# WE CAN'T REGULATE THAT?

## LIMITATIONS ON MUNICIPAL LAND USE REGULATION IN TEXAS

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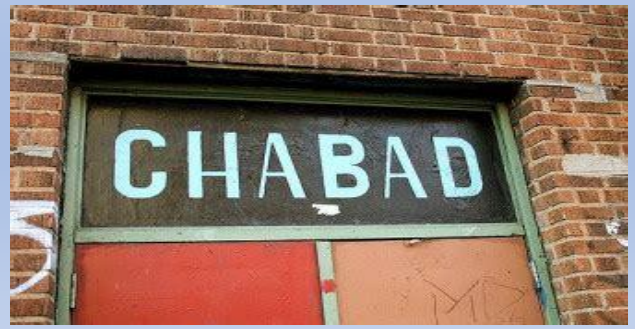
# Religious Land Uses

# Religious Land Uses Under RLUIPA

- Religious Land Use and Institutionalized Persons Act (RLUIPA) adopted by Congress in 2000
- In brief, in order to secure the rights of individuals to pursue and practice their religious beliefs, RLUIPA provides religious institutions protection from discrimination by local governments in land use regulations and the processing of applications for the construction of buildings to be used for religious purposes
- RLUIPA permits private individuals to challenge substantial burdens on religious exercise

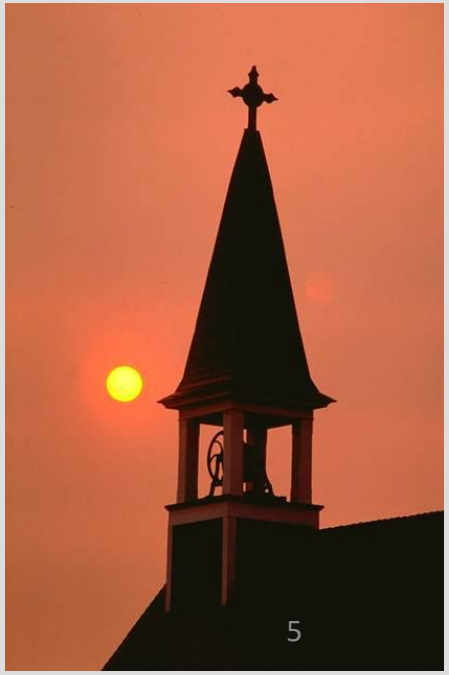
# What is “Religious Exercise” Under RLUIPA?

- Religious exercise is “any exercise of religion whether or not compelled by, or central to, a system of religious belief” and the “use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose”
- Includes construction, expansion or remodeling of a place of worship and use of a private home or business property for worship, prayer meetings or other religious activities
- Includes activities like soup kitchens, group homes or homeless shelters
- Not every activity of a church falls under RLUIPA’s protections (open to non-members, payment of fees to use, etc.)



# What would constitute a substantial burden on religious exercise?

- **Nowhere** to locate in a jurisdiction
- **Inability** to use property for religious purposes
- Imposing excessive and unjustified **delay**, **uncertainty or expense**
- **Religious animus** expressed by municipal officials



# What does NOT constitute a substantial burden on religious exercise?

- **Timely denial** that leaves other sites available
- Denial that has a **minimal impact** on the religious assembly
- Denial where there is **no reasonable expectation** of an approval
- **Personal preference, cost, or inconvenience**

# How to apply local land use regulations to religious land uses

- Use objective standards that apply equally to both secular and religious uses. If regulations differentiate between secular and religious uses, there must be a strong policy justification for excluding religious uses, such as creating a vibrant commercial core or preserving land for industrial use
- It will be difficult to provide such justification if comparable uses, such as private clubs and fraternal organizations, are allowed, but religious uses are prohibited
- Same density standards, bulk, area and dimensional requirements, off-street parking requirements, buffer requirements and similar regulations should apply to all religious and comparable institutional uses

# How to apply local land use regulations to religious land uses

- Approval requirements for religious uses should not be more onerous than the approval requirements for secular uses—if so, the land use requirement may be subject to an RLUIPA challenge

