Chapter 7

The Preemption of Local Land Use Laws by State and Federal Laws: Total Preemption, Partial Preemption and Laws That Are Not Preemptive

7-100 Introduction

At the federal level, preemption derives from the constitutional principle that the federal law is the supreme law of the land and trumps any laws of a state or locality that are inconsistent with a federal law. *United States Constitution, Article VI.* At the state level, a state law preempts any laws of a locality that are inconsistent with the state law. *Virginia Code § 1-13:17*; *West Lewinsville Heights Citizens Association v. Board of Supervisors of Fairfax County*, 270 Va. 259 (2005) (by-laws adopted by a board of supervisors must be consistent with the ordinances of the locality and the general laws of the Commonwealth). Ordinances are inconsistent with state law when they cannot coexist with a statute. *West Lewinsville Heights, supra.*

Federal preemption may occur in one of three ways: (1) the federal law expressly preempts state or local laws; (2) the federal law impliedly preempts a state or local law by occupying an entire field of regulation, so that no room is left for state regulation; or (3) state law is preempted to the extent it actually conflicts with federal law because compliance with both state and federal law is impossible, or when a state law stands as an impediment to a federal purpose. *Rum Creek Coal Sales, Inc. v. Caperton*, 971 F.2d 1148 (4th Cir. 1992).

Preemption analysis under Virginia law is slightly different. When the state enacts certain regulations in the exercise of its police power, a locality may, if it acts within its delegated powers, legislate on the same subject unless the General Assembly has expressly preempted the field. *Ticonderoga Farms, Inc. v. County of Loudoun*, 242 Va. 170 (1991); *King v. County of Arlington*, 195 Va. 1084 (1954). Thus, in determining whether a local law has been preempted by state law, Virginia courts consider whether: (1) the statute and ordinance address the same subject matter; (2) the potentially competing provisions can be harmonized; and (3) there is an express preemption clause. *See, e.g., Klingbeil Management Group Co. v. Vito*, 233 Va. 445 (1987). The fact that an ordinance enlarges on a statute's provisions does not create a conflict with the statute unless the statute limits the requirements for all cases to its own terms. *West Lewinsville Heights, supra.*

Every local land use zoning regulation must be analyzed to be certain that the regulation is not preempted by state or federal law. Following is a list of some common subjects the courts have determined to be either preempted or not.

7-200 Alcoholic beverage control

Virginia Code § 4.1-128 prohibits a locality, except in limited circumstances inapplicable to land use matters, from adopting an ordinance or regulation that "regulates or prohibits the manufacture, bottling, possession, sale, distribution, handling, transportation, drinking, use, advertising or dispensing of alcoholic beverages in the Commonwealth." Thus, the Attorney General has opined that a town ordinance banning the sale of alcohol in dance halls was prohibited by Virginia Code § 4.1-128. *1981-82 Va. Op. Atty. Gen. 14*.

However, a condition in a special use permit stating "[n]o alcoholic beverages shall be permitted" is not preempted by the Alcoholic Beverages Control Act, because it is a "valid zoning ordinance . . . regulat[ing] the location of an establishment selling . . . alcoholic beverages," as permitted by the Act. *County of Chesterfield v. Windy Hill, Ltd.*, 263 Va. 197 (2002). Likewise, an ordinance requiring a special use permit for adult uses (such as sellers of alcohol and adult movie theaters) within 1000 feet of one another does not violate Virginia Code § 4.1-128. *City of Norfolk v. Tiny House*, 222 Va. 414 (1981).

7-300 Amateur radio communications

In 1985, the Federal Communications Commission issued a declaratory ruling pertaining to amateur

radio preemption. This rule is known as "PRB-1." The ruling announced a policy of limited, rather than complete, federal preemption of local zoning laws affecting amateur radio communications, and required that:

> [L]ocal regulations which involve placement, screening, or height of antennas based on health, safety, or aesthetic considerations must be crafted to accommodate reasonably amateur communications, and to represent the minimum practicable regulation to accomplish the local authority's legitimate purpose.

PRB-1 does not allow an amateur radio operator to build an antenna at any height he wants. *Williams v. City of Columbia*, 906 F.2d 994 (4th Cir. 1990). Absent a full federal preemption in this area, localities have the power to restrict antennas to heights below that desired by radio licensees, provided that they strive to strike a balance between the federal interest in amateur radio communications and local zoning concerns. *Williams, supra*. However, in 1998, the General Assembly stripped away much of the local zoning authority remaining on this issue when it enacted Virginia Code § 15.2-2293.1, which prohibits localities from restricting the height of amateur radio antennas to less than 200 feet (if the locality's population density is 120 persons or less per square mile, 1990 United States Census) or 75 feet (if the locality's population density is more than 120 persons per square mile, 1990 United States Census).

7-400 Americans with Disabilities Act

Title II of the Americans with Disabilities Act ("ADA") provides:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. *Public entities* include counties, cities and towns. *42 U.S.C. § 12131(A).* Zoning qualifies as a public *program* or *service* and the enforcement of a zoning ordinance constitutes an *activity* of a locality within the meaning of Title II. *A Helping Hand v. Baltimore County*, 515 F.3d 356 (4th Cir. 2008); *see also*, *START, Inc. v. Baltimore County*, 295 F. Supp. 2d 569 (D.Md. 2003) (the administration of zoning laws is a "service, program, or activity" within the meaning of the ADA).

7-410 The ADA protects qualified individuals with a disability

Under the ADA, a person is a *qualified individual with a disability* if he or she has: (1) a mental or physical impairment that substantially limits a major life activity; (2) a record of such an impairment; or (3) is regarded as having such an impairment. *42 U.S.C. § 12102(2)*. The term *mental or physical impairment* may include conditions such as blindness, hearing impairment, mobility impairment, HIV infection, mental retardation, alcoholism, drug addiction, chronic fatigue, learning disability, head injury, and mental illness. The term *major life activity* may include seeing, hearing, walking, breathing, performing manual tasks, caring for one's self, learning, speaking, or working. *Joint Statement of the Department of Justice and the Department of Housing and Urban Development on Group Homes, Local Land Use, and the Fair Housing Act*, dated August 18, 1999. An individual may be *regarded as having an impairment*, regardless of whether or not he in fact has a substantially limiting impairment. *A Helping Hand v. Baltimore County*, 515 F.3d 356 (4th Cir. 2008) (on appeal from trial court granting a Rule 50 motion in favor of the clinic on this issue, holding that clients of methadone clinic could not be regarded as significantly impaired in a major life activity where they were regarded as criminals and undesirables, but were not necessarily regarded as significantly impaired in their ability to work, learn, care for themselves, or interact with others) ; *see, Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294 (4th Cir. 1998).

The term *qualified individual with a disability* does not include persons who pose "a significant risk to the health or safety of others by virtue of the disability that cannot be eliminated by reasonable accommodation." *Doe v. University of Maryland Medical System Corporation*, 50 F.3d 1261 (4th Cir. 1995). It also does not include

current users of illegal controlled substances, persons convicted for illegal manufacture or distribution of a controlled substance, sex offenders, and juvenile offenders. *See, Joint Statement, supra*.

