

ARTICLE

Struggling As Churches With Neighbors

A response to Marci Hamilton's *January 17, 2002 column* on FindLaw.com

By [Roman P. Storzer](#)

Mr. Storzer represents several churches, temples and other religious institutions, including Congregation Kol Ami and Castle Hills First Baptist Church in their lawsuits mentioned in Prof. Hamilton's column. He also co-authored The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices, 9 Geo. Mason L. Rev. 929 (2001) with Anthony R. Picarello, Jr.

In her column, Professor Hamilton argues that churches and other places of worship should have no constitutionally protected right to engage in religious activity that involves the use of real estate in residential communities:

[T]hese cases of conflict between religious institutions and their neighbors do not, in fact, involve the free exercise of religion. Rather, they are simply garden-variety land use cases where the landowner who claims a special use exemption happens to be religious.

Such an extreme view—that the First Amendment is irrelevant to the ability of churches to locate and worship in the neighborhoods in which people live—has been vigorously asserted by municipal governments across the nation mainly through their lobbying groups like the National League of Cities in an attempt to enforce their vision of the “proper church.” Fortunately, the law does not support this view. The ability of a church to hold a worship service, to operate a religious school, or to run a soup kitchen is not a “garden-variety land use case,” as Professor Hamilton would have it. Instead, this ability represents an integral part of a church’s mission that should be afforded more protection than a gas station or brickyard under the First Amendment.

Professor Hamilton supports her anomalous view with a series of myths about zoning law and religious freedom—myths that her column appears designed to perpetuate. I will address five of these in turn:

Myth #1: “Church Land Use Was Subject to General Zoning Laws”

Professor Hamilton argues that, prior to the passage of RLUIPA, churches had “no special Constitutional protections to invoke.” This statement is patently false. Ever since the Free Exercise Clause of the First Amendment was applied to state and municipal laws (and even earlier, under State constitutions themselves), courts have protected the right of churches to use land for religious practices in any neighborhood. This is a long-standing principle (see box at right), which is based on the virtually uniform holdings of courts “that religious activity itself is in furtherance of public morals and the general welfare.” Arden Rathkopf & Daren Rathkopf, The

More recently, several federal Courts of Appeals have upheld laws that, like RLUIPA, protect churches from certain zoning restrictions in order to “alleviat[e] a burden on the exercise of religion.” *Boyajian v. Gatzunis*, 212 F.3d 1, 9 (1st Cir. 2000). In *Cohen v. City of Des Plaines*, the Seventh Circuit held that an ordinance that accommodates nursery schools operated by religious institutions is constitutional, holding that “it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions.” 8 F.3d 484, 490 (1993). Although Professor Hamilton denies that zoning laws could ever constitute a “burden on religion,” or “significant governmental interference with the ability of religious organizations to define and carry out their religious missions,” courts and legislatures consistently disagree.

Myth #2: “A Federal Statute Tips Land Use Disputes In Religious Institutions' Favor”

Although Professor Hamilton discusses [Congregation Kol Ami v. Abington Township](#)—where she represents the Township—at some length in her column, nowhere in her column does she mention why the Congregation won their case. Notably, the ruling was not based on the Religious Land Use and Institutionalized Persons Act. In fact, the judge ruled in Congregation Kol Ami’s favor because the Township violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution—the Township failed to meet even rational basis scrutiny! The property at issue in Congregation Kol Ami includes a 250-seat chapel that has been in use for nearly 50 years. The Township’s ordinance prohibited houses of worship from even applying for a special exception in any residential district, but allowed such applications for a “train station, bus shelter, municipal administration building, police barrack, library, snack bar, pro shop, club house, [or] country

EXAMPLES OF CONSTITUTIONAL LIMITATIONS ON THE APPLICATION OF ZONING LAWS TO CHURCHES

Connecticut: “Cases from other states have held that it is illegal for a municipality to exclude churches in all zones, from all residential zones, to allow them in the municipality only with a special permit, or have held that there was no compelling reason to deny a special permit.” *Grace Cmty. Church v. Planning & Zoning Comm’n*, 615 A.2d 1092, 1102-1103 (Conn. Super. Ct. 1992).

Hawaii: “The wide majority of courts hold that religious uses may not be excluded from residential districts.” *State v. Maxwell*, 617 P.2d 816, 820 (Haw. 1980).

Illinois: Recognizing the “special rule regarding the construction of churches in areas zoned residential.” *Goffinet v. County of Christian*, 333 N.E.2d 731, 735 (Ill. App. Ct. 1975).

Indiana: “The law is well settled that the building of a church may not be prohibited in a residential district.” *Bd. of Zoning Appeals v. Schulte*, 172 N.E.2d 39, 44 (Ind. 1961).

New York: “[T]he general policy, as applied in this State, is that religious institutions are virtually immune from zoning restrictions.” *Bright Horizon House, Inc. v. Zoning Bd. of Appeals*, 469 N.Y.S.2d 851, 856 (N.Y. Sup. Ct. 1983).

Ohio: “We do not believe it is a proper function of government to interfere in the name of the public to exclude churches from residential districts for the purpose of securing to adjacent landowners the benefits of exclusive residential restrictions.” *State ex rel. Synod of Ohio of United Lutheran Church in Am. v. Joseph*, 39 N.E.2d 515, 524 (Ohio 1942).

Texas: “[A] city cannot legally exclude a church from a residential district by a zoning ordinance” *Congregation Comm. v. City Council*, 287 S.W.2d 700, 704 (Tex. Civ. App. 1956).

