., 1985)).

164 Id.; see also Christ College, Inc. v. Board of Supervisors, No. 90-2406, 1991 U.S. App. LEXIS 21680, at *11-12 (4th Cir. Sept. 13, 1991) (stating that zoning codes allowed parochial schools in two areas without special exemptions), cert. denied, 502 U.S. 1094 (1992); Christian Gospel Church, Inc. v. City of San Francisco, 896 F.2d 1221, 1224 (9th Cir.) (finding that government action did not prevent all home worship, just worship in a specific home), cert. denied, 498 U.S. 999 (1990). But see McCurry v. Tesch, 738 F.2d 271, 276 (8th Cir. 1984) (“Here, we need not consider whether alternative sites for worship would be open to the plaintiffs. Our inquiry ends with the holding that the state could achieve its objectives in a way less burdensome to the free exercise of religion.”), cert. denied, 469 U.S. 1211 (1985).

165 896 F.2d 1221 (9th Cir.), cert. denied, 498 U.S. 999 (1990).

166 Id. at 1224-25.

167 Id. at 1224 (holding that the “burden on religious practice in this zoning
Christ College, Inc. v. Board of Supervisors\textsuperscript{168} held that a zoning regulation, which prohibited the church from building a parochial school in a residential zone without a special exception, was not a significant burden on the church's religious rights.\textsuperscript{169} Even though the zoning law made it more difficult to locate the school on property of the church's choice, there was no "nexus between the government regulation... and impairment of ability to carry out a religious mission."\textsuperscript{170}

When, however, it appears that a facially neutral exclusion of religious uses in residential neighborhoods is being applied unfairly, courts may find that a particular religion has been substantially burdened. For example, the Fifth Circuit in Islamic Center, Inc. v. City of Starkville\textsuperscript{171} found a burden on the free exercise of religion when city zoning officials refused to permit a building located in a residential neighborhood adjacent to property being used as a church by another faith, to be used as a Muslim mosque.\textsuperscript{172} In the City of Starkville, the use of buildings as churches in areas near the University of Mississippi campus was prohibited unless city officials granted an exception.\textsuperscript{173} Muslim university students and faculty members formed the Islamic Center to provide group worship opportunities and purchased a residence near the campus to use as a place for worship.\textsuperscript{174} The court held that the city's refusal to grant an exception to the Islamic Center violated the Free Exercise of Religion Clause because the city failed to establish that it had a sufficient reason for denying the exception when it had granted requests for exceptions to nine Christian churches in similarly regulated areas.\textsuperscript{175} The court found that the "burden placed on relatively impecunious Muslim students by the Starkville ordinance is more than incidental, and the ordinance leaves no practical alternatives for establishing a mosque in the city limits."\textsuperscript{176}

\textsuperscript{169} Id. at *11-12.
\textsuperscript{170} Id. at *13-14 (explaining that a location preference must be linked to religious tenets).
\textsuperscript{171} 840 F.2d 293 (5th Cir. 1988).
\textsuperscript{172} Id. at 294.
\textsuperscript{173} Id.
\textsuperscript{174} Id. at 295.
\textsuperscript{175} Id. at 294 (setting forth as evidence the fact that 25 Christian churches were located in areas with similar regulations, nine of which moved in after the regulation).
\textsuperscript{176} Id. at 302.
A secondary concern in deciding whether a government regulation burdens free exercise is the "centrality of the burdened religious observance to the believer's faith." While "[r]eligious observances in the form of beliefs are absolutely protected from governmental infringement," religious "[p]ractices flowing from religious beliefs" are only protected when they are "integally related to the underlying beliefs." In *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, the "religious observance" at issue was the building of a church in a residential neighborhood. The Sixth Circuit found that building and owning a church is not a "fundamental tenet" of the Jehovah's Witnesses' religious beliefs and that "[n]o pressure is placed on the Congregation to abandon its beliefs and observances." The Tenth Circuit in *Messiah Baptist Church v. County of Jefferson* also distinguished religious belief from religious conduct and found there to be no evidence to support the church's argument that "building a church or building a church on the particular site is intimately related to the religious tenets of the church."

While one of the most common conflicts between religious uses and zoning is the exclusion of churches from residential zones, a recent case decided by the Washington Supreme Court analyzed the substantial burden test as applied to a landmark preservation ordinance. The court in *First Covenant Church v. City of Seattle* held that the city's landmark preservation provisions infringed upon the church's religious freedom because they required the church to seek approval from a secular board whenever any architectural changes were contemplated. The court found that such a requirement impermissibly burdened the church's right to free exercise by requiring approval for alterations that may be necessitated by the religious observances of the church and by reducing

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178 *Id.* (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)).
179 *Id.*
180 *Id.* at 303.
181 *Id.* at 306.
182 *Id.* at 307 ("Congregation may build a church in Lakewood only in commercial or multi-family residential district.").
184 *Id.* at 824-25 (citing *Lakewood*, 699 F.2d at 307).
185 Godshall, *supra* note 25, at 1568.
187 *Id.* at 219.
the value of the church’s property.\textsuperscript{188} This substantial burden on the church’s right to freely exercise religion was not justified by the city’s interest in preservation of aesthetic and historic structures, which the court did not find to be compelling.\textsuperscript{189} The government may burden religious exercise, but only if a compelling state interest justifies the burden.\textsuperscript{190}