Examples of disabilities from zoning cases in which the ADA may be at issue include drug and alcohol rehabilitation facilities, mental health facilities, and physical disabilities that prohibit the reasonable use of a dwelling. *See section 7-430 for a discussion of the cases considering these disabilities.*

7-420 A locality must reasonably accommodate a qualified individual with a disability in the administration of its zoning regulations

A locality is required to reasonably accommodate disabled persons by modifying its zoning policies, practices and procedures and may not intentionally discriminate against the disabled person. *Dadian v. Village of Wilmette,* 269 F.3d 831 (7th Cir. 2001). 28 C.F.R. § 35.130(b)(7) states:

> A public entity shall make *reasonable modifications* in policies, practices, or procedures when the modifications are *necessary* to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

The United States Department of Justice explains this requirement as follows:

> [Localities] are required to make reasonable modifications to policies, practices, or procedures to prevent discrimination on the basis of disability. Reasonable modifications can include modifications to local laws, ordinances, and regulations that adversely impact people with disabilities. For example, it may be a reasonable modification to grant a variance for zoning requirements and setbacks. In addition, [localities] may consider granting exceptions to the enforcement of certain laws as a form of reasonable modification. For example, a municipal ordinance banning animals from city health clinics may need to be modified to allow a blind individual who uses a service animal to bring the animal to a mental health counseling session.

The ADA and City Governments: Common Problems, U.S. Department of Justice, Civil Rights Division, Disability Rights Section.

Whether a requested accommodation is *reasonable* is highly fact-specific and determined on a case-by-case basis by balancing the cost to the locality and the benefit to the disabled person. *Dadian, supra*. Whether a requested accommodation is necessary requires a showing that the desired accommodation will affirmatively enhance a disabled person's quality of life by ameliorating the effects of the disability. *Dadian, supra*. The focus is on whether the accommodation in the case at hand would be so at odds with the purposes behind the rule that it would be a fundamental and unreasonable change. *Dadian, supra* (allowing front driveway access to elderly landowners' home, one of whom suffered from osteoporosis and had difficulty walking, was not so at odds with village's general prohibition against such driveways and would not cause an unreasonable change to the ordinance because the plaintiffs were not requesting a change to the ordinance itself, but application of the hardship exception in their case). *28 C.F.R. § 35.130(b)(7).*

Reasonable accommodation is not mandated when zoning laws are applied in a non-discriminatory manner. For example, the Department of Justice has explained to a complainant why a city's denial of a rezoning that would have allowed an office use in a predominantly single family neighborhood did not violate the ADA. The complainant was the owner of a consulting firm that employed 5 people, two of whom had disabilities (one recovering from alcoholism; the other having chronic depression) who sought the rezoning to relocate his business in the neighborhood. The letter explains:

> The evidence shows that the City's decision to deny the rezoning application for your property has the same effect on your employees without disabilities as it does on your employees with

disabilities. Further, the evidence shows that the City has an established policy of maintaining the area where your property is located as a predominantly single family area, and that this policy has the same effect on people without disabilities as it does on people with disabilities. The evidence shows that the City's decision to deny your rezoning application was made for reasons that are not discriminatory under the ADA. Therefore, we have determined that no violation of title II occurred.

Letter dated March 14, 1994, Coordination and Review Section of the Civil Rights Division of the United States Department of Justice.

7-430 Examples of typical zoning cases in which the ADA is in issue

Following are some examples of the types of cases that appear to dominate the zoning case law in which the ADA is in issue:

- Drug and alcohol rehabilitation programs: The anti-discrimination provision of the ADA prohibits zoning decisions by a locality that discriminate against drug and alcohol rehabilitation programs, the clients of which are "qualified individuals with a disability." *MX Group, Inc. v. City of Covington*, 293 F.3d 326 (6th Cir. 2002) ("[T]he blanket prohibition of all methadone clinics from the entire city is discriminatory on its face."); *Bay Area Addiction Research and Treatment, Inc. v. City of Antioch*, 179 F.3d 725 (9th Cir. 1999) (holding that the ADA applied to zoning ordinance barring methadone clinics within 500 feet of residential areas); *Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37 (2d Cir. 1997) (holding that the ADA applies to zoning decisions involving drug and alcohol rehabilitation center); *Habit Management, Inc. v. City of Lynn*, 235 F.Supp.2d 28 (D.Mass. 2002) (no showing that the placement of methadone clinics in industrial or business zones poses any significant risk); *A Helping Hand v. Baltimore County*, 515 F.3d 356 (4th Cir. 2008).

- Mental health facilities: The anti-discrimination provision of the ADA applies to mental health facilities. *Pathways Psychological v. Town of Leonardtown*, 133 F.Supp.2d 772 (D.Md. 2001).

- Variance from regulation to allow reasonable use of home: The anti-discrimination provision of the ADA prohibits zoning decisions by a locality that fail to reasonably accommodate persons with a disability to allow them the same housing opportunities without a disability. In *Trovato v. City of Manchester*, 992 F.Supp. 493 (D.N.H. 1997), a mother and daughter who both had muscular dystrophy were denied a variance that would allow them to build a paved parking space in the front of their home. The court found that the denial of the paved parking space adversely affected the plaintiffs' use and enjoyment of their home, and that their request was reasonable. In *Dadian v. Village of Wilmette*, 269 F.3d 831 (7th Cir. 2001), an elderly couple, one of whom suffered from osteoporosis and had difficulty walking, sought a hardship exception from the village's prohibition against front driveway accesses. The court found that in denying the permit, the village failed to provide a reasonable accommodation from its regulations.

- Variance from setback for ramp to provide access to building: If a zoning ordinance requires a certain setback between a business entrance and a curb, but the business must encroach on the setback to ramp its entrance, the zoning authority may be required to issue a variance as a reasonable modification to that ordinance. *See example in Title II Technical Assistance Manual, Part II-3.6100, Illustration 1*. Thus, the zoning procedures must allow for some process whereby requests for exemptions or special permits for such purposes may be considered. Such requests must be granted where reasonable. *Department of Justice*.

This section has provided only a brief overview of the application of the ADA to local zoning regulations. Zoning issues arising under the ADA may also trigger the application of the Fair Housing Act as well, and that Act is discussed in section 7-900.

7-500 <u>Biosolids (sewage sludge)</u>

When considering former Virginia Code § 32.1-164.5, which expressly authorized the land application of biosolids under a permit issued by the State Board of Health, the Virginia Supreme Court held that a zoning regulation banning the land application of biosolids was preempted by the state law and the regulations promulgated by the State Board of Health. *Blanton v. Amelia County*, 261 Va. 55 (2001). In reaching this decision, the Virginia Supreme Court relied on its often-stated rule that "a local government may not 'forbid what the legislature has expressly licensed, authorized, or required.'"