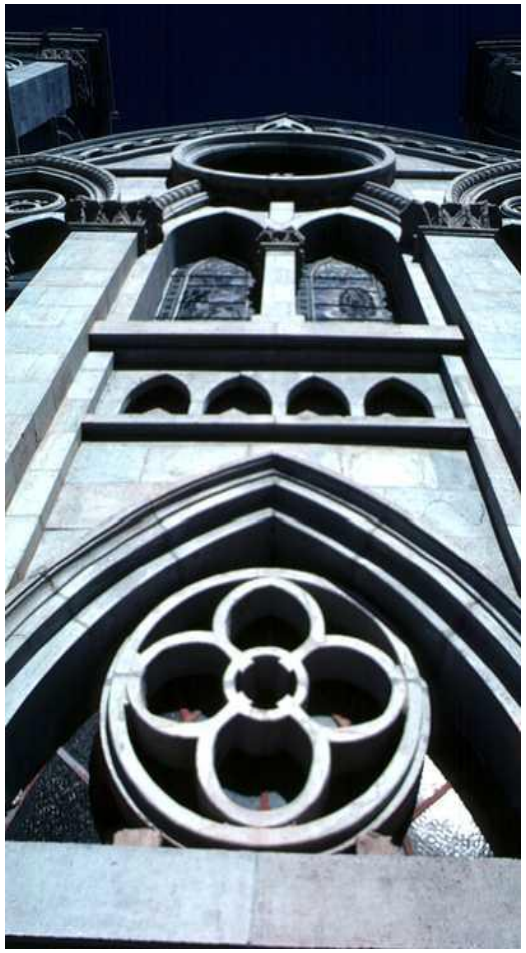
- Local governments should not assume that the usual presumption of validity for land use regulations will be applied. All decisions should be soundly supported by testimony and evidence, including recommendations from professional staff and the planning and zoning commission. Be wary of disregarding those recommendations

# How to apply local land use regulations to religious land uses

- There should be reasonable alternatives available for religious expression and there should be documentation of the availability of alternative sites
- Local governments should refrain from utilizing specific or conditional use permits for religious uses
- With the SUP or CUP requirement, there exists the perceived authority to otherwise deny the religious use—and the denial may lead to litigation

# How to apply local land use regulations to religious land uses

- At public hearings during the zoning process, the mayor, councilmembers and planning and zoning commissioners should inform the public that the focus of the public hearing is to evaluate the proposed land use and its impacts, and at no time are expressions of religious favoritism or religious intolerance permissible



# Cell Tower Regulation by Local Governments

# Telecommunications Act of 1996

The Act imposes **5 limitations** on local authorities when dealing with cell towers and telecommunications carriers. A local government:

- **shall not prohibit** or have the effect of prohibiting the provision of service
- **may not unreasonably discriminate** between providers of functionally equivalent services
- must act within a **reasonable time** after a request is filed
- must issue a **written opinion** explaining its decision to deny a request, which decision must be supported by substantial evidence
- denial of a request is subject to **judicial review**

# What constitutes “substantial evidence”?

- Opinions of real estate professionals detailing how real estate prices may be impacted by the location of the cell towers
- Opinions of the affected residents how the cell towers will impact them and property values
- The petition of the residents opposed to the cell towers should be introduced in support of the opposition
- Sufficient photographic evidence of the unattractiveness of the proposed towers and the towers’ visual height impact (where, in this case, the cell tower stood well above the tree line in a wooded residential neighborhood)
- Again, a blanket aesthetic objection does not constitute substantial evidence, but aesthetic objections coupled with evidence of an adverse impact on property values or safety concerns can constitute “substantial evidence” and safety impacts on a neighboring school constituted substantial evidence
- It also is relevant whether a company can reasonably place a cell site in an alternative location and eliminate the residents’ concerns

# Cell Tower Siting Denials Must Be Written

**In 2015, the United States Supreme Court in *T-Mobile South v. City of Roswell, Georgia*, held that**

**(1) local governments must "provide reasons when they deny applications" to build cell phone towers, but "these reasons need not be elaborate or even sophisticated, but rather . . . simply clear enough to enable judicial review"**

**(2) while the reasons supporting such a denial must be in writing, but nothing in the text of the Telecommunications Act of 1996 "imposes any requirement that the reasons must be given in any particular form"**

