MINUTES OF THE LANCASTER COUNTY BOARD OF ZONING APPEALS REGULAR MEETING

November 30, 2023 at 6:00 PM

1. Roll Call

Board Members present: Quorum is present (6 Board Members)

Frances Liu	Keye Jones	Kemesha Lowery
Gary Alden	Beverly Williams	Sheresa Ingram

Staff: Matthew Blaszyk, Planner
Jennifer Bryan, Clerk and Recording Secretary
Shannon Catoe, Zoning Director
Juie Faile, Zoning
Mika Garris, Zoning

Members of the press were notified in advance, but were not present. All adjacent property owners were notified by mail. A notice of public hearing was published in the Lancaster News at least 15 days prior to the meeting. The Agenda was posted on the County website, and posted in the lobby of the administration Building one week prior to the meeting. A copy of the agenda is on file.

THE FOLLOWING IS A SUMMARY ONLY; IT IS NOT A VERBATIM TRANSCRIPT.

2. Call to Order

Chair Liu called the public meeting to order at 6:05 p.m.

3. Approval of Agenda

Kemesha Lowery moved to Approve the Agenda; 2nd by Sheresa Ingram. The motion was approved by unanimous consent.

4. Approval of Minutes

a. Minutes of August 29, 2023

Chair Frances Liu asked that amendments be made to the Minutes of the August 29, 2023 meeting. Sheresa Ingram made a Motion to postpone adoption of the minutes until amendments could be made and presented at the meeting of January 9, 2024. Seconded by Kemesha Lowery.

Vote: 6:0. Motion to postpone is approved.

b. **Minutes of October 3, 2023**.
Motion to Approve by Sheresa Ingram; seconded by Keye Jones.
Vote: 6:0. Motion is approved.

5. Public Hearing Items

- County Attorney Ginny Merck-DuPont announced for the record that Attorney **Tommy Morgan** (Smith Robinson Law) is present as Legal Counsel for the Board of Zoning Appeals.
- Clerk Jennifer Bryan read the statement of matter presented for hearing.

a. VAR-2023-1769 Faith Presbyterian Church
Application by Janis Tacy on behalf of Faith Presbyterian Church for a Variance from Unified Development Ordinance Sec. 2.4 District Development Standards: Setbacks, for a 6.5 acre parcel at location 7520 Charlotte Highway, Indian Land (Tm# 0016-00-031.00). Zoned Institutional District (INS).

APPLICANT STATEMENT: **Janis Tacy** for First Presbyterian Church.
The site plan was designed and approved prior to the 2016 UDO. Subsequently the Church received a Variance for parking. The Church did not have sufficient funds to complete the structure as designed, and built a portion, which was completed and received a Certificate of Occupancy. In 2023 a site plan for an addition to complete the original plan was submitted, and was denied because it did not meet code regulations instituted in 2016. It is the Church's position that first, they were not notified that their permit needed to be renewed, and second, that federal RLUIPA statute applies in this case and that the requirement to change the design would constitute a "substantial burden."

STAFF REPRESENTATIVE: **Matthew Blaszyk** for Planning and Zoning Department. [See Staff Report attached to Agenda]. Completion of the modified plan for the fellowship hall and issuance of the CO closed the project. Applicants are responsible for filing any necessary renewals for their projects, there is no system for notifying applicants of expiration of vested rights (site plan) or permits. Compliance with current UDO requirements does not invoke RLUIPA.

PUBLIC HEARING: [See attached sign-in sheet]
Rev. David Bender, First Presbyterian Church: [See attached article regarding interpretation of RLUIPA statute] RLUIPA statute requires that in dealing with religious institutions, government agencies must meet objectives in the least intrusive way possible.

Dick Bonner, First Presbyterian Church: The site plan was designed to enhance the existing historic church structure. The northeast corner of the site plan does not encroach into the 20-foot setback. The addition as designed will not impact adjacent properties. Because of the location of the historic church and the adjacent cemetery, the site has significant restrictions that prevent relocating or redesigning the plan.

APPLICANT REBUTTAL: **Rev. David Bender** and **Janet Tacy** for First Presbyterian Church: [See attached copies of email communications from Deputy Planning Director Ashley Davis regarding UDO considerations and interpretation.] Under the RLUIPA standard, changing the site plan would create a "substantial burden," and would prevent the Church from fully practicing their beliefs.

EXECUTIVE SESSION: RECESS: 7:02 PM

c. **Executive Session**
For the receipt of legal advice subject to the attorney-client privilege related to pending public hearing, VAR-2023-1769 Faith Presbyterian Church for a Variance from Unified Development Ordinance Sec. 2.4 District Development Standards: Setbacks, for a 6.5 acre parcel at location 7520 Charlotte Highway, Indian Land (Tm# 0016-00-031.00). Zoned Institutional District (INS).

RECALL TO ORDER: 7:47 PM

QUESTIONS/DISCUSSION BY BOARD:

Keye Jones: Do you have anything to add to the statement regarding the burden on the congregation posed by compliance with setback regulations?
Rev. Bender: The capacity of our church is reduced, the capacity for the kitchen is reduced. Our ministry includes many public events that are compromised by reduced capacity.

Keye Jones: Does this burden prevent you from practicing your religion?
Rev. Bender: No.

Beverly Williams: Is this the first year the site as been a polling place?
Rev. Bender: This is the second year.

Rev. Bender: Not being able to build the building as designed, that we need, is a substantial burden on the practice of our religion.

Janis Tacy: We would not be able to use that part of our land. Because of the historic church, the cemetery, and encroachment on heelsplitter habitat, it is the only place we can expand.

Keye Jones: We are bound by the legal definition of "substantial burden," and this does not rise to that level.

CALLED VOTES: VARIANCE CRITERIA

i. THAT THERE ARE PRACTICAL DIFFICULTIES OR UNNECESSARY HARDSHIPS IN THE WAY OF CARRYING OUT THE STRICT LETTER OF THIS ORDINANCE: Agree (A) or Disagree (D)

Motion to approve by Gary Alden; Second Sheresa Ingram

F. Liu: A	K. Lowery: A	G. Alden: A
B. Williams: A	S. Ingram: A	K. Jones: D

Carried 5:1

ii. THAT IF THE APPLICANT COMPLIES WITH THE PROVISIONS OF THE ORDINANCE, THE PROPERTY OWNER SEEKING THE VARIANCE CAN SECURE NO REASONABLE RETURN FROM, OR MAKE NO REASONABLE USE OF HIS PROPERTY; Agree (A) or Disagree (D)

Motion to approve by Beverly Williams; second by Sheresa Ingram.

F.Liu: A	K. Lowery: D	G. Alden: A
B. Williams: A	S. Ingram: A	K.Jones: D

Carried 4:2

iii. THAT SPECIAL CONDITIONS AND CIRCUMSTANCES EXIST WHICH ARE PECULIAR TO THE LAND, STRUCTURE OR BUILDING INVOLVED AND WHICH ARE NOT APPLICABLE TO OTHER LANDS, STRUCTURES OR BUILDINGS LOCATED IN THE SAME LAND DEVELOPMENT DISTRICT; Agree (A) or Disagree (D)

Motion to approve by Beverly Williams; second by Sheresa Ingram

F.Liu: A	K. Lowery: A	G. Alden: A
B. Williams: A	S. Ingram: A	K.Jones: D

Carried 5:1

iv. THAT THE VARIANCE WILL NOT MATERIALLY DIMINISH OR IMPAIR ESTABLISHED PROPERTY VALUES WITHIN THE SURROUNDING AREA; Agree (A) or Disagree (D)

Motion to approve by Sheresa Ingram ; second by Kemesha Lowery

F.Liu: A	K. Lowery: A	G. Alden: A
B. Williams: A	S. Ingram: A	K.Jones: D

Carried 5:1

v. THAT THE SPECIAL CONDITIONS AND CIRCUMSTANCES REFERENCED IN III, ABOVE, RESULT FROM THE APPLICATION OF THIS ORDINANCE AND NOT FROM THE ACTIONS OF THE APPLICANT; Agree (A) or Disagree (D)

Motion to approve by Sheresa Ingram ; second by Gary Alden.

F.Liu: A	K. Lowery: A	G. Alden: A
B. Williams: A	S. Ingram: A	K.Jones: A

Carried 6:0

vi. THAT THE VARIANCE IS IN HARMONY WITH THE GENERAL PURPOSE AND INTENT OF THIS ORDINANCE AND PRESERVES ITS SPIRIT; Agree (A) or Disagree (D)

Motion to approve by Gary Alden ; second by Kemesha Lowery.

F.Liu: A	K. Lowery: A	G. Alden: A
B. Williams: A	S. Ingram: A	K.Jones: A

Carried 6:0

vii. THAT THE VARIANCE IS THE MINIMUM NECESSARY TO AFFORD RELIEF; Agree (A) or
Disagree (D) AND

Motion to approve by Sheresa Ingram; second by Gary Alden.