Since *Blanton* was decided, Virginia Code § 32.1-164.5 has been repealed and Virginia Code § 62.1-44.19:3 has been substantially amended to require the State Board of Health, with assistance from the State Department of Health and the Department of Conservation and Recreation, to promulgate regulations regarding the permitting, treatment, land application and analysis of sewage sludge. The Board of Health has other regulatory authority as well.

Virginia localities are enabled to regulate the storage of sewage sludge *(Virginia Code § 62.1-44.19:3(A)(5))*, to provide for the testing and monitoring of the land application of sewage sludge to ensure compliance with applicable laws *(Virginia Code § 62.1-44.19:3(I))*, and, as part of their zoning ordinances, to regulate the storage of sewage sludge, including requiring a special use permit to begin the storage of sewage sludge, even in agricultural zoning districts, except where the sludge is being stored on a farm and the sludge will be applied on the farm within 45 days *(Virginia Code § 62.1-44.19:3(R))*. If the locality tests and monitors the land application of sewage sludge, it also has the authority to abate a violation. *Virginia Code § 62.1-44.19:3.2.*

7-600 <u>Building Code</u>

The Virginia Supreme Court has stated that "when the General Assembly intends to preempt a field, it knows how to express its intention." *Resource Conservation Management, Inc. v. Board of Supervisors of Prince William County*, 238 Va. 15 (1989). A good example of an express preemption is found in Virginia Code § 36-98, which provides in part that the Uniform Statewide Building Code "shall supersede the building codes and regulations of [localities]." However, regulations in a locality's zoning ordinance or other land use controls that do not affect the manner of construction or materials to be used in the erection, alteration or repair of a building or structure, are not preempted. *Virginia Code § 36-97 (definition of building regulations).*

Virginia Code § 36-98 provides that the building code will supersede local regulations applicable to single family residential construction that: (1) regulates dwelling foundations or crawl spaces; (2) requires using specific building materials or finishes in construction; or (3) requires minimum surface area or numbers of windows. However, Virginia Code § 36-98 also expressly provides that the building code does not preempt proffers, special use permit conditions, variance conditions, standards, conditions and criteria established for clusters of single family dwellings, or land use requirements in airport or highway overlay districts, or historic districts created under Virginia Code § 15.2-2306.

7-700 <u>Chesapeake Bay Preservation Act; methodology for identifying perennial streams</u>

Regulations implementing the Chesapeake Bay Preservation Act allow a locality to determine whether streams are perennial either by referring to the United States Geological Survey map, or through the use of consistently-applied scientific criteria of perennial flow. *9 VAC 10-20-80(D)*. A locality does not have the authority to classify a stream as perennial in any other way, even under its zoning powers. *Pony Farm Associates, LLP v. City of Richmond*, 62 Va. Cir. 386 (2003) ("the General Assembly has set out the procedures applicable to determining whether a stream is or is not perennial and how [a Resource Protection Area] can be designated. If those procedures mean anything, they cannot be altered or amended by a municipality.")

7-800 Condominium Act

Neither a zoning ordinance nor any other land use ordinance may prohibit condominiums by reason of the form of ownership. *Virginia Code § 55-79.43(A)*. In addition, condominiums must be treated the same under zoning, subdivision, site plan and other land use ordinances as would physically identical projects or developments under a different form of ownership. *Virginia Code § 55-79.43(A) and (B)*.

7-900 Fair Housing Act

Although the federal government has stated that the Fair Housing Act ("FHA") does not pre-empt local zoning laws, the Act is discussed here nonetheless because it can pre-empt the way a locality's zoning regulations are administered.

Under the FHA, it is unlawful to discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of a person residing in or intending to reside in that dwelling. *42 U.S.C. § 3604(f)(1)(B)*. *Discrimination* under the FHA includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." *42 U.S.C. § 3604(f)(3)(B)*. A *handicap* under the FHA is the same as a *disability* under the Americans with Disabilities Act. *See section 7-410; see section 7-420 for a discussion of reasonable accommodation. See, Dadian v. Village of Wilmette*, 269 F.3d 831 (7th Cir. 2001).

The FHA operates to invalidate "any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice. . . " *42 U.S.C. § 3615*. The *Joint Statement of the Department of Justice and the Department of Housing and Urban Development on Group Homes, Local Land Use, and the Fair Housing Act*, dated August 18, 1999, explains that the FHA prohibits localities from:

- Using land use policies or actions that treat groups of persons with disabilities less favorably than groups of non-disabled persons. An example would be an ordinance prohibiting housing for persons with disabilities or a specific type of disability, such as mental illness, from locating in a particular area, while allowing other groups of unrelated individuals to live together in that area.

- Taking action against, or denying a permit, for a home because of the disability of individuals who live or would live there. An example of this would be denying a building permit for a home because it was intended to provide housing for persons with mental retardation.

- Refusing to make reasonable accommodations in land use and zoning policies and procedures where such accommodations may be necessary to afford persons or groups of persons with disabilities an equal opportunity to use and enjoy housing.

A locality will most often face a challenge to its zoning laws when they are applied against handicapped persons in such a way that: (1) handicapped persons are prevented from using and enjoying their home in the same manner as non-handicapped persons, *Dadian, supra*; or (2) the locality defines *family* in a way so that persons with handicaps are disqualified from living in single family residential neighborhoods. *Dr. Gertrude A. Barber Center, Inc. v. Peters Township*, 273 F.Supp.2d 643 (W.D.Pa. 2003).

7-910 Use and enjoyment of the home

The FHA prohibits zoning regulations and decisions that fail to reasonably accommodate persons with a handicap to allow them the same housing opportunities without a handicap.

In *Trovato v. City of Manchester*, 992 F.Supp. 493 (D.N.H. 1997), a mother and daughter who both had muscular dystrophy were denied a variance that would have allowed them to build a paved parking space in the front of their home. The court found that the denial of the paved parking space adversely affected the plaintiffs' use and enjoyment of their home, and that their request was reasonable.

In *Dadian v. Village of Wilmette*, 269 F.3d 831 (7th Cir. 2001), an elderly couple, one of whom suffered from osteoporosis and had difficulty walking, sought a hardship exception from the village's prohibition against front driveway accesses. The court found that in denying the permit, the village failed to provide a reasonable accommodation from its regulations.

These cases are also discussed in the context of the ADA in section 7-430.

7-920 <u>Allowing persons with handicaps to live in facilities within single family residential neighborhoods</u>

The United States Supreme Court has instructed that zoning regulations describing who or how many people may compose a family unit so as to include any number of people related by blood, marriage or adoption but no more than a limited number of unrelated people living together as a household unit, are subject to review under the FHA. *City of Edmonds v. Oxford House*, 514 U.S. 725 (1995); *see 42 U.S.C. § 3607(b)(1),* exempting from FHA scrutiny reasonable local, state, or federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling, and removing from the FHA's scope only total occupancy limits, *i.e.*, numerical ceilings that serve to prevent overcrowding in living quarters.