2. Is There a Compelling State Interest?

Once a court determines that a religious use is at issue and a government regulation has substantially burdened the free exercise of religious freedom by regulating such use, the regulation will be constitutionally invalid unless the government can demonstrate that a compelling state interest justifies the burden.\textsuperscript{191} In \textit{Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah},\textsuperscript{192} the Court applied the compelling interest test to an ordinance which prohibited animal sacrifice and found the ordinance to be a “law burdening religious practice that is not neutral or not of general application.”\textsuperscript{193} The \textit{Lukumi} Court, operating under the \textit{Smith} rule,\textsuperscript{194} explained that the “compelling interest standard that we apply once a law fails to meet the \textit{Smith} requirements is not ‘watered down’ but ‘really means what it says.’”\textsuperscript{195} The Court then found that the government interests in protecting the public health and preventing cruelty to animals were not sufficiently compelling to justify interfering with conduct protected by the First Amendment and were not narrowly tailored to meet such interests.\textsuperscript{196}

Although the Supreme Court in \textit{Lukumi} announced its intention to apply a compelling interest test that is not “watered down,”\textsuperscript{197} some

\begin{itemize}
\item \textsuperscript{188} \textit{Id.} at 219-20.
\item \textsuperscript{189} \textit{Id.} at 223.
\item \textsuperscript{190} United States v. Lee, 455 U.S. 252, 257-58 (1982).
\item \textsuperscript{191} \textit{Id.}; Thomas v. Review Bd., 450 U.S. 707, 718 (1981); see also Town v. State \textit{ex rel.} Reno, 377 So. 2d 648, 650 (Fla. 1979) (holding that the “State of Florida has a compelling interest in restricting the use of cannabis as a religious practice”), cert. denied, 449 U.S. 803 (1980).
\item \textsuperscript{192} 113 S. Ct. 2217 (1993).
\item \textsuperscript{193} \textit{Id.} at 2233.
\item \textsuperscript{194} See supra notes 122-37 and accompanying text.
\item \textsuperscript{195} \textit{Lukumi}, 113 S. Ct. at 2233 (quoting Employment Div., Dep’t of Human Resources v. Smith, 494 U.S. 872, 888 (1990)).
\item \textsuperscript{196} \textit{Id.} at 2234.
\item \textsuperscript{197} \textit{Id.} at 2233; Rust v. Clarke, 851 F. Supp. 377, 380 n.4 (D. Neb. 1994).
\end{itemize}
lower courts have found a compelling state interest whenever government uses its police power to regulate in a neutral manner.\textsuperscript{198} For example, in \textit{Christian Gospel Church, Inc. v. City of San Francisco},\textsuperscript{199} the Ninth Circuit found that a minimal burden on the church’s religious practice by restricting home worship was outweighed by San Francisco’s “strong interest in the maintenance of the integrity of its zoning scheme and the protection of its residential neighborhoods.”\textsuperscript{200} The court held that because the “government’s interests in not allowing an exception to the zoning provision are . . . strong” and the burden on religious freedom is minimal, “the zoning scheme requiring the grant of a conditional use permit for worship services to be held in this residential neighborhood does not violate the [F]ree [E]xercise [C]lause of the [F]irst [A]mendment.”\textsuperscript{201}

Nevertheless, there are times when zoning regulations may justifiably restrict a religious group from using its facility in a manner that is unsafe.\textsuperscript{202} In \textit{Congregation Beth Yitzchok, Inc. v. Town of Ramapo},\textsuperscript{203} the court determined that code provisions governing “unquestionably important safety requirements” could be enforced against a synagogue operating a nursery school because “[s]uch an interest is of a magnitude to justify even substantial inroads on the free exercise of religion.”\textsuperscript{204} Minimum health and safety requirements should be enforceable by government officials regardless of incidental interferences with religious freedom.\textsuperscript{205}

\footnotesize{(pointing out that the decision in O’Lone v. Estate of Shabazz, 482 U.S. 342 (1987), “seemed to water-down the ‘compelling interest test’ that had previously been applied in the Supreme Court’s free exercise jurisprudence”).

\textsuperscript{198} See, e.g., infra notes 206-76 and accompanying text (discussing recent homeless decisions).

\textsuperscript{199} 896 F.2d 1221 (9th Cir.), cert. denied, 498 U.S. 999 (1990).

\textsuperscript{200} \textit{Id.} at 1224.

\textsuperscript{201} \textit{Id.} at 1225.


\textsuperscript{204} \textit{Id.} at 663.

\textsuperscript{205} See \textit{id.} at 660, where the court quotes counsel for the city at oral argument:
3. Recent Homeless Decisions

At least three recent cases involving caring for the homeless by religious groups have referred to RFRA. Two of the cases decided claims based on the application of the RFRA, while one observed that the Act may apply to the case, but since it was not raised by either party it was not discussed. In the first case, Western Presbyterian Church v. Board of Zoning Adjustment, the court found "the Church’s feeding program to be religious conduct falling within the protections of the First Amendment and RFRA," and applied the RFRA standard to determine that the church’s right to free exercise of religion had been impossibly burdened. Before subjecting the challenged zoning ordinances to constitutional scrutiny, the court determined that feeding the homeless was protected religious conduct. The ordinances at issue in this case were facially neutral in that the proposed use was "not a use permitted as a matter of right in a residential zone, and was a prohibited use in the special purpose zone." Because the church was located in a "split

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I wouldn’t be here, or we wouldn’t have had the plaintiff into court in the first instance had this been a question of setback. We are not talking about technical violations of whether a side yard should be 50 feet, a front yard 75 feet. We are talking about the lives of children.


207 Daytona Rescue Mission, 885 F. Supp. at 1556 (applying RFRA to exclude homeless shelters from the definition of church or religious institution); Western Presbyterian Church, 862 F. Supp. at 544 (applying RFRA to invalidate a zoning ordinance).

208 First Assembly of God, 20 F.3d at 424 n.5 (applying the Supreme Court’s Free Exercise Clause analysis and the Grosz test to determine that the Free Exercise Clause was not violated by zoning ordinances).