F.Liu: D	K. Lowery: A	G. Alden: A
B. Williams: A	S. Ingram: A	K.Jones: D

Carried 4:2

viii. THAT THE PUBLIC HEALTH, SAFETY AND GENERAL WELFARE HAVE BEEN ASSURED AND SUBSTANTIAL JUSTICE HAS BEEN DONE: Agree (A) or Disagree (D)

Motion to approve by Sheresa Ingram; second by Gary Alden.

F.Liu: A	K. Lowery: A	G. Alden: A
B. Williams: A	S. Ingram: A	K.Jones: A

Carried 6:0

All eight criteria are found to be satisfied; the Variance is granted.

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6. **Other Business:**

a. Review of Next Month's agenda: Variance for Dustin Floyd (Sec. 24 Development Standards: Setbacks).

7. **Adjournment:**

With there being no further business, Gary Alden moved to adjourn; motion seconded by Beverly Williams. The motion was approved by unanimous consent. **Adjourned at 8:52 PM**.

See published agenda for Application and Staff Report.

ATTACHMENT 1:

SIGN-IN SHEET (PUBLIC COMMENTS)

Lancaster County
South Carolina

Board of Zoning Appeals
Public Hearing Sign In Sheet

Item 5a: VAR-2023-1769 Faith Presbyterian Church

Application by Janis Tacy on behalf of Faith Presbyterian Church for a Variance from Unified Development Ordinance Sec. 2.4 District Development Standards: Setbacks, for 6.5 acre parcel at location 7520 Charlotte Highway, Indian Land (TM# 0016-00-031.00). Zoned Institutional (INS) District.

ONLY STATEMENTS OF FACT WILL BE CONSIDERED AS EVIDENCE. HEARSAY AND OPINION ARE INADMISSABLE.

Council Chambers
101 N. Main Street, Lancaster South Carolina
Thursday, November 30, 2023

Citizens are allowed 3 minutes per person to speak. Everyone speaking before the Board will be required to do so in a civil manner. The Board will not tolerate personal attacks on individual Board Members, County Staff or any person or group. Racial slurs will not be permitted. The Board's number one priority is to conduct business for the citizens of this county.

PLEASE PRINT

1. David Bender
2. Dick Bonner
3.

ATTACHMENT 2:

Applicant's Petition in Support (183 Signatures)

To: The Lancaster County Board of Zoning Appeal Nov 30th

RE: Case Number: BZA 2023-1769, Faith Presbyterian Church

We, the undersigned, support the variance request by Faith Presbyterian Church to allow a setback of 20 ft on the North side for the construction of the proposed addition to the existing building. This setback of 20 ft will be in lieu of the 35 ft setback required for the Institutional Zoning District.

Name/Address	Member of Faith	Non-Member of Faith
Davis R Bonner 1431 Stonewater Pt Indian Land SC	✓	
Glenda Bonner 1431 Stonewater Ct. Indian Land	✓	
Roger [illegible] 15146 Legend Oaks Ct	✓	
[illegible] 20119 Dwelle Lane	✓	
Lois [illegible] 15146 Legend Oaks Ct	✓	
Vivian Mandracchia 49012 Gladiolus St IL, SC	✓	
Rodney Mandracchia 49012 Gladiolus St IL SC	✓	
Nancy Roche 2023 Moultrie Ct IL SC	✓	
Stephen M. Roche 2023 Moultrie Ct IL, SC	✓	
Bonnie Harris 1603 River Bend Blvd ILSC	✓	
Sally Heer 2050 Moultrie Court, IL, SC	✓	
Sandy Spaugh 4299 Perth Rd. Indian Land SC	✓	
Michael Spaugh " " " " " "	✓	
Kathy McGovern 3039 Azalea Dr. Indian Land SC	✓	
Janet Bershers 2082 Hartwell Ln, Indian Land SC	✓	
[illegible] 4441 Oriole Dr. Unit 100, Indian Land	✓	
Gail Smithwick 3009 Autumn Hill Lane, Indian Land	✓	
Brenda Kerns 27044 Snorkeling Ct Indian Land	✓	
Mark Flynn 27044 Sunset Ct Indian Land	✓	
Ma Bass 2051 Moultrie Ct., IL SC 29707	✓	
[illegible] 5252 W Winchester St IL SC 29707	✓	
Tori Reis 7044 Sunset Coastal Place 29707		
M.K. BJORKLUND 48410 SNAPDRAGON LN, INDIAN LAND, SC	✓	
[illegible] 20253 DOJEKICLN, INDIAN LAND SC	✓	
[illegible] 15265 LEGEND OAKS CT, INDIAN LAND	✓	

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Name/Address	Member of Faith	Non-Member of Faith
Demi J. Seufeld 17586 Hawks View Dr, Indian Land	✓	
Suzanne W Seufeld 17586 Hawks View Indian Land	✓	
Tom Reed 7044 Sunset Crater Place Indian Land	✓	
Richard Reed 7044 SUNSET CRATER PL LANCASTER SC	✓	
Ann Mary Northrop 15265 Legend Oaks Ct, Indian Land, SC	✓	
Rev. Scott Sorrell 5 Aberdeen 1443 Peel Forest Dr., Indian Land, SC	✓	
Raymond Weiss 1022 Biscayne Ct. Indian Land SC	✓	
Elsie Weiss 1022 Biscayne Ct. Indian Land SC	✓	
Carol Almond 2066 E Foxwood ct Indian Land SC	✓	
Judy Swerlbuy 3103 Azalea Dr. Indian Land, SC	✓	
Scott A Boyer 10441 Scotland Ave, Indian Land	✓	
Patsy L Boyer 10441 Scotland Ave, Indian Land	✓	
Christine E. Cyphers 23164 Kingfisher Dr, Indian Land	✓	
Linda L Stewart 15232 Legend Oaks Ct, Indian Land, SC	✓	
Janet Reinhardt 2021 Sunflower Ct Indian Land SC	✓	
Linda Gibson 4442 Oriole Dr unit 103 Indian Land SC	✓	
Joyce Fields 4254 Perth Road Indian Land SC	✓	
Betty Acker 4021 Christopher West Ct Indian Land SC		✓
Charles Acker "		✓
Kathy Hall 2319 Kingfisher Dr. Indian Land SC	✓	
Robert Smith 3033 Voyageurs way, Fort Mill, SC	✓	
Ronald Acker 1016 Mava Ct. Indian Land SC	✓	
Shirley Sweeny 6192 Jack Thomas Dr Indian Land	✓	
Jan Cullom 5012 Blossom Point Dr. Indian Land	✓	
Velta Rouchon 4493 Acorn Hill Dr. Lancaster S.C	✓	

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Name/Address	Member of Faith	Non-Member of Faith
Sharon J. Archer, 1016 Mava Ct., Indian Land, SC 29707	✓	
Beverley Brazzel 1064 Wellslane Indianland SC 29707	✓	
Jill Bikowski 4010 Murray St, " " "	✓	
Ron Brazzel 1064 Wellslane Indian Land SC 29707		✓
Simone [illegible] 2001 [illegible]	✓	
[illegible] Morker 4421 Oriole Dr. Unit 100, Indian Land	✓	
Mary Jane Carr 20164 Dovelure Ind. Land	✓	
Michael Carr 20164 Dovelure " "	✓	
Paul Morker 4421 Oriole Dr. Unit 100 I.L.	✓	
Pam Stephens 9017 Smokey Hill Ln, Ind. Land	✓	
Keith Stephens 9017 Smokey Hill Ln, Ind Land	✓	
Gloria Clement 8100 Penman Springs Dr Waxhaw	✓	
Roberta Kirk 55402 Derringer Ave Indian Land	✓	
Janice Harkey 4092 Highgate Lane Lancaster SC	✓	
Sam Barber 2030 Aberdeen Ln Indian Land SC	✓	
Marsha Fairbanks 8103 Crater Lake Dr. " "	✓	
Richard [illegible] 4067 Murray st. Indian Land SC	✓	
David J. Fairbanks 8103 Crater Lake Dr Indian Land SC	✓	
MARVIN GALLAWAY 4254 PERTH RD INDIAN LAND	✓	
Susan Moore 5130 Mill Race Land Lancaster	✓	
Holly Brown 6264 Raven Crest Dr Indian Land SC		✓
Susan [illegible] 7250 Hartwell Ln. Indian Land	✓	
Bill Cousin 4029 Ambleside, I.L., SC	✓	
Ally Chapman 8718 Waxhaw Creek Rd Waxhaw		✓
Payton Chapman 8718 Waxhaw Creek Rd Wax		✓

