

HOW CONGRESS UNDERMINED THE AMERICAN DREAM: The Effect of the Religious Land Use and Institutionalized Persons Act on Residential Neighborhoods

By **MARCI HAMILTON**

Thursday, Apr. 24, 2003

In 1974, in its decision in *Belle Terre v. Boraas*, the United States Supreme Court lyrically described the kind of neighborhood that, for many, represents the American Dream:

A quiet place where yards are wide, people few, and motorcycles restricted are legitimate guidelines in a land-use project addressed to family needs....The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Tragically - and apparently unwittingly - Congress attacked this bucolic American Dream when it enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA). The Act raises high hurdles that those residential homeowners who seek to achieve these values must now overcome.

The Act is unconstitutional, but regardless of what the courts do, Congress should consider drastic amendment and even repeal.

Why Congress Acted Against the Interest of Millions of Homeowners

How could Congress have passed legislation that so dramatically harmed the interests of so many of its constituents? There are two main explanations.

First, Congress did not bother to familiarize itself with the constitutional rules surrounding land use. There is no evidence in the legislative history that any member (or staffer) grasped that land use law that has been the domain of the states and local governments since the Framing. They simply did not understand that this attempt to federalize local land use law was a revolution in the making. Nor is there any evidence of even a modicum of knowledge of the purposes and principles underlying zoning and planning, or how such legal rules aid and protect private property owners.

Second, the record on RLUIPA was unbalanced, and thus distorted. The only groups permitted to testify regarding the bill were religious groups, and less than a handful of constitutional scholars, including myself. The very group most affected by the bill - residential homeowners - was conspicuously absent.

Also excluded were the affected cities, townships, states or their organizations, such as the National League of Cities - despite their frequent entreaties to have an opportunity to testify.

They were not even allowed to explain the basics of land use law, or to counter some of the religious organizations' most outlandish claims.

The religious groups testified that zoning laws burdened them. How? The groups made isolated references to alleged religious discrimination in the land use process - discrimination that, even if proven, would not have established a pattern of such conduct (that is, the pattern required to justify congressional intervention in local and state law). Otherwise, they simply complained about their obligation to abide by the same generally applicable, neutral zoning laws that every landowner must obey.

The proper answer to these complaints should have been: Too bad; the law applies to you just the same as it does to others. But that was not Congress's response.

On the contrary, the members of Congress, like so many politicians, did not question what the religious groups told them.

In the end, in July 2000, the Act passed both houses by "unanimous consent" -a voice vote with no requirement that any member be in attendance. (As a result, we will never know what any particular member thought of the Act.)

Clearly, Congress reasoned, quite naively, as follows: What harm could possibly arise from giving religious landowners such a privilege? As subsequent events have shown, the answer is: Plenty.

The Impact of RLUIPA in Residential Neighborhoods

Currently, homeowners trying to retain the residential character of their neighborhoods are finding RLUIPA an enemy to their dreams. Across the country, cases where religious landowners are seeking to get around residential zoning requirements abound. RLUIPA is the classic siren song, capable of persuading any religious landowner that they need not be good neighbors and that they have "rights" to choose location, size, and use at whim. That siren song has gone platinum as groups like the Becket Fund have funded federal litigation, making the religious landowners' decision to ignore the pleas of their neighbors in favor of federal court easier than ever. (Of course, Congress is largely to blame for such shenanigans because of its ill-advised decision to provide attorneys' fees for lawyers taking on RLUIPA claims.)

In one case, a church seeks to add a fourth story in a residential neighborhood zoned for two stories. In another, a private homeowner asserts the right to hold lengthy prayer meetings that exceed occupancy requirements every weekend. In a third, the church seeks a "small" addition of 30,000 square feet.

In a fourth, a synagogue seeks to convert a piece of property previously used to house a quiet convent, and then a monastery, into a lively complex offering services, education, and a catering hall for hundreds of families. In a fifth case, a quickly constructed 8000 square foot shul is overshadowing its 3000 square foot residential neighbors.

Every one of these projects changes the residential quality of the neighborhood in which it is planned. That is because every one is inconsistent with the character of the neighborhood, and involves a dramatic increase in the intensity of the use of the property, far above normal residential usage. Traffic (both pedestrian and automobile), lighting, setbacks, height, bulk, noise, and parking are all elements that contribute to the degradation of residential character; each project would alter at least one, and often several, of these elements.

Why Neighbors and State and Local Officials Are Correct to Be Aggrieved

The religious organizations' neighbors are fighting mad, and they should be. They were never asked whether they should have fewer property rights than their religious neighbors. Their interests apparently were never considered by Congress. And the people they normally hold accountable for zoning issues--mayors, city councils, and zoning boards--were kept out of the loop as well.