210 Id. at 544.

211 Id. at 547.

212 See supra notes 30-71 and accompanying text (discussing what constitutes a religious or accessory use).

213 Western Presbyterian Church, 862 F. Supp. at 540.
the church was required to obtain a special exception for the residential zone and a variance for the special purpose zone in order to conduct its feeding program. The church challenged the requirement to obtain a variance as a violation of its statutory and constitutional rights.

In applying the RFRA standard, the Western Presbyterian Church court determined that the District of Columbia zoning regulations substantially burdened the church's free exercise of religion. The court concluded that feeding the needy is an important religious function, and once a church is permitted in a particular location, the city may not regulate what religious functions the church conducts. Such regulation of religious conduct through zoning action "is a substantial burden on the free exercise of religion." If a law substantially burdens the free exercise of religion, "the government must demonstrate that it has a compelling governmental interest in such a burden and that the interest could not be protected by a less restrictive means." The compelling interest portion of this test was not an issue in this case because the District of Columbia conceded that it had no compelling interest in prohibiting the church from feeding the needy at its location as long as appropriate controls were in place. However, the court did leave open the possibility that the feeding program could be discontinued if the controls did not adequately address the neighbors' concerns and as a result, became a nuisance.

The Daytona Rescue Mission, Inc. v. City of Daytona Beach decision is another example of how current constitutional analysis and RFRA have been applied to resolve a conflict between land use ordinances and the feeding and housing of the homeless by a religious organization. In Daytona, the court upheld the city's statutory exclusion of homeless shelters and food banks from its definition of "Church or Religious Institution" so that

\[214\] Id. at 540 n.1 (explaining that part of the lot was in the residential zone and part of it was located in the special purpose zone).

\[215\] Id. at 540-41.

\[216\] Id. at 542.

\[217\] Id. at 546.

\[218\] Id.

\[219\] Id. at 547.

\[220\] Id. at 545.

\[221\] Id. (pointing out that the defendants relied only on the argument that the zoning regulations did not substantially burden the church's free exercise of religion).

\[222\] Id. at 546. See infra notes 277-314 and accompanying text (discussing the role of nuisance law as a viable land use control for religious uses).

\[223\] 885 F. Supp. 1554 (M.D. Fla. 1995).

\[224\] Id. at 1555.
such uses would be required to seek a conditional use permit. The church itself was a permitted use in the particular zone, but the proposed homeless shelter and food bank program were not considered accessory uses. In analyzing the constitutional challenge to the city's statutory exclusion of these homeless programs, the court employed the current Supreme Court analysis, RFRA, and the three-part test used by the Eleventh Circuit in *Grosz v. City of Miami Beach, Florida* to decide whether the Free Exercise Clause had been violated.

Using the current Supreme Court analysis, as delineated in the *Lukumi* decision, the *Daytona* court found that "the city code is neutral and of general applicability" and that "an entity seeking to establish a homeless shelter or food bank must meet the zoning requirements for that particular use in the particular zoning district regardless of whether the entity is a church or religious institution." Therefore, under the current Supreme Court analysis, the city's code does not violate the church's free exercise rights since "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." Because the Eleventh Circuit had previously developed and used the *Grosz* test, the *Daytona* court next analyzed the constitutional challenge using the *Grosz* three-part test which consists of the following requirements: (1) the government regulation must regulate religious conduct, not belief; (2) the law must have a secular purpose and secular effect; and (3) once these threshold tests are met, the court balances the competing governmental and religious interests.

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225 Id. at 1556.
226 Id. See also supra notes 104-07 and accompanying text.
228 *Daytona*, 885 F. Supp. at 1558 (applying both the Supreme Court's analysis and the *Grosz* three-part test because the Eleventh Circuit did so in its opinion in *First Assembly of God v. Collier County*, 20 F.3d 419, modified, 27 F.3d 526 (11th Cir. 1994), and cert. denied, 115 S. Ct. 730 (1995)); see supra note 162 and accompanying text.
229 *Daytona*, 885 F. Supp. at 1557-58 (citing *First Assembly of God v. Collier County*, 20 F.3d 419, 423, modified, 27 F.3d 526 (11th Cir. 1994), and cert. denied, 115 S. Ct. 730 (1995) (referring to the *Lukumi* decision to analyze laws challenged under the Free Exercise Clause)).
230 Id. at 1558.
231 Id. (quoting *First Assembly of God*, 20 F.3d at 424).
232 Id.
233 Id. (citing *First Assembly of God*, 20 F.3d at 424).
Under the first part of the Grosz test, the Daytona court found that the city code regulated conduct, not religious belief because the zoning ordinance "regulated housing the homeless on church property and not the belief in doing so." Arguably, this analysis could just as easily be employed to regulate worship services, considering that such regulation only affects the conduct of the church members, not their belief in the religious importance of worshipping. As to the second part of the Grosz test, the court found that "the code has a secular purpose and effect" because there was no evidence that the code was intended to burden religion or "that it negatively influence[d] the pursuit of religious activity or expression of religious belief." In this part of the analysis, the Daytona court failed to address why the church’s mission of providing for the needy is either not a religious activity or expression of religious belief and if it is, how it has not been negatively impacted by the city’s refusal to allow such religious activity on church property. The court later discussed the church’s assertion that because feeding the homeless is “central to their faith,” this factor distinguished the case from the First Assembly decision, where the court found that the church “had not indicated the significance of the practice of housing the homeless to their religion . . . .” The Daytona court responded to this assertion by stating that the Eleventh Circuit found against the church “without deciding that sheltering the homeless was central to plaintiffs’ religion." The court’s response here is again weak because it does not attempt to explain why prohibiting the feeding of the homeless does not “negatively influence” the pursuit of the church’s mission and religious tenets of their members’ faith.