In multiple cases, the courts have found a violation of the FHA where localities attempted to prevent or restrict persons with disabilities from living in the single family-zoned homes of their choice, even when the occupancy did not meet the locality's definition of a "family" under the applicable zoning ordinances. *See, e.g., Oxford House, Inc. v. Town of Babylon,* 819 F.Supp. 1179 (E.D.N.Y. 1993) (violation of FHA even though occupancy did not meet the town's definition of "family" and was not the "functional and factual equivalent of a natural family" as provided under zoning ordinance); *Oxford House v. Township of Cherry Hill*, 799 F.Supp. 450 (D.N.J. 1992) (proof of permanency and stability not required for related occupants, but required for nonrelated occupants, discriminatory); *Oxford House Evergreen v. City of Plainfield*, 769 F.Supp. 1329 (D.N.J. 1991) (occupancy limitations discriminatory).

The purpose of the FHA's requirement for reasonable accommodation is to facilitate the integration of persons with disabilities into all communities. *Dr. Gertrude A. Barber Center, Inc. v. Peters Township*, 273 F.Supp.2d 643 (W.D. Pa.. 2003). Thus, the FHA "prohibits the enforcement of zoning ordinances and local housing policies in a manner that denies people with disabilities access to housing on a par with that of those who are not disabled." *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775 (7th Cir. 2002).

Note that Virginia Code § 15.2-2291 imposes a limitation on a locality's zoning power by requiring that a zoning ordinance consider a residential facility in which no more than eight mentally ill, mentally retarded, or developmentally disabled persons reside, with one or more resident counselors or other staff persons, as residential occupancy by a single family. A *residential facility* means any group home or other residential facility for which the Department of Mental Health, Mental Retardation and Substance Abuse Services is the licensing authority. *Virginia Code § 15.2-2291(A)*. A zoning ordinance may not impose conditions more restrictive than those imposed on residences occupied by persons related by blood, marriage, or adoption. *Virginia Code § 15.2-2291(A).* A group home serving eight unrelated adults who do not meet these criteria does not qualify under Virginia Code § 15.2-2291(A) for treatment as a single-family residence insofar as zoning is concerned. *1995 Va. Op. Atty. Gen. 286.*

7-930 Examples provided by the Department of Justice and the Department of Housing and Urban Development

The *Joint Statement of the Department of Justice and the Department of Housing and Urban Development on Group Homes, Local Land Use, and the Fair Housing Act*, dated August 18, 1999, provides several other useful examples as to how the FHA applies to zoning regulations:

- Regulations must treat groups of unrelated persons equally: Local zoning and land use laws that treat groups of unrelated persons with disabilities less favorably than similar groups of unrelated persons without disabilities violate the FHA. For example, assume that a city's zoning ordinance defines a "family" to include up to six unrelated persons living together as a household unit, and gives such a group of unrelated persons the right to live in any zoning district without special permission. If that ordinance also disallows a group home for six or fewer people with disabilities in a certain district or requires this home to seek a use permit, those requirements would conflict with the FHA. The ordinance treats persons with disabilities worse than persons without disabilities.

- Regulations may generally limit the number of unrelated persons who may live together; reasonable accommodation may be required: A locality may generally restrict the ability of groups of unrelated persons to live together as long as the restrictions are imposed on all such groups. Thus, in the case where a family is defined to include up to six unrelated people, an ordinance would not, on its face, violate the FHA if a group home for seven people with disabilities was not allowed to locate in a single family zoned neighborhood, because a group of seven unrelated people without disabilities would also be disallowed. However, as discussed below, because persons with disabilities are also entitled to request reasonable accommodations in rules and policies, the group home for seven persons with disabilities would have to be given the opportunity to seek an exception or waiver. If the criteria for reasonable accommodation are met, the permit would have to be given in that instance, but the ordinance would not be invalid in all circumstances.

- Regulations may impose on group homes the same restrictions as on other groups of unrelated persons; reasonable accommodation may be required: Even though a zoning ordinance imposes on group homes the same restrictions it imposes on other groups of unrelated people, a locality may be required, in individual cases and when requested to do so, to grant a reasonable accommodation to a group home for persons with disabilities. For example, it may be a reasonable accommodation to waive a setback requirement so that a paved path of travel can be provided to residents who have mobility impairments. A similar waiver might not be required for a different type of group home where residents do not have difficulty negotiating steps and do not need a setback in order to have an equal opportunity to use and enjoy a dwelling.

- Reasonable accommodation determined on a case-by-case basis: Not all requested modifications of rules or policies are reasonable. Whether a particular accommodation is reasonable depends on the facts, and must be decided on a case-by-case basis. What is "reasonable" in one circumstance may not be "reasonable" in another. For example, assume that a locality does not allow groups of four or more unrelated people to live together in a single-family neighborhood. A group home for four adults with mental retardation would very likely be able to show that it will have no more impact on parking, traffic, noise, utility use, and other typical concerns of zoning than an "ordinary family." In this circumstance, there would be no undue burden or expense for the locality nor would the single-family character of the neighborhood be fundamentally altered. Granting an exception or waiver to the group home in this circumstance would not invalidate the ordinance. The locality would still be able to keep groups of unrelated persons without disabilities from living in single-family neighborhoods.

- Reasonable accommodation not required if significant burden or fundamental change: A fifty-bed nursing home would not ordinarily be considered an appropriate use in a single-family neighborhood, for obvious reasons having nothing to do with the disabilities of its residents. Such a facility might or

might not impose significant burdens and expense on the community, but it would likely create a fundamental change in the single-family character of the neighborhood. On the other hand, a nursing home might not create a "fundamental change" in a neighborhood zoned for multi-family housing. The scope and magnitude of the modification requested, and the features of the surrounding neighborhood are among the factors that would be taken into account in determining whether a requested accommodation is reasonable.

- Whether a locality can assure that a neighborhood does not have more than its fair share of group homes: The Department of Justice and HUD take the position, and most courts that have addressed the issue agree, that density restrictions are generally inconsistent with the FHA. However, if a neighborhood came to be composed largely of group homes, that could adversely affect individuals with disabilities and would be inconsistent with the objective of integrating persons with disabilities into the community. Especially in the licensing and regulatory process, it is appropriate to be concerned about the setting for a group home. A consideration of over-concentration could be considered in this context. This objective does not, however, justify requiring separations which have the effect of foreclosing group homes from locating in entire neighborhoods.