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Name/Address	Member of Faith	Non-Member of Faith
Mary E Wolf 617 Moses Drive, I.L 29707		✓
Doug Wolf 617 Moses Drive I.L 29707		✓
Nancy Gates + Richard Gates 20230 Dovetie Lane 29707		✓
Josephine Mayfield 4611 of Cherokee Ln Unit 100 29704		✓
Glen Affinson 23164 Kingfisher Ct. 29707	✓	
Brad / Tonia McNeely 4899 Old Hickory Rd Lancaster, SC 29720		✓
Kiley Arundell 911 Lily Magnolia Ct. OH		✓
Richard Monahan 4071 Twiddy St 29707	✓	
Sandy Monahan 4071 Twiddy St 29707	✓	
Nancy Sepastro 5025 Thistle, I.L. 29707	✓	
Joan Lyman 2143 Hartwell Ln. 29707	✓	
Tom Lyman " " " "	✓	
Larry Hubbard 2018 Aberdeen Ln Indian Land, SC 29707	✓	
Kathleen Hubbard " " " " " " "	✓	
Judy Brown 2294 Hartwell Ln. Indian Land SC 29707	✓	
Robert J. + Mary Bertolini 17553 Hawks View Dr IL	✓	
Ellie Bailey Twiddy ST.		✓
JoAnn Nitzmann, 5017 Broad Ln 29707	✓	
Jan Pellarde 825 Deer Crossing Dr.	✓	
Joan Landolt 4483 ACORN HILL DRIVE 29720	✓	
Dennis Beshers 2082 HARTWELL LN, INDIAN LAND 29707		✓
Jasmine Jones 3213 Queensland Ct. Indian Land 29707	✓	
Stephanie Lambert 2250 Hartwell Lane I.L. SC 29707		✓
Ginny Ostien ~~~~ 15259 Legend Oaks Ct., IL 29720		✓
John Ostien 15259 Legend Oaks Ct., IL 29720		✓

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Name/Address	Member of Faith	Non-Member of Faith
Dawne Teague 23059 Kingfisher Dr, Indian	✓	
Lou Lowe 23059 Kingfisher Dr. Indian Land SC	✓	
Ann Cook 9419 Whistling Straits Dr Indian Land SC		
Barbara Lowe 101 Salinda Pointe Dr. Unit 535 Lexington SC	✓	
Lois Briggs 4067 Murray St Indian Land SC	✓	
THOMAS BROWN 2294 HARTWELL, INDIAN LAND SC 29707	✓	
Melissa Wellman 7004 Sunset Crater Pl Lancaster SC 29720	✓	
Megan Wallman 7004 Sunset Crater Pl Lancaster SC 29720	✓	
Sharon K Fleming 3043 Santee Ct. Indian Land 29707	✓	
Sally Smith 3033 Voyageurs Way 29707	✓	
Robert Smith 3033 Voyageurs Way 29707	✓	
Barbara Stevens 2251 Hartwell Ln 29707	✓	
Tom Stevens 2251 Hartwell Ln 29707	✓	
DOUG SOBEY 4078 AMBLESIDE DR. IL, 29707	✓	
LINDA SOBEY 4078 AMBLESIDE DR. IL 29707	✓	
Bob TACY 86620 Arrington Rd, Lancaster 29720	✓	
JAN TACY 86620 Arrington Rd, Lancaster 29720	✓	
Richard Lambert 2250 Hartwell LN IL 29707	✓	
Carol Gunlicks Lancaster SC	✓	
Joanne Arecco	✓	
Ruben Arecco	✓	
Jack Haubach 47250 Everlasting St Indian Land SC	✓	
Ted Tozer 2809 Bevis Ln., Waxhaw, NC	✓	
Jill Belcowski 4010 Murray St, Indian Land, SC	✓	

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Name/Address	Member of Faith	Non-Member of Faith
Marcia Gardner 1756 Tranquility Blvd	✓	
Hank Howland 1756 Tranquility Blvd	✓	
Brenda Veal 2246 Hartwell Lane		✓
Jane Stein 1078 Truman Dr	✓	
Linda Hankins 2243 Hartwell		✓
Jen Hankins 2243 Hartwell Ln.		✓
Ruth Cook	✓	
Mic Smith	✓	
Valerie Weeks	✓	
Albert L. [illegible] 3213 Queensland Court	✓	
Melissa Whitaker 8209 Palmetto Place	✓	
David Cole	✓	
Barry Choate 9022 Waxhaw Creek Rd Waxhaw, NC	✓	
Barbara Choate 9022 Waxhaw Creek Rd Waxhaw, NC	✓	
Donna Hammell 52520 Winchester	✓	
Bruce Bjorklund 48410 SNAPDRAGON INDIAN LAND	✓	
Diane Winchester 6062 Chimney Bluff	✓	
Colin Winchester 6062 Chimney Bluff	✓	
Thomas C Hills 8084 Pawley Ct	✓	
Carol A Hills 8084 Pawley Ct 29707		✓
Michael W Boyes 2119 Ashley Glen Ln Land		✓
Julie T. Boyes 2119 Ashley Glen Ln Land 29707		✓
Edgar W. Bender 1443 Deer Forest Ln SC 29707	✓	
Osmond Simms	✓	
Ann Marie Simms	✓	

To: The Lancaster County Board of Zoning Appeal
RE: Case Number: BZA 2023-1769, Faith Presbyterian Church Nov. ~~18~~ 30 Page ~~87~~

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Name/Address	Member of Faith	Non-Member of Faith
Beth Young 2221 Sunny Valley Ct Indian Land SC 29707	✓	
Ann Beaty 19125 Mallard DR Indianland SC 29707		✓
Ken Edmonds 2066 E Foxwood Ct Indian Land SC 29707	✓	
Pam Bredin 20936 Dovekie Ln. Fort Mill SC 29707	✓	
Carolyn Hardesty 15343 Legend Oaks Ct. Indianland		✓
Mary Cardullo 20237 Dovekie Ln Indian Land SC 29707		✓
Barbara Davis 5017 Helmsworth Waxhaw, NC 28173		✓
Carolyn Krause 2052 Hartwell Ln Fort Mill 29707		✓
Judi Duncan 23310 Kingfisher Dr Indian Land.		✓
Susan Binley 52044 Longspur Lane Indian Land		✓
Julie Krueger 48498 Snapdragon Ln. Indian Land		✓
Betty Warfield 9311 Whistling Straits Dr.		✓
Ellen Wilmarth 2059 Hartwell Lane Indian Land 29707		✓
Gail A Nash 20257 Dovekie Lane Indian Land SC 29707		✓
Maureen LaCerte 44409 Rio Le dr. unit 102 Fortmill SC 29707		✓
Sue Hamilton 48495 Snap Dragon Ln Indianland 29707		✓
ROBERT BREDIN 2039 DOVEKIE LN.	✓	✓
Betty P. McCavitt 20289 Dovekie Ln. Indianland SC		
[illegible] 20289 Dovekie Ln - Indian Land SC	✓	
Sandy Tozer 2804 Davis Dr Waxhaw NC	✓	
Gary Curtis 2030 Yellowstone Dr Indian Land SC		✓
Glenn R. Pack 2203 Orson Drive Indian Land SC	✓	

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Name/Address	Member of Faith	Non-Member of Faith
Gary + Krysia McCurdy 41084 Calla Lily, Indianland	X	
Natalie Eunson 41093 Calla Lily Indian Land		X
Carol and Roy Williams 41096 Calla Lily Indianland		X
PAT and Chuck DIETRICH 41102 Calla Lily Indian Land		X
Karen and John Humphrey 41134 Calla Lily St. Indian Land		X
Jan + Tom Dillon 41114 Calla Lily Indian Land		X
Hewitt Johnston 41097 Calla Lily Indian Land		X
Jane Harvey 41090 Calla Lily St. I.L		X
Fred Harvey 41090 CALLA LILY ST INDIAN LAND		X
Kathy Bozzo 41122 Calla Lily St. Indian Land SC.		
Judy Ohne 7174 Shenandoah Indian La.	X	X
E.B. Ohne Jr. 7174 Shenandoah Dr. Indian Land		X

ATTACHMENT 3:

Article, “Avoiding and Defending Against RLUIPA Claims,” by J. Peloso and E. Seeman. Copyright 2019 Thomson Reuters.

AVOIDING AND DEFENDING AGAINST RLUIPA CLAIMS

JOHN F.X. PELOSO, JR.
PARTNER
ROBINSON & COLE LLP

John represents companies, municipalities, and individuals in business and real property disputes. He has significant experience representing clients in disputes involving title, zoning, wetlands, land use, RLUIPA, eminent domain, foreclosure, and other real property rights cases.