When they bought their dream home, in all likelihood they did not understand that a religious landowner could enter the neighborhood and alter its character with impunity. They probably reasonably assumed that zoning laws applied equally to every landowner - as indeed they should.

Aggravating the situation is the fact that, too often, the clergy member who leads the building project is heard to say that his congregation's religious mission is more important than the petty interests of its residential neighbors in securing a residential neighborhood. This is what happens when the federal government gets into the business of parceling out special privileges for religious entities.

Meanwhile, zoning and city officials should be fighting mad as well. Their proper role as land use lawmakers has been usurped by Washington. RLUIPA directly regulates - by nullifying - state and local land use law.

Its defenders say it is a commerce measure because it regulates land use. The truth is, however, that it attacks land use law, which is the proper province of cities and towns and states - not of the federal government. There is not a more direct attack on state sovereignty on the books.

Even If and When the Supreme Court Invalidates RLUIPA, Homeowners Need to Be Vigilant

RLUIPA is the second most aggressive attempt by Congress to take over traditional state functions. The first was the Religious Freedom Restoration Act (RFRA), a law that regulated every state and local law to the benefit of religious entities. Ultimately, its constitutionality went to the Supreme Court, where I represented the City of Boerne. In its decision in [*Boerne v. Flores*](#), the Court held that RFRA violated the principles of federalism and the separation of powers.

RLUIPA will also make its way to the Supreme Court, where it should be struck down on federalism and separation of church and state grounds, among others. In passing it, Congress far exceeded its power to regulate interstate commerce, and intruded far into the domain of localities.

If RLUIPA were upheld, which is doubtful, it would open a Pandora's box of further inroads into state and local autonomy. Secular real estate developers, too, will start to seek special preferences from the federal government, seeing a new opportunity for more efficient lobbying that can result in centralized regulation. Developers who lost on the local level will get an extra bite at the apple on the federal level - to the detriment of the localities whose residents best know their own neighborhoods, and can best plan how they should be used.

Unfortunately, RLUIPA should not be homeowners' only concern on this score. The religious groups that obtained RLUIPA in Congress are lobbying the states for similar favors. Two tacks are apparent. The first is to push a state Religious Freedom Restoration Act, which would affect land use laws as well. A dozen states have done so, and the pressure has not abated in other states. The second appeared in a recently proposed bill in Texas that would have permitted enforcement by zoning authorities of "only the least restrictive site development regulations applying to the least restrictive zoning district" against religious landowners.

How can homeowners fight back? Sadly, their own zoning, city, and state officials may not be of much help. For fear that they will anger the religious groups from whom they seek to curry future votes (just like Congress), they often cave to RLUIPA claims.

This political reality makes it abundantly clear that--contrary to the claims of RLUIPA's supporters--religious landowners are not likely to be discriminated against in the land use process, and the paucity of religious discrimination land use cases reinforces this political fact. With RLUIPA, the special treatment they normally receive is enhanced tenfold.

Thus, residential homeowners get slapped in the face twice: first by Congress and second by their local officials.

That means residential homeowners must act on their own behalf. Indeed, some are already doing so, bringing their own lawsuits against cities and religious landowners. Others are mobilizing politically. Others just want the phone numbers of their members in Congress and state officials.

Whatever approach homeowners take, they are likely to be aggressive in pursuing it. After all, their homes are their castles, and the unfairness of allowing religious groups to ignore zoning laws is plain. The federal government has floated the argument that RLUIPA is constitutional because it enforces constitutional guarantees, but the First Amendment has never guaranteed that religious landowners are to be treated better than their neighboring landowners. To the contrary, land use laws--even when they are applied to religious entities--have been subjected to rationality review under the Constitution, not the strict scrutiny mandated by RLUIPA.

Congress thus may well have awakened a sleeping giant. If it is lucky, the Supreme Court will relieve it of the burden of having to explain why it was so willing to devalue the American Dream. If not, it will have the hard duty of explaining to millions of residential homeowners why it saw fit to make them second-class citizens in their own neighborhoods.

Marci Hamilton is the Paul R. Verkuil Chair in Public Law, Benjamin N. Cardozo School of Law, Yeshiva University. Professor Hamilton's columns - including [an earlier column on RLUIPA](#) - are available on an archive on www.FindLaw.com. Her email address is hamilton02@aol.com Professor Hamilton represents a number of cities across the country involved in challenging RLUIPA.