Finding that the code passed the Grosz threshold tests, the Daytona court then used the third part of the Grosz test to balance the burden placed on the city by not enforcing its zoning code against the burden on the church’s religious interests to comply with the court. Here, the court determined that the balance weighed in favor of the city because: (1) the preservation of a government’s ability to regulate zoning is a

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24 Id. at 1558 (citing First Assembly of God v. Collier County, 775 F. Supp. 383, 386 (M.D. Fla. 1991)).
23 Id.
236 Id.
237 Id. at 1559.
238 Id.
239 Id. at 1558. As discussed supra notes 157-63, the balancing portion of the Grosz test appears to convert the Sherbert compelling interest test into a balancing exercise using religious burden and state interests.
significant interest\textsuperscript{240} and (2) the "imposition of a religious based exception would prevent enforcement of the zoning code and permit any non-conforming use of property if a religious interest was asserted."\textsuperscript{241} Although the church argued that serving the needy was a mission central to its religious beliefs, the court determined that the burden on religion was "at the lower end of the spectrum" since "other facilities exist within the City which house the homeless" and the church did not adequately explore alternative sites.\textsuperscript{242} It is not difficult to see weaknesses in this analysis since churches or their activities could always be restricted by arguing that "other facilities exist within the City" for activities such as worship or religious education. The \textit{Daytona} court gave no weight to factors such as the fact that religious freedom is a constitutionally protected right or the fact that religious uses often contribute to the public welfare.\textsuperscript{243} The court instead hinted at concerns about safety and security, but did not consider how these issues might be adequately addressed by the church if it were permitted to operate its programs for the homeless.\textsuperscript{244}

The \textit{Daytona} court also analyzed the church's constitutional claim under RFRA's restoration of the compelling interest test.\textsuperscript{245} First, the court found that the city code did not "substantially burden" the church's exercise of religion because the church was not prevented from running a homeless shelter in other parts of Daytona Beach and the church had only pursued two sites at which to locate its facility.\textsuperscript{246} Second, even

\textsuperscript{240} \textit{Daytona}, 885 F. Supp. at 1558 (citing First Assembly of God v. Collier County, 775 F. Supp. 383, 386 (M.D. Fla. 1991)).

\textsuperscript{241} \textit{Id.}

\textsuperscript{242} \textit{Id.} at 1559.

\textsuperscript{243} ANDERSON, \textit{supra} note 9, § 12.21, at 538 ("[Religious] uses are favored for reasons ranging from their unique contribution to the public welfare to constitutional guaranties of freedom of worship.").

\textsuperscript{244} \textit{Daytona}, 885 F. Supp. at 1559. \textit{See} Western Presbyterian Church v. Board of Zoning Adjustment, 862 F. Supp. 538 (D.D.C. 1994), \textit{appeal dismissed}, Nos. 94-7104, 94-7189, 1995 WL 118016 (D.C. Cir. Feb. 3, 1995); \textit{see also} infra notes 277-314 and accompanying text (discussing how nuisance law can be used to address these types of concerns).

\textsuperscript{245} \textit{Daytona}, 885 F. Supp. at 1559.

\textsuperscript{246} \textit{Id.} at 1560. Section 2000bb-1 of the RFRA provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section." Subsection (b) provides for an exception as follows:

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person —
assuming the court found a substantial burden on the church's free exercise of religion, the city successfully argued that "enacting and enforcing fair and reasonable regulations throughout its jurisdiction is a compelling interest and that regulating a homeless shelter providing daily shelter and feeding furthers zoning interests." This decision is a prime example of how courts can make RFRA ineffective by "watering down the compelling interest test." If the compelling interest test is satisfied when an ordinance is fair and reasonable and furthers zoning interests, then any land use regulation that passes a rational basis standard will not violate the Free Exercise Clause — no matter what its impact on religion. The Daytona court also stated that the least restrictive means was used by the city to further its zoning interests because the code "requires a church or religious institution to meet the applicable zoning requirements in the same manner as any other person or entity seeking to establish a homeless shelter or food bank." It seems that under this court's reasoning, the least restrictive means test can be satisfied by any regulation that is "neutral" and of "general applicability" — which just takes one back to the Smith rule. Certainly, the future success of RFRA will depend on how the compelling interest test is applied by the courts. If it is applied in the same way the Daytona court applied it in this case, then "when [courts] want to uphold something, compelling

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(1) is in furtherance of a compelling governmental interest; and
(2) is the least restrictive means of furthering that compelling governmental interest.


247 Daytona, 885 F. Supp. at 1560.

248 Laycock, Free Exercise and the RFRA, supra note 136, at 901 (explaining that the principal danger to RFRA is watering down the compelling state interest test since "[t]here is no government bureaucrat in America who doesn't believe that his program serves a compelling interest in every application"). Even prior to the Smith decision, some courts appeared to apply a "watered-down" compelling interest test. See, e.g., Congregation Beth Yitzchok, Inc. v. Town of Ramapo, 593 F. Supp. 655, 663 (S.D.N.Y. 1984) ("[W]hen in conflict with legitimate zoning concerns as public safety, health and welfare, the [F]irst [A]mendment guarantee of religious expression cannot be viewed as absolute." (quoting Holy Spirit Ass'n v. Town of New Castle, 480 F. Supp. 1212, 1216 (S.D.N.Y. 1979))).