7-1000 Federal uses and buildings

40 U.S.C. § 3312 codifies the limited obligation of federal building projects to comply with local building codes and zoning laws. The requirements of 40 U.S.C. § 3312 do not apply to a building for which the Administrator of General Services or the head of the federal agency authorized to construct or alter the building decides that the application of this section to the building would adversely affect national security. *40 U.S.C. § 3312(a)(2).*

- *Building code*: Each building constructed or altered by the General Services Administration or any other federal agency must be constructed or altered, to the maximum extent feasible as determined by the Administrator or the head of the federal agency, in compliance with one of the nationally recognized model building codes and with other applicable nationally recognized codes, including electrical codes, fire and life safety codes, and plumbing codes, as the Administrator decides is appropriate. *40 U.S.C. § 3312(b).* The Administrator or the head of the federal agency shall use the latest edition of the nationally recognized codes. *40 U.S.C. § 3312(b)*

- *Zoning ordinance*: Under the common law, federal uses and buildings are exempt from local zoning requirements. *United States v. City of Chester*, 144 F.2d 415 (3rd Cir. 1944). 40 U.S.C. § 3312 amends the common law to a limited extent. For federal buildings, the federal General Services Administration and every other federal agency must *consider* a locality's zoning laws and any other state or local laws relating to landscaping, open space, minimum distance of a building from the property line, maximum height of a building, historic preservation, and aesthetic qualities, before it constructs or alters a building. *40 U.S.C. § 3312(a).*

The head of the General Services Administration or the federal agency is required to consult with appropriate state and local officials in preparing the plans for the building; submit those plans to the state and local officials for their review, if requested; and allow the building to be inspected during construction or alteration if the locality provides a copy of the inspection schedule before the work is begun and reasonable notice of the intention to conduct the inspection is provided prior to each inspection. *40 U.S.C. § 3312(d).*

State or local officials may make recommendations to the head of the General Services Administration or the federal agency concerning measures necessary to meet the requirements of the locality's zoning ordinance or the other classes of laws listed above, and measures to take into account local conditions. *40 U.S.C. § 3312(e).* The head of the General Services Administration or the federal agency is required to give due consideration to the recommendations of the local building and zoning officials. *40 U.S.C. § 3312(e).*

A locality has no recourse if the General Services Administration or the federal agency fails to comply with the requirements of 40 U.S.C. § 3312. *40 U.S.C. § 3312(f)*.

7-1100 Game and inland fisheries

The powers of the Virginia Department of Game and Inland Fisheries and the zoning powers of a locality do not overlap and, therefore, a locality's zoning authority is not preempted by the licensing requirements of the Department. *Tullidge v. Zoning Appeals Board of Augusta County*, 29 Va. Cir. 385 (1992).

7-1200 High voltage transmission lines

Virginia Code § 56-46.1 requires State Corporation Commission approval of electrical transmission lines of 150 kilovolts or more. Virginia Code § 56-46.1(F) provides that approval of a transmission line by the State Corporation Commission "shall be deemed to satisfy the requirements of [Virginia Code § 15.2-2232] and local zoning ordinances with respect to such transmission lines." This express preemption "not only evinces the General Assembly's view that such construction should be governed by statewide uniform regulations but also takes into account the practicality that such lines often traverse several counties." *Board of Supervisors of Fairfax County v. Virginia Elec. and Power Co*., 222 Va. 870 (1981).

However, transmission lines of 150 kilovolts or more are required to cooperate with localities in their preparation of their comprehensive plan. Virginia Code § 15.2-2202(D) requires that every utility responsible for the construction, operation and maintenance of such lines must furnish reasonable information requested by a locality's planning commission within the utility's certificated service area where the lines may affect the locality's comprehensive plan.

7-1300 Landfills

The Waste Management Act (Virginia Code § 10.1-1400 *et seq*.) does not preempt a locality from prohibiting landfills as a land use under its zoning power. *Resource Conservation Management, Inc. v. Board of Supervisors of Prince William County*, 238 Va. 15 (1989). The Virginia Supreme Court also has held that the Act did not preempt a county ordinance that required all persons operating facilities for the disposal of solid waste to obtain a permit from the county. *Ticonderoga Farms, Inc. v. County of Loudoun*, 242 Va. 170 (1991) (the "power to prohibit includes the power to regulate"). The ordinance in *Ticonderoga Farms* imposed substantial fees, bond requirements, operational regulations, and construction standards upon the operators of solid waste facilities.

7-1400 Lottery ticket sales

The State Lottery Law (Virginia Code § 58.1-4000 *et seq*.) does not preempt a locality from prohibiting the sale of lottery tickets on the premises of a retail store as a special use permit condition. *1995 Va. Op. Atty. Gen. 85*. The Attorney General concluded that the most relevant provisions of the State Lottery Law related "to the licensing of agents, and not to the uses of land" and that the law did not evidence "a legislative intent to remove from local governments the authority to impose reasonable restrictions on the sale of lottery tickets at specific sites if the purpose of the restriction is to further a legitimate land use goal." The Attorney General stated that he did not view "the prohibition of the sale of lottery tickets in a particular location under a locality's special use permit authority as unreasonably infringing on the ability of the State Lottery to conduct its business, as might a general ordinance prohibiting the sale of lottery tickets within an entire commercial district."

7-1500 Railroads

Congress and the courts long have recognized a need to regulate railroad operations at the federal level. *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998). A number of federal laws are controlling, but three commonly found to preempt state and local attempts to regulate railroad activities are the Interstate

Commerce Commission Termination Act of 1995, the Federal Railroad Safety Act of 1970, and the Noise Control Act of 1972.

The state and local issues examined in this section are limited to those that are primarily related to land use. The general principal arising from the statutory and case law is that, if a railroad is engaged in transportation-related activities, federal law will preempt state and local attempts to regulate.

7-1510 The Interstate Commerce Commission Termination Act of 1995

The Interstate Commerce Commission Termination Act of 1995 ("ICCTA") *(*49 U.S.C.A. §10101 *et seq.)* abolished the Interstate Commerce Commission and gave the Surface Transportation Board exclusive jurisdiction over: (1) transportation by rail carriers and the remedies provided with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one state. *49 U.S.C. § 10501(b)*.

The ICCTA preempts, among other things, state and local regulation of matters directly regulated by the Surface Transportation Board, such as the construction, operation, and abandonment of rail lines. *Emerson v. Kansas City S. Ry. Co.*, 503 F.3d 1126 (10th Cir. 2007); *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439 (5th Cir. 2001). Whether a state or local regulation is preempted requires a factual assessment of whether the action would have the effect of preventing or unreasonably interfering with railroad transportation. *Emerson, supra*.

Following is a summary of state and local permitting or preclearance requirements preempted by the ICCTA because, by their nature, they could be used to deny a railroad the ability to perform part of its operations or to proceed with activities authorized by the Surface Transportation Board *(collected in Emerson, supra)*:

- Preconstruction permitting of a transload facility. *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638 (2d Cir. 2005).
- Environmental and land use permitting. *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998).
- The demolition permitting process. *Soo Line R.R. Co. v. City of Minneapolis*, 38 F.Supp.2d 1096 (D.Minn. 1998).
- Requirement that railroad companies obtain state approval before discontinuing station agents, abandoning rail lines, or removing side tracks or spurs. *Burlington Northern Santa Fe Corp. v. Anderson*, 959 F.Supp. 1288 (D.Mont. 1997).

Following is a summary of areas of state and local regulations directly regulated by the Surface Transportation Board and, therefore, are preempted by the ICCTA *(collected in Emerson, supra)*:

- State statutes regulating railroad operations. *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439 (5th Cir. 2001) (state and local regulations such as those attempting to limit the duration that crossings are blocked are operational requirements and are preempted); *R.R. Ventures, Inc. v. Surface Transportation Board*, 299 F.3d 523 (6th Cir. 2002) (state statute regulating railroad operations preempted); *CSX Transportation, Inc. v. City of Plymouth*, 283 F.3d 812 (6th Cir. 2002) (holding that state law imposing limitation on duration at which crossing may be blocked by train, which is related to train speed, was preempted).