EVAN J. SEEMAN
COUNSEL
ROBINSON & COLE LLP

Evan focuses his practice on land use and zoning, real property litigation, and municipal law. He represents developers, landowners, municipalities, corporations, and advocacy groups. Evan has substantial experience in defending municipalities nationwide in cases involving RLUIPA.

koyash07/shutterstock

Under the Religious Land Use and Institutionalized Persons Act (RLUIPA), municipalities are prohibited from implementing zoning and other land use regulations that impose a substantial burden on religious exercise. Applying the statute can be confusing and the financial consequences of a RLUIPA violation are often severe. Municipalities and their counsel must therefore understand RLUIPA's requirements and take steps to avoid and defend against RLUIPA claims.

The Religious Land Use and Institutionalized Persons Act (RLUIPA), enacted in 2000, is a federal law that prohibits municipalities from implementing zoning and other land use regulations that impose a substantial burden on a person's or group's religious exercise. The consequences of violating RLUIPA can be severe. In addition to injunctive relief, a prevailing plaintiff can recover its legal fees, which, in addition to the municipality's legal fees, can reach millions of dollars.

Municipalities should view RLUIPA as a federal zoning ordinance that is part of any local zoning code. As a federal statute, RLUIPA takes precedence over conflicting state and local laws. This often creates confusion for zoning agencies and municipal officials, because many factors that apply in analyzing a claim under RLUIPA are not relevant to zoning applications submitted by secular groups.

This article explains how municipalities can effectively avoid and defend against RLUIPA claims. In particular, it:

- Provides an overview of regulation of religious land use.
- Examines claims made against municipalities under RLUIPA.
- Describes RLUIPA's safe harbor provision.
- Offers guidance on counseling municipal officials on RLUIPA's requirements.

Search Local Government Regulation of Religious Land Uses Under RLUIPA for more on RLUIPA.

RELIGIOUS LAND USE: OVERVIEW

To avoid and defend against RLUIPA claims, municipalities must first understand:

- The definition of "religious exercise."
- Permissible regulation of religious land use.

RELIGIOUS EXERCISE

RLUIPA defines religious exercise as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief" (42 U.S.C. § 2000cc-5(7)(A)). Under RLUIPA, "[t]he use, building, or conversion of real property for the purpose of religious exercise" is considered to be religious exercise (42 U.S.C. § 2000cc-5(7)(B)).

RLUIPA's reach is broad and applies to almost any type of use alleged by a religious group as a form of religious exercise, even if nontraditional, as long as the beliefs are sincerely held. Courts do not determine what is and what is not religious exercise (see *U.S. v. Ballard*, 322 U.S. 78, 86-87 (1944)).

While municipalities are free to challenge the sincerity of religious beliefs, they should not opine on what they view as religious exercise. Challenging whether a religious group's proposed use is religious exercise could give rise to a discrimination claim.

Mixed use of a property can still be considered religious exercise (see *Chabad Lubavitch of Litchfield Cty., Inc. v. Borough of Litchfield,* 2016 WL 370696, at *6-7 (D. Conn. Jan. 27, 2016) (applying a segmented approach to each room in a multi-use building under which RLUIPA's substantial burden analysis was applied to rooms that were used for both secular and religious purposes, but not applied to rooms used only for secular purposes)).

REGULATION OF RELIGIOUS LAND USE

Religious uses are not exempt from zoning. A religious group "has no constitutional right to be free from reasonable zoning regulations nor does [it] have a constitutional right to build its house of worship wherever it pleases" (*Alger Bible Baptist Church v. Twp. of Moffatt*, 2014 WL 462354, at *6 (E.D. Mich. Feb. 5, 2014)). Courts have consistently recognized that "land-use regulation is one of the historic powers of the [s]tates" (*City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 744 (1995)).

Prohibiting religious uses from certain zones is generally permissible as long as a municipality does not:

- Impose a substantial burden on the religious exercise of a person unless the action is the least restrictive means of advancing a compelling governmental interest (42 U.S.C. § 2000cc(a)(1)).
- Treat religious uses on less than equal terms with analogous secular assembly uses (42 U.S.C. § 2000cc(b)(1)).
- Discriminate based on religion (42 U.S.C. § 2000cc(b)(2)).
- Totally exclude religious uses from locating anywhere in the municipality (42 U.S.C. § 2000cc(b)(3)(A)).
- Unreasonably limit the opportunity for religious groups to locate within its jurisdiction (42 U.S.C. § 2000cc(b)(3)(B)).

However, this does not mean that religious uses must be permitted in any zoning district or that a religious group's proposed use of property is allowed as of right. Municipalities can allow religious uses as special permit uses (also known as conditional uses or special exception uses).

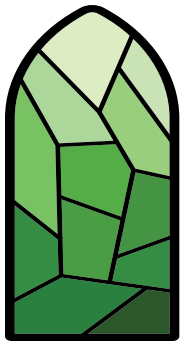
Municipalities regulate land with zoning and other controls based on their comprehensive plans. Comprehensive plans outline the municipality's long-term goals and policies that guide local land use decisions and operate as blueprints for development. As with most other uses, municipalities typically allow religious and other assembly uses in certain zones and exclude those uses from other zones. These restrictions further the municipality's comprehensive plan.

Courts have expressed deference to local planning principles to reject unreasonable limits claims and substantial burden claims under RLUIPA (see, for example, *Eagle Cove Camp & Conference Ctr., Inc. v. Town of Woodboro,* 734 F.3d 673 (7th Cir. 2013)).

RLUIPA CLAIMS

The primary claims made against municipalities under RLUIPA are:

- Substantial burden claims.
- Equal terms claims.
- Discrimination claims.
- Unreasonable limits claims.



If few parcels are available for religious use, municipalities should consider whether amendments to zoning regulations or to the official zoning map would make more land available for religious use.

SUBSTANTIAL BURDEN CLAIMS

The most common RLUIPA claim involves an assertion by a religious group that government action has substantially burdened its religious exercise. To claim a substantial burden, the religious group must first establish one of the following elements:

- The substantial burden is imposed on a program or activity that receives federal financial assistance.
- The substantial burden affects interstate commerce.
- The government has made an individualized assessment of the proposed religious use by imposing or implementing a land use regulation.

(42 U.S.C. § 2000cc(a)(2).)

If the religious group can establish that government action substantially burdens its religious exercise, the government can only avoid liability if it can show that its action advanced a compelling governmental interest using the least restrictive means possible (42 U.S.C. § 2000cc(a)(1)).

RLUIPA lawsuits turn on whether an adverse zoning decision truly infringes religious exercise or is only a matter of preference or convenience for the religious group. Courts frequently reject claims of "financial cost and inconvenience, as well as the frustration of not getting what one wants" as constituting a burden on religion (*Castle Hills First Baptist Church v. City of Castle Hills*, 2004 WL 546792, at *11 (W.D. Tex. Mar. 17, 2004); see also *Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214, 1227 (11th Cir. 2004) ("While we certainly sympathize with those congregants who endure Floridian heat and humidity to walk to services, the burden of walking a few extra blocks, made greater by Mother Nature's occasional incorrigibility, is not 'substantial' within the meaning of RLUIPA")).

To help avoid and defend against substantial burden claims, municipalities should:

- Designate a surplus of land for religious use.
- Plan for a compelling interest.
- Regulate religious use based on size and impact.
- Encourage reapplication after a denial.

Designate a Surplus of Land for Religious Use

Conducting an annual inventory of all land available for religious use may help to plan for these uses and to avoid or defend against RLUIPA claims. The more land that is available for religious uses, the more difficult it is for a religious group to show that an adverse decision has caused it to modify or forego its religious exercise.

Some courts consider whether there are feasible alternative properties available for religious use. For example, the US Court of Appeals for the Second Circuit found a substantial burden where a village in New York denied an Orthodox Jewish group's special permit to expand its coeducational day school because of a lack of feasible alternatives. The Second Circuit credited the testimony of the school's experts, who testified that the planned location of the school expansion "was the only site that would accommodate the new building." (*Westchester Day Sch. v. Vill. of Mamaroneck,* 504 F.3d 338, 352-53 (2d Cir. 2007).)

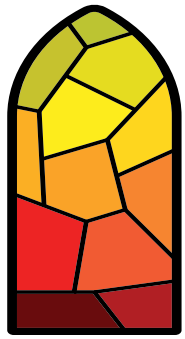
A surplus can also help municipalities defeat claims brought under RLUIPA's total exclusion provision, which provides that "[n]o government shall impose or implement a land use regulation that ... totally excludes religious assemblies from a jurisdiction" (42 U.S.C. § 2000cc(b)(3)(A)). Claims under this provision can be defeated by a municipality by making some land available for religious use.

A municipality's annual inventory should determine how many parcels are:

- Vacant.
- Available for sale.
- Zoned to allow religious use.