Missouri: Recognizing that state law “does not give municipalities power over the use of property used for religious purposes by religious organizations whose rights to free exercise of religion are protected by constitutional guaranties.” *Village Lutheran Church v. City of Ladue*,

club.” The court found this ordinance to unconstitutionally impose an unreasonable restriction on religious uses:

935 S.W.2d 720, 722 (Mo. Ct. App. 1996).

Not only does a house of worship inherently further the public welfare, but defendants’ traffic, noise and light concerns also exist for the uses currently allowed to request a special exception. Indeed, there can be no rational reason to allow [the permitted uses] to request a special exception under the 1996 Ordinance, but not Kol Ami.

Nor does Professor Hamilton mention that Abington Township’s Zoning Hearing Board has since ruled that the Congregation was entitled to a special exception permit. In ruling that it was irrational to permit a train station to apply for a permit, but not a church, the court primarily relied on the Equal Protection analysis of another zoning case, *City of Cleburne v. Cleburne Living Ctr., Inc.*—not RLUIPA. This decision provides an important example of the principle described above: that churches should not be discriminated against in the application of zoning laws. Although RLUIPA contains an equivalent provision prohibiting any “land use regulation . . . that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution,” that is simply a restatement of existing constitutional law.

Myth #3: “Under traditional free exercise clause analysis, generally applicable laws such as zoning laws are subject to very low-level review even when they affect religious institutions.”

Although characterizing it as “traditional,” Professor Hamilton was referring to the Free Exercise analysis established in the Supreme Court’s revolutionary 1990 decision of *Employment Division v. Smith*, which involved the criminal use of the drug peyote. However, even under that decision, such “low-level” scrutiny only applies to laws that are “neutral” and “generally applicable.” The Court in *Smith* reaffirmed that strict scrutiny remains the applicable standard for reviewing laws that involved “individualized governmental assessments” of the relevant conduct at issue.

It is difficult to imagine a context that is more concerned with individualized governmental assessments than the granting or denying of conditional use permits, special use permits, or variances. By their very nature, such actions are fact-specific, discretionary, and detailed examinations of the particular circumstances of a zoning application—completely unlike the across-the-board prohibition at issue in *Smith*. (The explanation for why strict scrutiny is the appropriate standard of review for zoning restrictions that burden religious exercise is presented in greater detail in *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 *George Mason Law Review* 929 (2001).) It is, again, important to note that RLUIPA’s “Substantial Burdens” section does little more than codify the strict scrutiny review that already applies under the Free Exercise Clause in situations involving “individualized assessments.”

Myth #4: “Claiming Religious Discrimination Where There Is None”

Professor Hamilton asserts that these conflicts “have nothing to do with religion”

and that lawyers wrongly “have taken to charging ‘discrimination’ anytime a neighbor objects.” While it is true that, in some cases, neighbors and municipalities are genuinely concerned with issues such as traffic and noise, in many others they are driven by hostility to that particular faith or religion generally. In my experience

representing a number of religious institutions, this hostility is most often aimed at religious groups that fall outside the American mainstream, either because they are minority or unfamiliar faiths or because they engage in nontraditional activities such as operating a radio station or storefront ministry. In our [Castle Hills First Baptist Church case](#) (referred to by Professor Hamilton), there is much evidence that the community's hostility was aimed at what its officials malign as "megachurches." This hostility is all the more inappropriate and offensive when it is the residential neighbors who have moved near Castle Hills First Baptist—the Church was the first structure built in the area, which had previously been farmland—thus "coming to the (alleged) nuisance."

It is encouraging that Professor Hamilton now acknowledges that there are at least a "few cases" of religious discrimination, whereas previously she had stated that "there is little, if any, proof that churches have been the target of discrimination by local zoning boards." [Letter](#) from Marci A. Hamilton, Thomas H. Lee Chair of Public Law, Benjamin N. Cardozo School of Law, Yeshiva University, to United States Senate (July 24, 2000).

Furthermore, discrimination among religions is only one category of prohibited government zoning actions. Government may not substantially burden religious exercise—regardless of discrimination—unless it has a compelling interest to do so. And government cannot treat religious assemblies worse than nonreligious assemblies. In representing [Haven Shores Community Church](#) in its suit against the City of Grand Haven, Michigan, I discovered that churches were not permitted in that city's "Community Business District," while myriad other uses were, including "private clubs," "fraternal organizations," "lodge halls," "funeral homes," "theaters," and "assembly halls, concert halls or similar places of public assembly." The city determined that a place of worship was not a "similar place of public assembly." It is both irrational and unconstitutional to determine that churches should not be treated equally with these other assembly uses. (The City ultimately settled the case with the Church after it brought suit, permitting it to locate in that district.)

Myth #5: "[N]o jurisdiction is likely to try" to "zone out religious uses."

Again, contrary to Professor Hamilton's belief, not only are jurisdictions likely to "try" to zone out religious uses, at least one already has. I represented the [Unitarian Universalist Church of Akron, Ohio](#) in its lawsuit against the City of Fairlawn, Ohio. There, the City prohibited places of worship in all of its zoning districts except one (the "M-3" district), and had established only one M-3 district, which was gerrymandered around a single church. On top of that, the City refused to create any more M-3 districts. By refusing to rezone the Unitarian Universalist Church's property as M-3, the City prevented the Church from building a needed Fellowship Hall. Other than churches grandfathered in before Fairlawn's 1993 Zoning Ordinance, no other church could locate within its borders. Perhaps Professor Hamilton and the National League of Cities find that to be within "the latitude to zone real property in the best interest of all," but fortunately both the U.S. Constitution and RLUIPA prohibit it. (Fairlawn has since settled the case after The Becket Fund's entrance, allowing the Fellowship Hall to be built.)