**(3) a local government "must provide or make available its written reasons [denying a cell tower application] at essentially the same time as it communicates its denial"**

# Prompt Action on Cell Tower Applications

- FCC has generally interpreted this provision to allow local governments **90 days** to act on applications to place new antennas on existing towers and **150 days** to act on other siting applications
- 2 timing components that must be taken into account by a local government: (1) **act promptly** upon an application for a cell tower; and (2) if denying the application, the written decision denying the application should be "**essentially contemporaneous**" with the city council meeting at which the action was taken
- FCC "shot clock" regulations (that is, the amount of time a local government is authorized to review an application) **do not apply when a local government is acting in a proprietary capacity**—when a city is leasing its property for a cell tower and a collocation request on that property is made, for example

# Group/Community Homes

# Applicable State and Federal Laws

- In 1988 the federal Fair Housing Act was amended to **extend fair housing protections to the handicapped**
- It is **unlawful to discriminate** or to otherwise make unavailable or deny a dwelling to any buyer or renter **because of a handicap** of that individual, someone associated with that individual, or of a resident or potential resident
- Applies to **state or local land use**, regulations, practices or decisions which discriminate against individuals with handicaps
- Congress found that local governments have sometimes restricted the ability of individuals with handicaps to live in communities through health, safety or land-use requirements on congregate living arrangements among non-related persons with disabilities
- Reference point in state law is **Chapter 123 of the Texas Human Resources Code**, entitled “Community Homes for Persons with Disabilities”
- The statute is short—it **prohibits zoning restrictions against community homes**, provides basic definitions, and addresses limitations on community homes

# Local Government Considerations

- Community homes are allowed in **every residential zoning** district, but all group homes are not community homes
- **Carefully define** in a zoning ordinance any distinctions between the various types of group homes
- Community homes should **never be treated as commercial enterprises** subject to traditional commercial zoning standards, such as parking requirements, landscaping, setbacks between adjacent residential and commercial uses
- **Do not require specific/special/conditional use permits** for community homes, as defined by Chapter 123 of the Texas Human Resources Code
- If a group home is operated by a religious institution, **consider the interplay between RLUIPA, state law and the local zoning ordinance**

# Municipal Regulation of Alcoholic Beverage Establishments

# Texas Alcoholic Beverage Code

- Before 1977 courts uniformly held that cities could impose more stringent regulations than imposed by state law
- In 1977 the Texas Liquor Control Act codified into the Texas Alcoholic Beverage Code
- Section 109.57 added in 1987 and severely restricts municipal control over alcohol beverage establishments

# Practical Effects of Section 109.57

- Cities **may not impose stricter standards** on alcoholic beverage establishments than are imposed on similar premises or businesses not licensed or permitted by the TABC
- There can be **no discrimination against a business** holding a TABC license or permit
- A city **may prohibit the sale of alcohol in residential zones**, but not in non-residential zones
- A city may not prohibit the sale of alcohol in one residential zone but allow it in another residential zone

# Municipal Regulation of Oil and Gas Operations

# In November 2014, Denton Banned Fracking: GAME ON!

# Post-Election Issues

- **2 lawsuits filed against Denton the day after the election**
  - **Texas Oil & Gas Association**
  - **Texas General Land Office**
- **Both alleged that a municipal ban on hydraulic fracturing is preempted by Texas law**

# House Bill 40
# 2015 Legislature

- Filed March 10, 2015, with 49 sponsors
- Preempts municipal authority to regulate an "oil and gas operation"
- A city would not be able to "enforce an ordinance or amended ordinance that bans, limits, or otherwise regulates an oil and gas operation"
- Cities retain authority to enforce ordinances that regulate (i) only surface activity that is incident to an oil and gas operation, including fire and emergency response, traffic, lights or noise, imposing notice or reasonable setback requirements (ii) is commercially reasonable, (iii) does not effectively prohibit an oil and gas operation, and (iv) is not otherwise preempted by state or federal law.