249 Daytona, 885 F. Supp. at 1560.

250 Smith "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. § 2000bb(a)(4).
doesn’t mean what it says, and lots of interests [will be] important enough.\footnote{Laycock, \textit{Free Exercise and the RFRA}, supra note 136, at 902 (discussing how the Supreme Court has applied the compelling interest test).}

The third recent homeless decision, \textit{First Assembly of God of Naples v. Collier County},\footnote{20 F.3d 419, \textit{modified}, 27 F.3d 526 (11th Cir. 1994), \textit{and cert. denied}, 115 S. Ct. 730 (1995).} did not apply RFRA to the church’s free exercise challenge since RFRA was not raised by either party.\footnote{\textit{Id.} at 424 n.5.} Instead, the court applied the Supreme Court’s Free Exercise Clause analysis, as well as its own constitutional test as pronounced in the \textit{Grosz} case,\footnote{\textit{Id.} at 423-24 (applying the \textit{Grosz} test because it aids analysis since the \textit{Grosz} case was so closely analogous).} and found that the county’s zoning ordinances did not violate the church’s rights under the Free Exercise Clause.\footnote{\textit{Id.} at 424.} In \textit{First Assembly of God}, the church converted a day-care center on its property into a homeless shelter.\footnote{\textit{Id.} at 420.} The local community objected to this use of the property because of concerns over health and safety. As a result, the church’s homeless shelter was found to be in violation of several zoning ordinances.\footnote{\textit{Id.}} Under the current Supreme Court analysis, the Eleventh Circuit determined that enforcement of these zoning ordinances did not violate the church’s free exercise rights because the “ordinances [were] neutral and of general applicability.”\footnote{\textit{Id.} at 424.} The court found that the “intent of the ordinance was not to inhibit or oppress any religion; rather, the Commission was motivated to address a general problem of health and safety concerns. The fact that First Assembly was affected was incidental.”\footnote{\textit{Id.} at 420.} It is interesting to note that the ordinance at issue, which defined a homeless shelter as a group home and restricted permissible locations to certain zones, was enacted after the “opening of the shelter, amid much consternation over the problem of the homeless in the Naples community.”\footnote{\textit{Id.} at 423 (noting that this case is distinguishable from the \textit{Lukumi} case, where the ordinances at issue “explicitly targeted the religious conduct of animal sacrifice”).} This circumstance indicates that the county did intend to affect the church’s right to operate a homeless shelter; however, the Eleventh
Circuit found that the county’s motivation was based on secular concerns regarding the operation of group homes.\textsuperscript{261}

The Eleventh Circuit in \textit{First Assembly of God} claimed to apply the three-part test it adopted in \textit{Grosz v. City of Miami Beach, Florida}\textsuperscript{262} to find that “First Assembly’s right to free exercise of religion is not violated by the County’s zoning ordinances.”\textsuperscript{263} The first two parts of this test require that: (1) “the government regulation must regulate religious conduct, not belief;” and (2) “the law must have a secular purpose and a secular effect.”\textsuperscript{264} The Eleventh Circuit noted that the \textit{Grosz} case was “closely analogous” to this case and, therefore, it did not even bother to analyze the facts of the case before it, concluding only that “[i]n \textit{Grosz}, as in the instant case, the two thresholds are easily met.”\textsuperscript{265}

Although the \textit{Grosz} case involved a conflict between religious worship and zoning regulations, the facts differ significantly from the facts in \textit{First Assembly of God}. In \textit{Grosz}, a Jewish rabbi began conducting orthodox worship services in his remodeled garage located in a residential area and was found to be in violation of a Miami Beach zoning ordinance which prohibited “churches, synagogues and similarly organized religious congregations in single-family residential zones.”\textsuperscript{266} This prohibition against religious uses had already been “upheld by the State and Federal trial and appellate courts.”\textsuperscript{267} In \textit{First Assembly of God}, however, the church was already established in a residential district which permitted churches and “their customary accessory uses.”\textsuperscript{268} The homeless shelter was closed based on the Code Enforcement Board’s decision that “the shelter was not a ‘customary accessory use’ of the church and that the applicable housing and zoning codes did not permit the shelter space to

\textsuperscript{261} \textit{Id.} ("These regulations apply to all group homes, once again regardless of their ownership or affiliation, and were motivated by wholly secular concerns.").


\textsuperscript{263} \textit{First Assembly of God v. Collier County}, 20 F.3d 419, 424, \textit{modified}, 27 F.3d 526 (11th Cir. 1994), \textit{and cert. denied}, 115 S. Ct. 730 (1995). Other courts, prior to the enactment of RFRA, have applied the Eleventh Circuit’s \textit{Grosz} test to resolve Free Exercise claims resulting from the enforcement of zoning laws. \textit{See supra} note 162.

\textsuperscript{264} \textit{First Assembly of God}, 20 F.3d at 424 (citing \textit{Grosz v. City of Miami Beach, Florida}, 721 F.2d 729, 733 (11th Cir. 1983), \textit{cert. denied}, 469 U.S. 827 (1984)).

\textsuperscript{265} \textit{Id.}

\textsuperscript{266} \textit{Grosz}, 721 F.2d at 731.

\textsuperscript{267} \textit{Id.}

\textsuperscript{268} \textit{First Assembly of God}, 20 F.3d at 420.
be used as a residence for such a large number of people."\textsuperscript{269} Because the \textit{Grosz} facts involved prohibition of all religious uses in a residential area while the \textit{First Assembly of God} facts involved a decision that the homeless shelter was not an accessory use, the \textit{First Assembly of God} facts deserved at least some analysis separate from the analysis performed over 10 years earlier in \textit{Grosz}.