- State statutes regulating contracts between rail carriers. *San Luis Cent. R.R. Co. v. Springfield Terminal Ry. Co.*, 369 F.Supp.2d 172 (D.Mass. 2005) (contract between rail carriers concerning use of railroad cars and payment rates preempted in light of other ICCTA provisions regulating those issues).

- Attempts to condemn railroad tracks or nearby land. *City of Lincoln v. Surface Transportation Board*, 414 F.3d 858 (8th Cir. 2005) (attempt to use eminent domain to acquire portion of property abutting a rail line for municipal bicycle trail preempted); *Wis. Cent. Ltd. V. City of Marshfield*, 160 F.Supp.2d 1009 (W.D.Wis. 2000) (attempt to use state's condemnation statute to condemn an actively used railroad track preempted).

- State negligence and nuisance claims. *Friberg, supra* (state claims of negligence and negligence per se concerning a railroad's alleged road blockages of road leading to plaintiff's business preempted); *Rushing v. Kansas City S. Ry. Co.*, 194 F.Supp.2d 493 (S.D.Miss. 2001) (state law nuisance and negligence claims that would interfere with operation of railroad switchyard preempted).

Following is a summary of state and local activities not preempted by the ICCTA:

- Traditional police powers over the development of railroad property such as electrical, plumbing and fire codes, at least to the extent that the regulations protect the public health and safety, are settled and defined, and can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved or rejected without the exercise of discretion on subjective questions. *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638 (2d Cir. 2005).

- Zoning regulations applied to railroad-owned land used for non-railroad purposes by a third party. *Florida East Coast Railway Company v. City of West Palm Beach*, 266 F.3d 1324 (11th Cir. 2001).

- Miscellaneous laws and acts determined to not have anything to do with transportation. *Emerson, supra* (summary judgment for railroad reversed because railroad's acts of depositing old railroad ties and other debris into drainage ditch abutting plaintiff's property, which allegedly caused the flooding of plaintiffs' property, were not preempted because they had nothing to do with transportation); *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295 (3rd Cir. 2004) (state regulation of solid waste disposal facility serving railroad not preempted).

7-1520 The Federal Railroad Safety Act of 1970

Issues regarding state and local regulation of train speed and the duration that railroad crossings are blocked are also considered under the Federal Railroad Safety Act of 1970 ("FRSA"). The FRSA contemplated a comprehensive and uniform set of safety regulations in all areas of railroad operations. *Chicago Transit Authority v. Flohr*, 570 F.2d 1305 (7th Cir. 1977). The purpose of the FRSA is to "promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." *49 U.S.C. § 20101*.

The FRSA includes a preemption provision that, among other things, allows state and local governments to regulate only on those matters on which the Secretary of Transportation has not yet regulated. The Secretary regulates train speeds, which depend on the classification of the tracks. *CSX Transportation, Inc. v. City of Plymouth*, 283 F.3d 812 (6th Cir. 2002) (holding that state law imposing limitation on duration at which crossing may be blocked by train, which is related to train speed, was preempted); *see also CSX Transportation, Inc. v. City of Mitchell,* 105 F.Supp.2d 949 (S.D.Ind. 1999) (granting summary judgment to railroad and enjoining city from enforcing law prohibiting railroad from blocking crossing for more than 10 minutes).

In *Plymouth*, the attorney general argued that the crux of the state statute was not train speed, but "the time that trains may block highway traffic." The court of appeals was unpersuaded by this contention, explaining that "the amount of time a moving train spends at a grade crossing is mathematically a function of the length of the train and the speed at which the train is traveling." The court concluded that the statute would

require the railroad to modify either the speed at which its trains travel or their length, and would also restrict the railroad's performance of federally mandated air brake tests. The court also concluded that numerous federal regulations covered the speed at which trains may travel and, thus, the federal regulations "substantially subsume the subject matter of the relevant state law."

Congress intended that the ICCTA and the FRSA coexist. While the Surface Transportation Board must adhere to federal policies encouraging "safe and suitable working conditions in the railroad industry," the ICCTA and its legislative history contain no evidence that Congress intended for the Surface Transportation Board to supplant the Federal Railroad Administration's authority over rail safety under the FRSA. *Tyrrell v. Norfolk Southern Railway Co.*, 248 F.3d 517 (6th Cir. 2001). Rather, the agencies' complementary exercise of their statutory authority accurately reflects Congress's intent for the ICCTA and the FRSA to be construed *in pari materia*. *Id.*

7-1530 <u>The Noise Control Act of 1972</u>

Issues regarding state and local regulation of train noise are evaluated under the Noise Control Act of 1972 ("NCA"), which establishes the maximum noise levels for rail cars engaged in interstate commerce. The preemption provision under the NCA has been described as being "decidedly narrow." *Rushing v. Kansas City Southern Ry. Co.*, 185 F.3d 496 (5th Cir. 1999).

Many cases in this area are based on state nuisance claims brought by abutting landowners. Generally, if the noise generated by the train has a transportation purpose and is within the NCA's noise limits, state and local regulation is preempted. *Rushing, supra* (holding that a triable issue of fact existed based on the plaintiffs' lay opinion that the railroad's expert's opinion regarding compliance was based on sound measurements which did not reflect the true sound level plaintiffs typically heard); *Jones v. Union Pacific RR*, 79 Cal.App.4th 793 (2000) (holding that plaintiff's nuisance claim could proceed against railroad for excessive idling and horn blowing near plaintiff's home because plaintiff had adequately alleged that these activities did not have a transportation purpose but were, instead, done solely to harass the plaintiff).

7-1600 <u>The Religious Land Use and Institutionalized Persons Act of 2000</u>

The religious liberties protected by the First Amendment (*see section 6-500*) must also be considered in light of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"). The key provision of RLUIPA states:

> No government shall impose or implement a *land use regulation* in a manner that imposes a *substantial burden* on the *religious exercise* of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution – (A) is in furtherance of a *compelling governmental interest*; and (B) is *the least restrictive means* of furthering that compelling governmental interest. (italics added)

42 U.S.C. § 2000cc(a)(1). In giving meaning to these terms, RLUIPA must be "construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of [the] Act and the Constitution." *42 U.S.C. § 2000cc-3(g).* One court has recently described RLUIPA as follows:

> As a legislative accommodation of religion, RLUIPA occupies a treacherous narrow zone between the Free Exercise Clause, which seeks to assure that government does not interfere with the exercise of religion, and the Establishment Clause, which prohibits the government from becoming entwined with religion in a manner that would express preference for one religion over another, or religion over irreligion.

Westchester Day School v. Village of Mamaroneck, 386 F.3d 183 (2d Cir. 2004).