If few parcels are available for religious use, municipalities should consider whether amendments to zoning regulations or to the official zoning map would make more land available for religious use. Real estate experts and planners can help municipalities better understand the market and determine whether they should amend their zoning maps to make more land available for religious use. Additionally, if a municipality chooses to defend a RLUIPA lawsuit, real estate experts and planners may be able to persuade a court that other sites are available for the religious group to use.

A compelling interest must be more than pro forma reliance on traditional zoning interests. It must be supported by a complete and comprehensive record of the municipality's interests, and government action must be tailored to meet those interests.



Plan for a Compelling Interest

If a religious group shows that a government action has substantially burdened its religious exercise, a municipality can avoid liability only if its actions were taken to advance a compelling interest using the least restrictive means possible. Municipalities therefore must consider the compelling interests they seek to promote when taking a government action, such as enacting a regulation or denying a religious use application.

According to the US Supreme Court, compelling interests are interests of the "highest order" (see *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993)). Examples of compelling interests include:

- Promoting public health and safety (*Wis. v. Yoder*, 406 U.S. 205 (1972)).
- Preserving the rural and rustic, single-family residential character of a residential zone (*Eagle Cove Camp*, 734 F.3d at 673).
- Enforcing zoning regulations to ensure the safety of residential neighborhoods (*Murphy v. Zoning Comm'n of New Milford*, 289 F. Supp. 2d 87, 108 (D. Conn. 2003), vacated, 402 F.3d 342 (2d Cir. 2005)).
- Preventing crime (*Harbor Missionary Church Corp. v. City of San Buenaventura*, 642 F. App'x 726 (9th Cir. 2016)).

A compelling interest must be more than pro forma reliance on traditional zoning interests. It must be supported by a complete and comprehensive record of the municipality's interests, and government action must be tailored to meet those interests. Creating a complete and comprehensive record is especially important to defeat substantial burden claims, which are the most fact-intensive type of RLUIPA claim.

Municipal counsel should speak with the responsible planner and other municipal officials to identify these interests in advance. Relying on compelling interests during the review process can be proof that the municipal actions sounded in legitimate concerns from the start, and could be strong evidence to support the municipality's decision.

Regulate Religious Use Based on Size and Impact

Municipalities can treat religious uses differently from other uses based on the expected size and impact of the religious uses and still comply with RLUIPA. Municipalities have been successful in defending against RLUIPA claims by focusing on the size and impact of proposed religious uses, including the compelling interests the municipality seeks to advance.

For example, in *Adhi Parasakthi Charitable, Medical, Educational, and Cultural Society of North America v. Township of West Pikeland*, a Hindu group claimed that a local zoning code treated religious uses differently from secular uses. The court denied summary judgment because the zoning code did not discriminate against religious uses in favor of secular uses, but against large-scale uses in favor of small-scale uses. (721 F. Supp. 2d 361, 378 (E.D. Pa. 2010).) Similarly, a court denied summary judgment to a church, finding that the city's hostility toward the church's expansion arose not from religious discrimination, but from concerns over its size and proposed growth, which "threatened to outstrip the character and size of the city" (*Castle Hills*, 2004 WL 546792, at *14).

Encourage Reapplication After a Denial

Encouraging modifications to a proposed religious use application and suggesting that the religious group resubmit its proposal can increase a municipality's chances of defeating a substantial burden claim. A municipality can express on the record that it is willing to entertain a modified religious use application for a similar proposal.

However, disingenuously leaving open the possibility of modification and resubmission will not insulate municipalities from substantial burden claims. For example, in *Fortress Bible Church v. Feiner*, the court found a town's stated willingness to consider a church's future religious use application was not genuine. There was sufficient evidence that the town wanted to derail the church's project after the church refused to make a payment in lieu of taxes, and the town had manipulated the statutory environmental review process to that end. (694 F.3d 208, 219 (2d Cir. 2012).)

An honest effort to develop alternatives may be the best approach for municipalities to avoid a RLUIPA violation and the potential for protracted and costly litigation. However, when engaging in dialogue over possible uses, it is important to emphasize that approval is not guaranteed, even though the municipality may be more receptive to a modified proposal that incorporates the specific recommendations of the municipality.

In some cases, it may be helpful for the religious group and the municipality to jointly engage a mediator. If a municipality does not want to encourage reapplication, identifying compelling interests using the least restrictive means possible is crucial to defeating a substantial burden claim.

EQUAL TERMS CLAIMS

Municipalities must be careful to avoid the perception of unequal treatment when excluding religious uses from certain zones. RLUIPA requires that religious uses be treated as well as any comparable secular assembly use (42 U.S.C. § 2000cc(b)(1)). Courts have established different tests to determine unequal treatment (see *Elijah Grp., Inc. v. City of Leon Valley*, 643 F.3d 419, 422-23 (5th Cir. 2011)). However, violations of the equal terms provision are commonly found in cases where:

- A municipality imposes a different, more onerous application process on a religious group than on a secular group.
- Zoning codes prohibit religious uses, but permit secular assembly uses.

To help avoid and defend against equal terms claims, municipalities should:

- Use the same process and procedures for religious and secular uses.
- Articulate justifications for using different standards.
- Consider the impacts of all uses in commercial zones.

Use the Same Process and Procedures

If religious uses are prohibited in a particular zone, municipalities should ensure that analogous secular assembly uses are also prohibited. For example, courts have found violations where zoning codes prohibit religious uses, but allow secular assembly uses, such as:

- Clubs.
- Meeting halls.
- Community centers.
- Auditoriums.
- Theatres.
- Recreational facilities.

(*Midrash Sephardi*, 366 F.3d at 1231-32.)

Violations have also been found where religious uses are allowed, but subject to different, more stringent standards (see *Corp. of the Catholic Archbishop of Seattle v. City of Seattle*, 28 F. Supp. 3d 1163 (W.D. Wash. 2014) (requiring a private Catholic high school to obtain a variance from the city zoning code to install light poles on its athletic fields, while granting public schools a special exception from that requirement, violated the equal terms provision of RLUIPA)). Municipalities should develop comparable regulations for broad classes of similar uses, including by:

- Classifying assembly uses together.
- Permitting and prohibiting all assembly uses in the same zones, if possible.

Regulating for broad classes of uses may also help municipalities:

- Establish the neutrality and general applicability of their zoning codes.
- Demonstrate that they do not impermissibly target religious use.

However, some states have carved out regulatory power over certain types of uses, such as public schools. Courts have found that public uses regulated by the state are not proper comparators to equal terms claims involving similar but private uses regulated by municipalities (see *Marianist Province of the U.S. v. City of Kirkwood*, 2018 WL 4286409 (E.D. Mo. Sept. 7, 2018)).

Municipal counsel should scrutinize the zoning code to determine which uses could potentially be considered assembly uses. Assembly uses may not be obvious. For example, zoning codes that identify municipal uses may not appear to qualify as secular assembly uses, but they can include public schools, libraries, and museums.

If it is unclear whether a particular use could be considered an assembly use, municipal counsel should err on the side of caution, and regulate that use in the same manner as other grouped assembly uses.

Articulate Justifications for Using Different Standards

There may be valid reasons why a municipality does not want to regulate broadly, and these reasons may be acceptable if they are carefully articulated. Courts have held that municipalities must articulate any justifications for unequal treatment in the applicable sections of the zoning code itself to avoid claims of subjectivity (see *Catholic Archbishop of Seattle*, 28 F. Supp. 3d at 1168-69).

Justifications that have defeated, or that courts have held could potentially defeat, equal terms claims include:

- Creating parking spaces.
- Controlling traffic.
- Generating municipal revenue.
- Limiting a commercial zone to commercial use.

(See *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367, 373 (7th Cir. 2010).)

Consider the Impacts of All Uses in Commercial Zones

When creating a pure commercial district in name, municipalities should proceed with caution if they then allow non-commercial secular uses, but reject religious uses. In this case, municipalities should:

- Identify potential justifications for different treatment.
- Consider what other uses are allowed.
- Assess whether any other uses could cause the same impacts the municipality seeks to alleviate by using different standards for religious uses.

If other allowed uses are determined to cause the same or similar impacts as the religious uses that are excluded from the commercial zone, the municipality may be subject to an equal terms claim.

PREPARING FOR A RIPENESS DEFENSE

RLUIPA claims must be ripe to be adjudicated. The US Supreme Court set out the most common test to determine ripeness in *Williamson County Regional Planning Commission v. Hamilton Bank*, which requires that a religious group obtain a final, definitive position about how it can use its property, including exhaustion of the variance process (473 U.S. 172 (1985)). Under this test, courts have dismissed RLUIPA lawsuits for lack of ripeness where the religious group did not seek variance relief.