In performing the third part of the \textit{Grosz} test, which balances the governmental and religious interests, the court again referred to the analysis in the \textit{Grosz} case and again concluded, without analysis of the facts before it, that "'[t]he burden on First Assembly to either conform its shelter to the zoning laws, or to move the shelter to an appropriately zoned area, is less than the burden on the County were it to be forced to allow the violation.'\textsuperscript{270} In light of the Eleventh Circuit's eagerness to uphold zoning regulations against free exercise challenges, whether intentional\textsuperscript{271} or incidental,\textsuperscript{272} future free exercise claims under RFRA may receive a watered-down compelling state interest test as was applied in \textit{Daytona Rescue Mission, Inc. v. City of Daytona Beach}.\textsuperscript{273}

Looking at these three recent land use cases, which address the issue of religious ministering to the homeless, it is evident that in some jurisdictions religious freedom will remain subject to restrictions by local zoning regulations regardless of the enactment of RFRA. Courts have the ability to uphold land use restrictions on religious conduct by narrowly interpreting what constitutes a "substantial burden" and by broadly interpreting what qualifies as a "compelling state interest."\textsuperscript{274} The approach taken by the court in \textit{Western Presbyterian Church} is the most protective of religious freedom, in that it finds a "substantial burden" whenever zoning authorities regulate what religious functions a church

\textsuperscript{269} \textit{Id.}
\textsuperscript{270} \textit{Id.} at 424 (citing \textit{Grosz}, 721 F.2d at 741).
\textsuperscript{271} \textit{See} Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2230 (1993) (reversing the Eleventh Circuit's decision based on a finding that the "ordinances had as their object the suppression of religion").
\textsuperscript{272} \textit{See} \textit{Lukumi}, 113 S. Ct. at 2232; \textit{First Assembly of God}, 20 F.3d at 423; \textit{Grosz}, 721 F.2d at 729.
\textsuperscript{273} 885 F. Supp. 1554 (M.D. Fla. 1995). \textit{See supra} notes 245-51 and accompanying text.
\textsuperscript{274} \textit{See} \textit{Western Presbyterian Church} v. Board of Zoning Adjustment, 862 F. Supp. 538, 546 (D.D.C. 1994) ("If circumstances change and the feeding program becomes a nuisance, upon a proper showing this Court will appropriately modify its final order.")}, \textit{appeal dismissed}, Nos. 94-7104, 94-7189, 1995 WL 118016 (D.C. Cir. Feb. 3, 1995).
may conduct. The court explains that any conflicts with the government’s interests in providing for the public health, safety, and welfare can adequately be resolved under nuisance law.

In conclusion, then, in order to preserve religious freedom in the face of zoning regulations of general applicability, courts must apply RFRA with a recognition that any zoning restriction on religious conduct must be justified by a compelling state interest that is much more than just a desire to give deference to the government’s police power. Although minimum health and safety regulations should be enforceable against religious uses, nuisance law rather than restrictive zoning regulation should be used (as it was prior to the advent of zoning) to control and remedy any detrimental effects a religious use may have on the surrounding community.

III. THE ROLE OF NUISANCE LAW

Prior to the acceptance of zoning in this country as a constitutional and effective land use control method, communities controlled the quality of life in their neighborhoods by using nuisance litigation. Land use nuisance cases reflected the adage that a landowner may use his land as he pleases so long as he does not unreasonably interfere with the use of land by others. However, with the advent of zoning as a proactive means of land use control, rather than the reactive nuisance litigation approach, nuisance actions have become less important as a way to resolve land use disputes. Local governments have overwhelmingly opted for the use of zoning ordinances to regulate land uses such that incompatible uses are segregated and land use conflicts are minimized in advance.

Because zoning regulations are proactive in nature, ordinances which are found to restrict a religious use can be challenged as an unconstitu-

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275 See id. ("Zoning boards have no role to play in telling a religious organization how it may practice its religion.").
276 See supra notes 191-205 and accompanying text.
278 See MANDELKER, supra note 2, § 4.01, at 94 (explaining that courts resolved land use disputes through nuisance cases which provided a model for zoning legislation).
279 Id. § 4.02, at 94.
280 Id. § 4.02, at 95-96.
281 Id. (stating that “most municipalities have adopted zoning ordinances”).
tional prior restraint on the free exercise of religion. The majority of cases involving challenges to zoning ordinances based upon the theory of prior restraint appear to be First Amendment freedom of speech cases involving regulation of adult bookstores and theaters. However, zoning restrictions on religious uses have also been challenged as prior restraints on religious freedom. For example, in Nichols v. Planning and Zoning Comm'n, 667 F. Supp. 72, 78 (D. Conn. 1987) (holding that a zoning regulation which gives discretionary power to administrative official to control in advance free exercise of religion is invalid as a prior restraint); Minney v. City of Azusa, 330 P.2d 255, 260 (Cal. Ct. App. 1958) (holding that a zoning ordinance requiring variance for construction of a church does "not constitute a prohibited previous restraint on the free exercise of religion"); Grace Community Church v. Town of Bethel, No. 30-69-94, 1992 Conn. Super. LEXIS 2131, at *2 (July 16, 1992) (requesting a declaratory

282 See, e.g., Grace Community Church v. Town of Bethel, No. 30-69-94, 1992 Conn. Super. LEXIS 2131, at *2 (July 16, 1992) (pointing out that the "plaintiff requested a declaratory judgment that the provision in the Bethel Zoning Regulations requiring a special permit to construct a church in residential and other zones of the Town was in violation of both the U.S. and Connecticut Constitutions as: (1) a prior restraint on the free exercise of religion"), aff'd, 622 A.2d 591 (Conn. App. Ct.), cert. denied, 114 S. Ct. 383 (1993).