# Legislature Throws Cities a Worthless Bone

- **Added a new Section 81.0523(d) of the Texas Natural Resources Code:**

  **(d) An ordinance or other measure is considered prima facie to be commercially reasonable if the ordinance or other measure has been in effect for at least five years and has allowed the oil and gas operations at issue to continue during that period.**

- **Touted as a "safe harbor" by the industry for regulations already on the books, it is nothing more than a rebuttable presumption. An irrebuttable presumption would have been a safe harbor, but that was not offered.**


# Municipal Regulation of Pawn Shops

# Public Perceptions of Pawn Shops

- **Pawn shops may increase crime in a neighborhood**
- **May negatively impact nearby home values**
- **Belief that stolen goods are often traded, thus bringing in unwelcome elements to a neighborhood**
- **A concentration of pawn shops in a neighborhood viewed as particularly negative by residents**

# Texas Listens to the Pawnbrokers:

- The National Pawnbrokers Association estimated that in 2012, there were more than **10,000 pawn shops in the United States**
- Pawnbrokers clearly have had the ear of Texas legislators in the past. In 1991 the Legislature approved House Bill 1258, now codified in Section 211.0035 of the Texas Local Government Code, which addresses the authority of municipalities to zone pawnshops:
  - A city council **shall designate pawnshops** that have been licensed to transact business by the Consumer Credit Commissioner under Chapter 371, Finance Code, **as a permitted use in one or more zoning classifications**.
  - A city council **may not impose a specific use permit requirement or any requirement similar in effect to a specific use permit requirement** on a pawnshop that has been licensed to transact business by the Consumer Credit Commissioner under Chapter 371, Finance Code.
- Consequently, Texas municipalities **may not "zone out"** pawnshops from the city, may not impose any type of specific use permit or similar permit requirement on pawnshops, and must allow pawn shops as a permitted use in at least one zoning district in the city

# Sport Shooting Ranges

# Chapter 229 of the LGC limits municipal authority to regulate firearms

- A municipality **may not adopt regulations relating to the discharge** of a firearm or air gun at a sport shooting range
- Chapter 229 does not eliminate the authority of a city to **regulate the use of property** under a municipal zoning ordinance
- Consequently, a city **may prohibit** a "sport shooting range" as a permitted use in its corporate limits

# Propane Gas Cylinder Exchange Racks

# Propane Gas Cylinder Exchange Racks

- In Attorney General Opinion KP-0086 (2016), Texas Attorney General Ken Paxton wrote that "Section 113.054 [of the Texas Natural Resources Code] plainly states that the [Texas Railroad] Commission's rules and standards preempt and supersede *any* ordinance, order, or rule adopted by a political subdivision . . . relating to *any* aspect or phase of the liquefied petroleum gas industry." Thus, according to the Attorney General, "the existence of an unapproved local LPG provision would generally be in conflict with the statute's mandate that local-level regulation is preempted and superseded by the [Texas Railroad] Commission's regulation"

# Propane Gas Cylinder Exchange Racks

- According to Rule § 9.1(a)(2) of the Texas Administrative Code, Texas Railroad Commission **regulations apply to propane gas cylinder exchange racks**. Does that provision unequivocally preempt all local regulation as a consequence?
- In one city in North Texas, industry representatives claim that **any municipal regulations** about propane gas cylinder exchange racks at a convenience store **are specifically preempted** by Section 113.054 of the Texas Natural Resources Code and the Texas Attorney General's analysis of the preemptive effect of that section
- The preemptive effect of Section 113.054 may be addressed in **pending litigation involving the City of Houston** and the Texas Propane Gas Association

# Confederate Monuments and Statues in Texas: A 2019 Update

**House Bill 583** (died in committee) would have:

- **prohibited a monument or memorial that is located on municipal or county property for at least 40 years from being removed, relocated or altered.**
- **authorized a monument or memorial that is located on municipal or county property for at least 20 years but less than 40 years to be removed, relocated or altered, including alteration to maintain historical accuracy, only by approval of a majority of the voters of the municipality or county, as applicable, voting at an election held for that purpose.**
- **provided that an intentional violation would subject an entity to a civil penalty in an amount of not less than $1,000 and not more than $1,500 for the first violation and not less than $25,000 and not more than $25,500 for each subsequent violation. Each day was a separate violation.**

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