Another test to determine ripeness, which must be considered before the *Williamson County* test, is the relaxed ripeness test. Under the relaxed ripeness test, a court can adjudicate RLUIPA claims, even if the religious group did not seek a variance, if both:

- The religious group suffered immediate injury from the government's actions.
- Additional administrative remedies would not further define the alleged injuries.

(*Dougherty v. N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 90 (2d Cir. 2002).)

To preserve a ripeness defense, municipalities should consider establishing either:

- An administrative procedure to allow a religious group to appeal an adverse zoning decision to the zoning board of appeals or another agency.
- A formal process of reconsideration for land use decisions, especially one that is required before a further administrative appeal.

These additional procedures could place municipalities in a position to:

- Demonstrate that an alleged immediate injury is ill-defined absent an appeal of an adverse decision.
- Prompt the court to dismiss a lawsuit, especially where the religious group did not seek a variance or other relief.

For example, in *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, a city sought to create an entertainment district. The city required churches, but not other secular groups, to obtain a conditional use permit because a state statute prohibited the issuance of new liquor licenses to businesses operating within 300 feet of a church. The US Court of Appeals for the Ninth Circuit rejected the city's stated justification for the unequal treatment, namely to promote the development of the entertainment district, because "many of the uses permitted as of right would have the same practical effect as a church of blighting a potential block of bars and nightclubs" (*City of Yuma*, 651 F.3d 1163, 1174 (9th Cir. 2011)).

DISCRIMINATION CLAIMS

RLUIPA's nondiscrimination provision prohibits a municipality from imposing a land use regulation that discriminates against an assembly or institution based on its religion or religious denomination (42 U.S.C. § 2000cc(b)(2)). Although few courts have interpreted or applied this provision, the Second Circuit found that the provision implicated many of the same factors under the Equal Protection Clause, including statements made by community members (*Chabad Lubavitch*, 768 F.3d at 199; see below *Denounce Discriminatory Statements Made by Members of the Public*). Plaintiffs can also support discrimination claims by identifying other religious groups that have been treated more favorably. However, religious animus (express or implied) is required to prove a discrimination claim.

Additionally, discriminatory comments made by government officials or consultants reviewing a religious group's land use proposal, especially when made on the public record, can be damaging to municipalities defending against other RLUIPA claims, such as substantial burden claims. Plaintiffs' attorneys might construe any relevant comment as an example of overt discrimination. One court found a town's "open hostility" to religious use, in support of finding a violation of RLUIPA's substantial burden provision, was evinced in part by:

- Town board members' comments that they opposed the religious use application because it was "another church."
- The town's instruction to the town planner to "stop" and "kill" the project.

(*Fortress Bible*, 694 F.3d at 214, 219-20.)

Some courts consider whether a municipality's decision was arbitrary and capricious when evaluating RLUIPA claims (see *Westchester Day Sch.*, 504 F.3d at 351). Discriminatory comments made by public officials could also support a finding that a municipality's decision was arbitrary and capricious. Even comments from municipal counsel that are not carefully considered are subject to being misconstrued.

To help avoid and defend against discrimination claims and other claims under RLUIPA, municipalities should:

- Cure damage from discriminatory statements made by municipal officials.
- Denounce discriminatory statements made by members of the public.

Cure Damage from Statements Made by Municipal Officials

Municipal officials should immediately and publicly renounce on the record any statements that could be construed as discriminatory and should clarify that the religious group's beliefs do not impact the municipality's review of the religious use application.

The municipality should also consider:

- Requesting that the offending individual recuse himself from further review of the religious use application, as well as:
  - note on the record that the reason for the recusal is due to the discriminatory statement; and
  - affirm again that the religious group's beliefs do not affect the municipality's decision.
- Asking the religious group for suggestions regarding how the municipality can remedy the situation. If the municipality acts on the religious group's suggestion (for example, by officially condemning the statement), the religious group may have waived the opportunity to challenge the statement.

Even if a statement is unclear, but could be construed as discriminatory, the record should be clarified. While it is difficult to predict whether these actions would be sufficient to cleanse the record, they demonstrate good faith efforts on the part of the municipality.

Denounce Discriminatory Statements Made by Members of the Public

Municipalities should address discriminatory statements made by members of the public. If these comments are not appropriately addressed, the municipality could be found to be complicit in, or, more consequentially, persuaded by these statements. Additionally, the Second Circuit recently ruled that public comments are one factor to consider under a RLUIPA discrimination claim (*Chabad Lubavitch*, 768 F.3d at 199).

In *City of Cleburne v. Cleburne Living Center*, the city denied a special permit for a group home for people with developmental disabilities due to residents' prejudices against those individuals (473 U.S. 432 (1985)). The city's deference to the negative attitudes and unfounded fears of the residents supported a finding of discrimination under the Equal Protection Clause. Although not a religious land use case, the same principle applies. As the US Supreme Court noted, "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." (*Cleburne Living Ctr.*, 473 U.S. at 448.)

The steps municipalities should take to address discriminatory statements made by members of the public differ depending on whether the discriminatory statements are made:

- At a public hearing.
- Outside of a public hearing.

To help prevent members of the public from making discriminatory statements at a public hearing, municipalities should consider:

- Preparing a statement to be read at the opening of the public hearing to inform the public that the religious group may submit evidence about its religion, particularly regarding what its beliefs require and the space needed to accommodate its exercise of religion.
- Requesting that members of the public:
  - refrain from challenging the religious group's beliefs, even if they disagree about whether the proposed use is religious use; and
  - limit any comments to zoning issues only.

If discriminatory statements are made, a municipal official should immediately:

- Instruct the speaker to limit his comments to zoning issues.
- Denounce the discriminatory statement.
- Reiterate on the record that religion plays no part in the municipality's decisions.

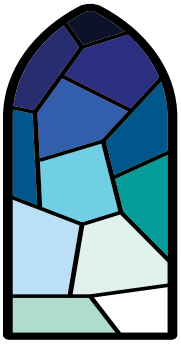
Discriminatory statements made by members of the public outside of a public hearing, such as those made on blogs or through local media outlets, are not part of the record. However, these types of statements can taint the public debate and color a municipality's decision to deny use. Municipal officials who are aware of those comments should denounce them in a public forum.

UNREASONABLE LIMITS CLAIMS

RLUIPA's exclusions and limits provision prohibits a municipality from imposing a land use regulation that either:

- Completely excludes religious assemblies from a jurisdiction.
- Unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

(42 U.S.C. § 2000cc(b)(3).)



Discriminatory statements made by members of the public outside of a public hearing, such as those made on blogs or through local media outlets, are not part of the record. However, these types of statements can taint the public debate and color a municipality's decision to deny use.

As with discrimination claims, claims under the exclusions and limits provision are not frequently adjudicated.

This provision imposes two separate requirements on municipalities:

- **Municipalities may not entirely prohibit religious uses from locating within a jurisdiction.** Religious uses must be allowed to locate somewhere, whether it is in a single zoning district or multiple zones. A total exclusion claim is defeated where religious uses are allowed, even if exclusively as special permit uses. (*Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 990 (7th Cir. 2006).)
- **Local governments must provide reasonable opportunities for religious uses to locate.** For example, a violation of the unreasonable limits provision was found where religious uses were subject to heightened frontage requirements. This meant that religious uses had to aggregate five properties to satisfy the frontage requirement at an additional cost of between $880,000 and $2.5 million. The court stated that "[w]hile it is true that religious assemblies cannot complain when they are subject to the same marketplace for property as are all land users, religious assemblies are not participating in the same marketplace when they are required to aggregate anywhere from 2-7 times the number of properties as the average land user and required to obtain more frontage than any other non-residential uses in the same district." (*Chabad of Nova, Inc. v. City of Cooper City*, 575 F. Supp. 2d 1280, 1290 (S.D. Fla. 2008).)

Search Local Government Regulation of Religious Land Uses Under RLUIPA for more on unreasonable limits claims.

RLUIPA'S SAFE HARBOR PROVISION

The availability of land for religious uses may not be enough to defeat an unreasonable limits or substantial burden claim. Courts have found violations of RLUIPA's unreasonable limits provision "where regulations effectively left few sites for construction of houses of worship, such as through excessive frontage and spacing requirements, or have imposed steep and questionable expenses on applicants" (US Department of Justice (DOJ), Statement of the Department of Justice on the Land-Use Provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA), Question 15 (Dec. 15, 2010)). Additionally, there may be no opportunity to make more land available for religious use.

To address these situations, RLUIPA contains a safe harbor provision that authorizes municipalities to exempt religious land uses from certain policies or practices that might otherwise violate the statute (42 U.S.C. § 2000cc-3(e)). Although the safe harbor provision does not expressly provide what municipalities must do to avoid liability, it gives them broad authority to act. Municipalities should add the safe harbor provision verbatim to their local zoning codes, to allow for religious uses when a religious group is having difficulty finding land.