283 See, e.g., Young v. American Mini Theatres, Inc., 427 U.S. 50, 60 (1976) (arguing that zoning ordinances will not have "a significant deterrent effect on the exhibition of films protected by the First Amendment"); 11126 Baltimore Blvd., Inc. v. Prince George's County, Md., 58 F.3d 988, 994 (4th Cir.) (concluding that "adult bookstore ordinance bears a close enough relationship to, and engenders a sufficient risk of suppression of, protected expression to permit Warwick Books to bring a facial challenge to the ordinance"), cert. denied, 116 S. Ct. 567 (1995); East Brooks Books, Inc. v. City of Memphis, 48 F.3d 220, 226 (6th Cir.) (holding that ordinance regulating sexually oriented business withstands constitutional scrutiny), cert. denied, No. 95-203, 1995 WL 472074 (U.S. Oct. 2, 1995); Wiener v. County of San Diego, 23 F.3d 263, 264 (9th Cir. 1994) (involving a zoning ordinance regulating adult bookstores which was challenged as a standardless prior restraint); Basiardanes v. City of Galveston, 682 F.2d 1203, 1220 (5th Cir. 1982) (holding that zoning ordinance unconstitutionally restricts adult theaters); Entertainment Concepts, Inc., III v. Maciejewski, 631 F.2d 497, 505 (7th Cir. 1980) (holding that an ordinance providing for revocation or suspension of movie theater's license upon finding of obscenity is an unconstitutional prior restraint), cert. denied, 450 U.S. 919 (1981). Anticipatory nuisance actions could also be viewed as prior restraint; however, courts are hesitant to grant injunctions against anticipatory nuisances and will not do so unless "the plaintiff can show with certainty that the use will be a nuisance in the area in which it plans to locate." MANDELKER, supra note 2, § 4.03, at 102.

& Zoning Commission, a resident in the Town of Stratford, Connecticut, was informed by the Town Zoning Enforcement Officer that he was in violation of a town ordinance because he conducted regular religious meetings in his home each week. The regulations, applicable to single-family residential districts, required special approval for "[a] church, parish hall, or other religious use." The court determined that the ordinance was unconstitutionally vague because the phrase "other religious use" does not have "the certainty necessary to forewarn the plaintiffs here that a small group of like-minded individuals, followers of The Way, may not meet in Nichols’ home to interact as their religion may dictate." In addition to not giving citizens adequate warning of what type of activity is prohibited, the court found that the regulation was impermissibly subject to arbitrary and discriminatory application by zoning officials. Finally, the court observed that a regulation "which gives an administrative official discretionary power to control in advance the right of citizens to’ exercise constitutionally protected activities — specifically the free exercise of religion and the right to freely associate with others” is invalid as a prior restraint on such freedoms. The court concluded that "[t]o allow the Zoning Board or the Zoning Enforcement Officer indiscriminately [sic] to continue to declare one’s use of his home as an ‘other religious use’ and thereby prohibit that use . . . would plant the seed for ‘covert forms of discrimination,’ and provide the means by which the Town of Stratford could ‘suppress[ ] a particular point of view.’" This Article proposes that instead of using public zoning regulation to control in advance land use concerns generated by religious uses, nuisance law should be employed to resolve conflicts that arise when a religious use actually creates such a land use problem. Nuisance judgment that zoning regulations requiring a special permit to build a church in residential zone was a prior restraint on the free exercise of religion). 667 F. Supp. 72 (D. Conn. 1987). 1995-96 [BALANCING LAND USE 547

286 Id. at 75.
287 Id. (citing Town of Stratford Zoning Regulations §§ 4.1.6 & 4.1.6.3).
288 Id. at 77 (“[O]ther religious use’ does not provide for the citizen of ordinary intelligence a clear standard by which to regulate his activities.”).
289 Id. at 78 (finding that regulations did not sufficiently articulate the standard for enforcement).
290 Id. (quoting Kunz v. New York, 340 U.S. 290 (1951)).
292 The use of nuisance law as an exception to public land use regulation has
concepts have indeed been used in some cases to address land use conflicts created by the influx of individuals outside the immediate community as a result of religious activities that minister to the needy. Most recently, the court in *Western Presbyterian Church v. Board of Zoning Adjustment* issued a permanent injunction to allow the church to operate a feeding program for the homeless in a residential neighborhood, but noted that it would change its order “[i]f circumstances change and the feeding program becomes a nuisance.” This reference to nuisance law was the court’s way of ensuring that the community’s concerns about crime and safety were recognized. In *Wilkinson v.*

**293** Western Presbyterian Church v. Board of Zoning Adjustment, 862 F. Supp. 538 (D.D.C. 1994), *appeal dismissed*, Nos. 94-7104, 94-7189, 1995 WL 118016 (D.C. Cir. Feb. 3, 1995); Wilkinson v. LaFranz, 574 So. 2d 403 (La. Ct. App. 1991); Greentree at Murray Hill Condo. v. Good Shepherd Episcopal Church, 550 N.Y.S.2d 981 (N.Y. Sup. Ct. 1989); Slevin v. Long Island Jewish Med. Ctr., 319 N.Y.S.2d 937 (N.Y. Sup. Ct. 1971). Nuisance law has also been used to resolve other land use conflicts involving religious interests. See, e.g., Cochise County v. Broken Arrow Baptist Church, 778 P.2d 1302, 1304 (Ariz. Ct. App. 1989) (holding that church building and its use for “printing, collating, binding and dissemination of printed materials” are a nuisance as a matter of law when building permit is not obtained prior to construction or use of building); City of Chula Vista v. Pagard, 115 Cal. App. 3d 785, 800-01 (Ct. App. 1981) (explaining that use of religious family households is not a nuisance per se and instead requires a factual finding to determine if overcrowded dwelling is a nuisance); Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Ashton, 448 P.2d 185, 192 (Idaho 1968) (holding that use of church property as a lighted recreation complex does not constitute a nuisance); Coe v. City of Dallas, 266 S.W.2d 181 (Tex. Civ. App. 1953) (holding that use of building as a religious healing center constitutes a nuisance); Assembly of God Church v. Bradley, 196 S.W.2d 696, 697 (Tex. Civ. App. 1946) (explaining that “church building is not a nuisance per se but its location and the time and manner of its use may create a nuisance”) (citing Waggoner v. Floral Heights Baptist Church, 288 S.W. 129 (Tex. Civ. App. 1926)).


**295** *Id.* at 546 (pointing out that injunction includes provision that feeding program is allowed to resume to the extent it does not constitute a nuisance).