See chapter 21 for a discussion of the application of RLUIPA to decisions made by an architectural review board as part of review of the design of a structure. See also, Virginia Code § 57.2-02 (restating an individual's freedom of religion and prohibiting a locality from unduly burdening that right).

7-1610 **<u>RLUIPA applies when a locality makes an *individualized assessment* of the proposed uses of property</u>**

In the land use context, RLUIPA applies if a substantial burden is imposed on a religious exercise when a locality makes an *individualized assessment* of the proposed uses for the property involved. *42 U.S.C. § 2000cc(a)(2)(C)* (though not discussed here, under 42 U.S.C. § 2000cc(a)(2)(B), subsection (a) is also triggered when a regulation impacts interstate commerce).

Zoning ordinances "by their nature impose individual assessment regimes" because their application to particular parcels "necessarily involve[s] case-by-case evaluations of the propriety of proposed activity against extant land use regulations." *Freedom Baptist Church v. Township of Middletown*, 204 F.Supp.2d 857 (E.D. Penn. 2002). Thus, applications for rezonings affecting a single or a limited number of parcels, special use permits, site plans, variances, certificates of appropriateness, waivers and modifications are all types of "assessments" that may trigger RLUIPA. *See, e.g., Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895 (7th Cir. 2005) (rezoning); *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F.Supp.2d 961 (N.D.Ill. 2003) (ordinance amendment); *Westchester Day School v. Village of Mamaroneck*, 386 F.3d 183 (2d Cir. 2004) (special use permit); *Guru Nanak Sikh Society v. County of Sutter*, 456 F.3d 978 (9th Cir. 2006) (conditional use permit); *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F.Supp.2d 1203 (C.D.Cal. 2002) (conditional use permit); *Konikov v. Orange County*, 410 F.3d 1317 (11th Cir. 2005) (special exception); *Shepherd Montessori Center Milan v. Ann Arbor Charter Township*, 259 Mich.App. 315 (2004) (use variance); *Episcopal Student Foundation v. City of Ann Arbor*, 341 F.Supp.2d 691 (E.D.Mich. 2004) (landmark demolition permit).

RLUIPA does not apply to eminent domain. *Faith Temple Church v. Town of Brighton*, 405 F. Supp.2d 250 (W.D.N.Y. 2005) (eminent domain is "conspicuously absent" from RLUIPA's definition of land use regulation); s*ee also*, *St. John's United Church of Christ v. City of Chicago*, 401 F.Supp.2d 887 (N.D.Ill. 2005). RLUIPA also does not apply to other governmental decisions that may indirectly affect land use. *See, Prater v. City of Burnside*, 289 F.3d 417 (6th Cir. 2002) (city decision to not close segment of public street to allow church to make private use of it was not subject to RLUIPA because the decision not to close the road was not a landmarking or zoning law).

7-1620 **<u>Whether the affected acts are a *religious exercise*</u>**

Religious exercise includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief. *42 U.S.C. § 2000cc-5(7); Hernandez v. Commissioner*, 490 U.S. 680 (1989) (pre-RLUIPA: "It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretation of those creeds"). Under RLUIPA, the use, building, or conversion of real property for the purpose of religious exercise is considered to be a religious exercise by the person or entity that uses or intends to use the property for that purpose. *42 U.S.C. § 2000cc-5(7).* As under the First Amendment, a religious exercise need not be mandatory or necessary in order to be protected under RLUIPA. *Kikmura v. Hurley*, 242 F.3d 950 (10th Cir. 2001).

However, not every activity carried out by a religious institution or individual constitutes *religious exercise*. *146 Cong. Rec. at S 7776*. "In many cases, real property is used by religious institutions for purposes that are comparable to those carried out by other institutions. While recognizing that these activities or facilities may be owned, sponsored or operated by a religious institution, or may permit a religious institution to obtain additional funds to further its religious activities, this alone does not automatically bring these activities or facilities within [RLUIPA's] definition of 'religious exercise.' For example, a burden on a commercial building, which is connected to religious exercise primarily by the fact that the proceeds from the building's operation

would be used to support religious exercise, is not a substantial burden on 'religious exercise'." *146 Cong. Rec. at S 7776*.

The institution or individual claiming that a particular belief or practice is protected exercise has "the burden of demonstrating the honesty and accuracy of his contention that the religious practice at issue is important to the free exercise of his religion." *Adkins v. Kaspar*, 393 F.3d 559 (5th Cir. 2004). However, *religious exercise* is not confined to religious worship, since many religions offer services beyond traditional worship as part of their religious offerings. *Episcopal Student Foundation v. City of Ann Arbor*, 341 F.Supp.2d 691 (E.D.Mich. 2004).

The proposed use of land, rather than the religious nature of the landowner, determines whether a land use is religious in nature. *83 Am.Jur.2d, Zoning and Planning § 436 (1992)*. In a case decided long before RLUIPA, the South Dakota Supreme Court summarized the case law from around the country on this question as follows:

> Religious use, moreover, is not defined solely in terms of religious worship. Case law on point reveals that activity related to the purpose of a religious organization has been construed to be a religious use. This includes the church itself, a parochial school with areas for recreational and extracurricular activity, [citation omitted] a student dormitory, [citation omitted] an orphanage, [citation omitted] a center for counseling drug users, [citation omitted] and a chapel [citation omitted].
>
> The scope of religious use is not unlimited, however. Classification of religious use has been denied to the operation of day classes to school children at a location several blocks from the church, [citation omitted] to a church which was to be used as a healing center, [citation omitted] and to a church which wanted to construct a ritualarium or mikvah in a highly restricted residential district which permitted churches [citation omitted].
>
> Thus, while we acknowledge that religious conduct should be given a wide latitude of expression, we believe the community also has an interest to protect in these situations. The public is entitled to preservation of its health and safety.

City of Rapid City v. Kahler, 334 N.W.2d 510 (1983).

Whether a use falls within the meaning of *religious exercise* under RLUIPA will depend on the facts of the particular case. Thus, activities such as community outreach, social events, including a concert series, feeding members and nonmembers of the congregation, and providing a student lounge and meditation room may fall within religious exercise. *Episcopal Student Foundation v. City of Ann Arbor*, 341 F.Supp.2d 691 (E.D.Mich. 2004) (affidavit stated that the plaintiff's religious mission and beliefs included: "providing a spiritual community for its members, creating a progressive and creative worship experience for its members, offering meditation, prayer and study groups for its members, and continually working to welcome new members into the congregation"). However, the scope of such activities is not unlimited and they may not necessarily fall within the meaning of religious exercise. In *North Pacific Union Conference Association of the Seventh-Day Adventists v. Clark County*, 118 Wash.App. 22 (2003), the court rejected the church's definition of *worship* which would have included "any church activity that furthers its worship program." The court said that such a broad definition would allow the church to build a school, hospital, or retail store in the agricultural zoning district in which the church owned land.

The two aspects of religious exercise that arise most often are the use itself – whether a particular activity is permitted within the zoning district – and the location, relocation or expansion of a religious institution. These aspects are discussed in section 7-1630 in the context of whether the locality's regulations impose an impermissible *substantial burden*.