The safe harbor provision could be used by municipalities to, for example:

- Reconsider a denial, for example where a religious group claims that a zoning denial, coupled with the realities of the real estate market, have imposed a substantial burden on religious exercise (see *Riverside Church v. City of St. Michael*, 2017 WL 3521719 (D. Minn. Aug. 16, 2017)).
- Reverse a denial and approve the religious use application subject to reasonable conditions. Municipalities should work with religious groups to determine which conditions would be acceptable for all parties. If this is not feasible, the municipality should ensure that all conditions of approval are reasonable in scope and further compelling interests (such as public health and safety) in the least restrictive means possible.
- Reopen a hearing, inform the religious group of an acceptable development design, or reevaluate the religious use application if the former hearing was full of religious animus, in cases where a RLUIPA lawsuit is filed after a denial or when a religious use application is approved with conditions.
- Amend zoning codes to ensure that religious uses are treated the same as secular uses to comply with RLUIPA's equal terms provision.

COUNSELING MUNICIPAL OFFICIALS

RLUIPA is not easy to understand, and even courts interpret it differently. Municipal counsel should:

- Provide training to municipal officials on RLUIPA's requirements.
- Conduct mock religious use application exercises.
- Provide real-time advice at meetings and public hearings.

RLUIPA TRAINING

Proper training of municipal officials by municipal counsel prior to the review of a religious use application is essential to avoid and defend against RLUIPA claims.

For example, in *Grace Church of North County v. City of San Diego*, the court found a violation of RLUIPA's substantial burden provision in part because of the arbitrariness of the municipality's decision-making process. The court noted that the planning board members "lacked legal training and possessed little to no knowledge of RLUIPA" and there was "no attempt by the City to educate the [planning board] regarding RLUIPA." (555 F. Supp. 2d 1126, 1137 (S.D. Cal. 2008).)

Even if comprehensive training is not feasible, municipal counsel should offer training tailored to the issues relevant to specific proposals. Additionally, municipal counsel should consider:

- Providing annual courses to update municipal officials on new developments in the law.
- Updating zoning handbooks.
- Circulating copies of the DOJ's RLUIPA reports, which are freely available to decision-makers (see, for example, DOJ, Update on the Justice Department's Enforcement of the Religious Land Use and Institutionalized Persons Act: 2010—2016).
- Administering mandatory trainings and testing for municipal officials based on their review of the zoning handbook or other materials.

However, if municipal counsel is involved in reviewing the religious group's application, training should be conducted by

an outside provider. This can help maintain the confidentiality of the attorney-client relationship. Non-privileged actions and statements from municipal counsel, likely the municipality's agent, will be part of the record if a RLUIPA claim is litigated.

Search Attorney-Client Privilege and Work Product Doctrine Toolkit for resources to assist counsel in navigating the attorney-client privilege and the work product doctrine in litigation.

MOCK RELIGIOUS USE APPLICATION EXERCISES

Municipalities can create mock exercises to help identify any vulnerabilities in their regulations by enlisting municipal officials to take on roles as potential religious group applicants and make hypothetical applications. The hypothetical applications should build in as many teaching points as possible. Roles can be assigned to some participants, but not others, to create a more realistic scenario.

For example, the mock exercise could involve a religious group's application for a house of worship with a private, religious school in a residential neighborhood. Additional complexities could be introduced to make the mock exercise more challenging, such as:

- The religious group seeks to use hallucinogenic tea as part of its faith.
- Part of the school will be used for only religious classes, while the other part of the school will be used for only secular classes.
- Within the past few years, the municipality has approved both secular and religious high schools of varying sizes in the same zone.
- Municipal officials:
  - have a conflict of interest; or
  - have made questionable comments.
- Neighbors are angry about the religious group's proposal.

After the mock exercise is complete, municipal counsel should identify any issues and critique the municipality's decision and its handling of the mock public hearing.

REAL-TIME ADVICE

Municipal or special counsel should attend all meetings or hearings where religious land use proposals are considered. Some of the factors under RLUIPA may conflict with certain aspects of the standard discretionary review process. For example:

- Financial hardship generally cannot form the basis for variance relief, but a religious group's financial situation is relevant to substantial burden claims (see *Westchester Day Sch.*, 504 F.3d at 352-53).
- Consideration of the religious group's ability to find ready alternatives may not be relevant to most other types of applications, but is relevant to religious and other land uses that have First Amendment protection, such as adult entertainment.

Additionally, if a municipal official makes a comment that is clearly inconsistent with RLUIPA, it may be necessary for municipal counsel to step in and provide real-time advice to avoid a decision that may later be found to violate RLUIPA.

ATTACHMENT 4:

Emails from Ashley Davis, Deputy Planning Director, Lancaster County.

From: Ashley Davis
To: Jennifer Bryan
Subject: FW: Faith Presbyterian Church
Date: Wednesday, December 6, 2023 2:45:51 PM
Attachments: LCLogo_c716c29e-f766-46c0-a18c-7d20f2fc6ebd.png

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From: Ashley Davis
Sent: Monday, September 18, 2023 5:12 PM
To: dick.bonner64@gmail.com; dmbender33@aol.com; rjtacy@gmail.com
Cc: Matthew Blaszyk <mblaszyk@lancastersc.net>; Allison Hardin <ahardin@lancastersc.net>
Subject: RE: Faith Presbyterian Church

Mr. Bonner,

There are a few points I would like to address in your email below.

1. Per the South Carolina Vested Rights Act Section 6-29-1530, Site Specific Development plans have a vested right to develop for a period of 2 years after which applicants must request extensions of the approved plan via the process laid out by the local jurisdiction (in this case: Lancaster County UDO section 9.2.17). The church did not file any form of extension request therefore the former plan set has expired and holds no bearing on new approvals.

2. Lancaster County UDO section 1.1.6.D states: *All development approvals granted in accordance with the UDO and other County ordinances and policies in effect prior to the effective date for this ordinance established in Section 1.1.11, shall have until 2 years to complete the approved development under the terms of the previous ordinances and policies. After such time, all development must be completed in accordance with the provisions of this UDO.*

3. UDO Section 1.1.7.C.2.A and 1.1.7.C.2.B states: *a. Any type of land development application which has been officially filed with the appropriate County official prior to the effective date of this ordinance or any amendment thereto, may continue to be processed under the land use rules and regulations in effect prior to said date. b. The application approval process for such applications must be completed within 2 years of the filing date.*

4. UDO Section 9.3.3.A.4 states: ***Maximum Build-Out Period:*** *If construction is not begun under such an outstanding permit within a period of one year subsequent to the passage of this ordinance, or where it has not been completed within 2 years subsequent to passage of this ordinance, any further construction or use shall be in conformity with the provisions of this ordinance. We as County employees do not have the authority to provide exemptions to this portion of the UDO.*

5. UDO Section 9.3.4.B.4 states: ***Expansion of Structures:*** *Any improvement or expansion of any structure on a nonconforming occupied lot must comply with all other minimum requirements of this ordinance or a variance must be obtained from these requirements through an action of the Board of Zoning Appeals.*

6. As local regulatory documents are legally binding documents, County Staff cannot simply make the determination to exempt you from any of the regulations provided above and/or from setback and Highway Corridor Overlay standards unless explicitly allowed by the controlling document itself.

7. In no way are these standards (setbacks and highway corridor overlay) denying the church the opportunity to fulfill its Religious & Community Mission. An expansion may occur on this site, religious practice may continue, and new buildings may be constructed so long as they comply with current local, state, and federal laws and regulations.

8. Lastly, there is no path for "grandfathering" a new building to prior standards. You may however request a variance or variances from the Board of Zoning Appeals. If you would like to discuss this process further, please let us know.

Best,
Ashley

From: Dick Bonner <dick.bonner64@gmail.com>
Sent: Monday, September 18, 2023 1:48 PM
To: Matthew Blaszyk <mblaszyk@lancastersc.net>
Cc: David Bender <dmbender33@aol.com>; Robert Tacy <rjtacy@gmail.com>
Subject: Faith Presbyterian Church

Good Afternoon Matthew,

We have diligently reviewed your reply of Sep 11 and are still of the opinion that we should be Grandfathered and allowed to comply with the 20' side setback that was in place when we designed & constructed the first portion of our existing building as the total building footprint was clearly shown on those plans. We even went as far as grading & strengthing the pad to accommodate. We desired to complete building in one phase but were unable to obtain financing for the total amount required to complete.

We were not advised at that time of any foreseen changes to the zoning setbacks or we would have designed the building differently. The recent changes are extremely punitive to our plans. During construction we constructed roughins for the openings into the area we now plan to construct. By losing 15' additionally to the side of the building we will not be able to utilize those openings. Further, we cannot easily modify the building because of the location of the existing "1800's" church building which we are carefully trying to protect as it is a significant part of Indian Land & Lancaster County history. Also the cemetery on the E. Elevation will likely prohibit additional encroachment.