**296** *Id.* (“The Church recognizes its responsibility to the community and has
the court held that a cause of action could be maintained against a church’s operation of a soup kitchen for violation of the zoning law and for nuisance. The court explained that if the church could show that it was “authorized to operate a church in this zone and that the soup kitchen is an integral part” of its activities, the soup kitchen would be allowed to operate “unless their activities are being carried on in such a way as to constitute a nuisance.”

Private and public nuisance actions were also brought against a church in Greentree at Murray Hill Condominium v. Good Shepherd Episcopal Church, where neighbors argued as well that city zoning regulations had been violated and that the church was required to file an Environmental Impact Statement (“EIS”) in order to operate a temporary homeless shelter. The court concluded that the temporary homeless shelter was a permissible accessory use protected under the church’s current certificate of occupancy and that the project was a “temporary emergency activity involving the homeless crisis in this city and, as such, [was] exempt from the preparation of an EIS.” Both nuisance actions were dismissed because the allegations were legally insufficient. The private nuisance action, at a minimum, did not allege that the interference with the right of use and enjoyment of the neighbors’ property was substantial in nature or that the church’s actions were unreasonable. The public nuisance action, in turn, was not brought by a public official and failed to allege “that the emergency temporary homeless shelter program offends, interferes with or causes damage to the general public at large in the exercise of rights common to all, nor that it offends public morals or interferes with the use by the public of a public place or endangers or injures the property, health, safety or comfort of a considerable number of persons.”

represented that it will take all reasonable steps to assure the program will not result in harm to its congregation and neighbors.”

298 Id. at 407.
299 Id.
301 Id. at 984.
302 Id. at 986.
303 Id. at 987.
304 Id. at 987-88.
305 Id. at 988.
306 Id.
When a New York church attempted to establish a drug center in Long Island for young people with drug problems, neighbors objected to the center as a violation of existing zoning and as a public danger.\textsuperscript{307} The court held that "the drug center is a religious use of the church property and a valid extension of the religious institution for zoning purposes."\textsuperscript{308} Although the issue was not phrased in terms of nuisance, the court addressed the neighbors' argument that the location of the drug center, even assuming it is a "valid religious usage in discharge of a legitimate public objective," presents a danger to the community.\textsuperscript{309} The court agreed that "[w]here the religious use may be so fraught with danger or peril to the community because of the particular use sought, the detriment to the community can outweigh the religious consideration."\textsuperscript{310} However, the court observed that the church and the hospital had taken security measures such as close supervision and regular police survey in order to address certain dangers to the community.\textsuperscript{311} Nevertheless, the court recognized that the facts were not clear as to the impact on the community and that factual issues such as "statistics and expert testimony with respect to real and potential expansion of crime and drug use in the immediate vicinity" would need to be addressed by the trial court.\textsuperscript{312}

RFRA\textsuperscript{313} requires that government not substantially burden the free exercise of religion unless it shows that the action "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."\textsuperscript{314} Using nuisance law as a remedy for land use problems that result from religious uses of property in residential areas appears to be a less restrictive means of controlling land use than using zoning regulations to control uses in advance of actual problems such as traffic congestion, lowering of

\textsuperscript{307} Slevin v. Long Island Jewish Med. Ctr., 319 N.Y.S.2d 937, 940 (N.Y. Sup. Ct. 1971) (involving the Christ Episcopal Church Parish House in Manhasset which conducted a drug abuse program by arrangement with Long Island Jewish Hospital).

\textsuperscript{308} Id. at 946.

\textsuperscript{309} Id. at 947.

\textsuperscript{310} Id.

\textsuperscript{311} Id. at 948 (explaining that other measures included attendance scrutiny, geographic restrictions, urine testing, and meals at the center).

\textsuperscript{312} Id. at 948-49 (explaining that denial of summary judgment returns matter to trial court for determinations of fact).


\textsuperscript{314} Id. §§ 2000bb-1(b)(1) & (2) (emphasis added).
property values, or increased crime in the neighborhood. Therefore, RFRA may require government officials, who find it necessary to restrict religious land uses for compelling interests such as the health, safety, and welfare of citizens, to use nuisance litigation rather than zoning regulation to control actual land use problems, not just anticipated problems.

CONCLUSION

Religious groups that reach outside their immediate communities to address social problems, such as homelessness, as part of their religious mission should be encouraged in their efforts by limiting the degree to which zoning regulations are applied to their activities. These groups are trying to fill the void left by the lack of local, state, and federal funding to care for those in need. Rather than discouraging religious groups from filling this void with private funds, government should support these activities by honoring what is already an established constitutional principle — freedom of religion. Land use conflicts characterized by community opposition and excessive regulation of religious uses should be resolved by giving deference to the free exercise of religion.
of religion protected under the First Amendment. Zoning regulations applied to religious uses should be limited to those minimum restrictions necessary to address important health and safety concerns such as fire safety standards, but not traffic congestion or parking limitations.\textsuperscript{317} Since regulating religious uses through zoning in anticipation of potential problems may act as an invalid prior restraint on religious freedom, nuisance litigation — not zoning regulation — should be used to determine a remedy when religious land uses actually do interfere with the use and enjoyment of the neighboring property. In addition, RFRA demands that whenever a compelling government interest requires that religion be substantially burdened, such an action must be accomplished in the least restrictive manner.

Religious land uses should be restricted only when they interfere with another’s use and enjoyment and the benefit of the religious use is outweighed by the burden on the other landowners’ use of their property. Nuisance litigation, not zoning regulation, is the least restrictive means of furthering compelling governmental interests that substantially burden the religious exercise of ministering to those in need.

\textsuperscript{317} Gahr, \textit{supra} note 120, at 15 (explaining that RFRA “will limit the use of zoning codes only to health and safety concerns”).