All things considered, it is entirely likely we might have to cancel our plans for the completion of the Facility that the Congregation & Community was promised in 2015 and provided funding for. In my humble opinion, I guess t could be said that because of the recent Lancaster County Zoning change "Faith Presbyterian Church is being denied opportunity to fulfill its Religious & Community Mission Practices".

We therefore, request that Grandfathering Faith Presbyterian Church to 2015 Side Setback requirement that was in effect when the first half of the building was constructed be extended. Once again, ***"The Granting of this request would not be of substantial Detriment to the surrounding properties or to the Public Good."***

If Grandfathering cannot be provided by you. Please provide us with the contact information of the persons or agency where we should next turn.

Once again we sincerely thank you for your support in this matter.

Regards,
Dick Bonner
704-953-8644

From: Ashley Davis
To: Jennifer Bryan
Subject: FW: Faith Presbyterian Church
Date: Wednesday, December 6, 2023 2:44:46 PM
Attachments: LCLogo_c716c29e-f766-46c0-a18c-7d20f2fc6ebd.png
LCLogo_c716c29e-f766-46c0-a18c-7d20f2fc6ebd.png
LCLogo_c716c29e-f766-46c0-a18c-7d20f2fc6ebd.png

Lancaster County
South Carolina
www.mylancastersc.org

Ashley Davis, *Deputy Planning Director*
Planning

Lancaster County Government
P.O. Box 1809
Lancaster, SC 29720

P:(803) 285-6005 F: (877) 636-7963
ADavis@lancastersc.net

From: Robert Tacy <rjtacy@gmail.com>
Sent: Tuesday, September 26, 2023 3:16 PM
To: Ashley Davis <ADavis@lancastersc.net>
Cc: Matthew Blaszyk <mblaszyk@lancastersc.net>; Rev David Bender <DMBender33@aol.com>; Dick Bonner <dick.bonner64@gmail.com>
Subject: Re: Faith Presbyterian Church

Ashley,
Thank you so much for the information and clarifications. Most of this is what I expected. It is interesting that Rev. Bender is listed as the registered agent; we had thought it would be the President of the Corporation. I think I will come in person. Is there any particular time that is best ... or that I should avoid?

Also, is this considered my conference with you? Again thank you for your help and hopefully I will meet you on Monday or Tuesday.

Jan Tacy

(my husband is Robert and we share the same email)
803-577-1032

On Tue, Sep 26, 2023 at 2:43 PM Ashley Davis <ADavis@lancastersc.net> wrote:

> Robert,
>
> 1. It is up to you all to determine what you are requesting a variance for as there were a number of outstanding comments. With that said, if the goal is to receive a variance to the side setback, then you would be requesting a variance from the INS Side setback in UDO section 2.4.
> 2. This ordinance went into effect on 11.28.2016; I believe the church was able to fall under the prior setbacks based on UDO Section 1.1.7.C.2 as an application may have been filed but the plans had not yet been approved at the adoption date of this ordinance.
> 3. The application fee is $375 and is payable to Lancaster County. This fee does not fall under the fee waiver in section 7-25 as it is not a building permit or plan review fee; it is a zoning variance fee. This fee goes towards the cost the county incurs when meeting legal noticing requirements established by the state.
> 4. The Property Owners signature should be a legal signatory of "Faith Presbyterian Church USA". It appears based on available state records that a David Michael Bender is listed as the Registered Agent for this Non-Profit.
> 5. You can submit in person (only one copy is needed), or you can submit though the Evolve Portal found at the link below:
>
> https://evolvepublic.infovisionsoftware.com/lancaster/?portal=project
>
> -Ashley
>
> Lancaster County South Carolina
> www.mylancastersc.org
>
> **Ashley Davis,** *Deputy Planning Director*
> Planning
>
> Lancaster County Government
> P.O. Box 1809
> Lancaster, SC 29720
>
> P:(803) 285-6005 F: (877) 636-7963
> ADavis@lancastersc.net
>
>

From: Robert Tacy <rjtacy@gmail.com>
Sent: Tuesday, September 26, 2023 1:44 PM
To: Ashley Davis <ADavis@lancastersc.net>; Matthew Blaszyk <mblaszyk@lancastersc.net>
Cc: Rev David Bender <DMBender33@aol.com>; Dick Bonner <dick.bonner64@gmail.com>
Subject: Re: Faith Presbyterian Church

Ashley and Matthew,
One more question. Regarding the fee of $375, would that be covered by:

Sec. 7-25. - Schedule of permit fees.
(9)*Religious institutions.* The first thirty thousand dollars ($30,000.00) in combined building permit fees and plan review fees shall be waived for work on a sanctuary, church educational facility (except pre-school, K—12 school, or post-secondary school facilities), and family life center facility of a religious institution. Other facilities of a religious institution, including, but not limited to, a manse, parsonage, or a denominational administrative facility, shall have standard fees assessed. Proof of designation as a religious institution shall be by submission of the appropriate Internal Revenue Service documentation.

Thanks. Hope to get together soon.

Jan Tacy

On Mon, Sep 25, 2023 at 7:44 AM Robert Tacy <rjtacy@gmail.com> wrote:

> Good morning Ashley and Matthew,
>
> This is Jan Tacy and I will be preparing Faith's Variance Application and presenting Faith's appeal to the BZA. I see from the BZA website that applicants must confer with you, Ashley, prior to submission. Therefore, I would like to meet with you or speak on the phone as soon as possible.
>
> We want to have our appeal heard at the November 14, 2023 BZA meeting, which means I need to make our submission by October 3, 2023. Please let me know when we can get together. I apologize for the short timeframe but I have been out of town for the last two weeks on a trip that had been preplanned. I am meeting with Rev. David Bender and Dick Bonner today at 10:30 am, but am otherwise available all week.
>
> I do have questions:
> 1. Confirm we are appealing Section 2.4 District Development Standards of the current UDO

adopted 11.28.2016, which sets the setback requirement of 35 ft for side, rear, and street side in properties zoned Institutional District (INS). Is 11.28.2016 when the 35 ft setback went into effect?
2. Clarify when Faith was rezoned to INS and how we would have been notified.
3. Confirm the application fee is $375.00 and is payable to who?
4. The first page of the Variance Application which requests property information asks for the property owner of record. The property is owned by Faith Presbyterian Church USA. Who signs for the church? The Pastor? Also, is this page "Form 1"?
5. Do I submit the application in person and, if so, do I need an appointment? How many copies? Will I receive a case # after submission?

Looking forward to meeting or talking with you in the near future. Thank you for your help and insight throughout this process.

Sincerely,
Jan Tacy
803-577-1032

ATTACHMENT 5:

Zoning Variance Criteria

ZONING VARIANCE CRITERIA

i. THAT THERE ARE PRACTICAL DIFFICULTIES OR UNNECESSARY HARDSHIPS IN THE WAY OF CARRYING OUT THE STRICT LETTER OF THIS ORDINANCE;

ii. THAT IF THE APPLICANT COMPLIES WITH THE PROVISIONS OF THE ORDINANCE, THE PROPERTY OWNER SEEKING THE VARIANCE CAN SECURE NO REASONABLE RETURN FROM, OR MAKE NO REASONABLE USE OF HIS PROPERTY;

iii. THAT SPECIAL CONDITIONS AND CIRCUMSTANCES EXIST WHICH ARE PECULIAR TO THE LAND, STRUCTURE OR BUILDING INVOLVED AND WHICH ARE NOT APPLICABLE TO OTHER LANDS, STRUCTURES OR BUILDINGS LOCATED IN THE SAME LAND DEVELOPMENT DISTRICT;

iv. THAT THE VARIANCE WILL NOT MATERIALLY DIMINISH OR IMPAIR ESTABLISHED PROPERTY VALUES WITHIN THE SURROUNDING AREA;

v. THAT THE SPECIAL CONDITIONS AND CIRCUMSTANCES REFERENCED IN III, ABOVE, RESULT FROM THE APPLICATION OF THIS ORDINANCE AND NOT FROM THE ACTIONS OF THE APPLICANT;

vi. THAT THE VARIANCE IS IN HARMONY WITH THE GENERAL PURPOSE AND INTENT OF THIS ORDINANCE AND PRESERVES ITS SPIRIT;

vii. THAT THE VARIANCE IS THE MINIMUM NECESSARY TO AFFORD RELIEF; AND

viii. THAT THE PUBLIC HEALTH, SAFETY AND GENERAL WELFARE HAVE BEEN ASSURED AND SUBSTANTIAL JUSTICE HAS BEEN DONE