7-1630 Whether a zoning regulation or its implementation imposes a *substantial burden* on religious exercise

When dealing with concepts such as whether a land use regulation or decision *substantially burdens* religious exercise, the standard is more abstract than concrete, and the several federal courts of appeal that have addressed whether a land use regulation or decision imposes a *substantial burden* have not adopted a uniform definition.

The Fourth Circuit Court of Appeals, whose jurisdiction includes Virginia, has not yet defined what constitutes a substantial burden in the context of a land use matter under RLUIPA. The legislative history to RLUIPA indicates that the term was supposed to have the same meaning given to it by the courts in the Free Exercise Clause cases. In a prisoner case (RLUIPA applies not only to local land use regulations and decisions, but also to institutionalized persons), the court found that a substantial burden on religion occurs:

> . . . when a state or local government through act or omission 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.

Lovelace v. Lee, 472 F.3d 174 (4th Cir. 2006). This standard is similar to the standard adopted by the Eleventh Circuit Court of Appeals in *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), an RLUIPA land use case where the court said:

> [A substantial burden must] place more than an inconvenience on religious exercise; a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct.

This standard has also been applied by the Seventh Circuit Court of Appeals in *Vision Church, United Methodist v. Village of Long Grove*, 468 F.3d 975 (7th Cir. 2006).

The courts have rejected any definition that finds a substantial burden arising from the mere existence of *any* obstacle to the religious institution's desired use. *Vision Church, supra*; *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752 (7th Cir. 2003) (rejecting an interpretation where the slightest obstacle to religious exercise incidental to the regulation of land use – however minor the burden it were to impose – could then constitute a substantial burden).

7-1631 A summary of the key issues pertaining to the consideration of a special use permit for a religious institution under RLUIPA

This section and the following sections analyze whether a locality's requirement that a religious institution obtain a special use permit *substantially burdens* the institution's religious exercise. There is no question that a locality's zoning ordinance and special use permit requirements are *land use regulations*, and that a religious institution's establishment of a religious building for religious purposes is a *religious exercise*. *42 U.S.C. § 2000cc-5(7)*. If it is found that the locality's zoning scheme substantially burdens religious exercise, the locality must demonstrate the requirements further a *compelling governmental interest* in the *least restrictive means*.

Generally, requiring a religious institution to obtain a special use permit does not impose a substantial burden on religious exercise. Following are some general principles discussed at length in section 7-1632:

- A locality's procedural zoning requirements do not impose a substantial burden on religious exercise;
- A locality's substantive zoning requirements do not impose a substantial burden on religious exercise;

- Zoning regulations that are secular in nature do not impose a substantial burden on religious exercise;

- A special use permit decision that is based only on secular zoning considerations will likely not be found to impose a substantial burden on religious exercise;

- The expense required to comply with a locality's zoning regulations does not, in and of itself, impose a substantial burden on religious exercise;

- The denial of a special use permit does not substantially burden religious exercise if there are other lands available in the locality to establish a religious use; and

- The denial of a special use permit does not substantially burden religious exercise if the religious institution has the opportunity to revise and resubmit another application.

However, there are circumstances when the denial of a special use permit will likely be found to impose a substantial burden on religious exercise. These circumstances generally arise when it appears that a locality has denied the special use permit for reasons other than sound zoning principles and has left the religious institution with few or no viable options. Following are some general principles discussed at length in section 7-1633:

- A decision that directly burdens religious exercise may impose a substantial burden on religious exercise;

- Endless delays in the process may impose a substantial burden on religious exercise;

- The denial of viable options may impose a substantial burden on exercise;

- A decision based on vague and subjective standards may impose a substantial burden on religious exercise; and

- A decision based on the arbitrary and capricious application of standards may impose a substantial burden on religious exercise.

This subject matter is complex and these bullet points, though they summarize general guiding principles, cannot serve as a substitute for reading and understanding sections 7-1632 and 7-1633.

7-1632 <u>Requiring a religious institution to obtain a special use permit does not impose a substantial burden on religious exercise</u>

A number of challenges have been made to a locality's authority to require religious institutions to comply with a locality's procedural and substantive zoning requirements. Assuming that these requirements are secular in nature and are applied in a reasonable and fair manner, the courts have routinely upheld the validity of local zoning requirements when they are applied to religious institutions.

1. <u>A locality's procedural zoning requirements do not impose a substantial burden</u>

The procedural requirements of a locality's zoning regulations, such as submitting an application, paying fees, and obtaining various land use approvals, do not impose a substantial burden on religious exercise. *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024 (9th Cir. 2004) (no substantial burden where college failed to comply with city's application requirements to obtain approval of use in PUD zoning district; the court found that the college was "simply adverse to complying with the PUD ordinances requirements" and that the city's requirements imposed "no restriction whatsoever" on the college's religious exercise); *Civil*

Liberties for Urban Believers v. City of Chicago, 342 F.3d 752 (7th Cir. 2003) ("costs, procedural requirements, and inherent political aspects" of the application process which are "incidental to any high-density urban land use" are not sufficient to establish a substantial burden); *Christian Methodist Episcopal Church v. Montgomery*, 2007 U.S. Dist. LEXIS 5133 (D.S.C. 2007) (town's zoning laws requiring landowners to apply for a special use permit or to assign their rights to do so to the church-tenant did not substantially burden religions exercise).

2. <u>A locality's substantive zoning requirements do not impose a substantial burden</u>

Under RLUIPA, religious institutions have no right to establish their use wherever they choose within the locality, and they are subject to a locality's substantive zoning requirements. *See, e.g.*, *Vision Church, United Methodist v. Village of Long Grove*, 468 F.3d 975 (7th Cir. 2006) (requirements that church obtain special use permit and comply with size limitation established by the village's assembly ordinance did not impose substantial burden); *Konikov v. Orange County*, 410 F.3d 1317 (11th Cir. 2005) (requirement that rabbi obtain a special use permit to operate a religious facility from his home did not impose a substantial burden); *Christian Methodist Episcopal Church v. Montgomery*, 2007 U.S. Dist. LEXIS 5133 (D.S.C. 2007) (church's claim that it should be allowed to operate wherever it so chooses, without regard to zoning rules "is simply unreasonable and not supported by the statute or by the First Amendment" and numerous courts have upheld zoning regulations as applied to churches as not creating a substantial burden on religion).

In order to be valid, a locality's regulations must be secular in nature, as discussed in section 7-1632(3) below.

3. <u>Zoning regulations that are secular in nature do not impose a substantial burden</u>

Zoning regulations, including the requirement that a religious institution obtain a special use permit, do not constitute a substantial burden under RLUIPA where they are "'neutral and traceable to municipal land planning goals'" and where there is no evidence that government actions were taken "*because* [the applicant] is a *religious* institution." *Vision Church, United Methodist v. Village of Long Grove*, 468 F.3d 975 (7th Cir. 2006). In response to any claim that the village discriminated against religious institutions in *Vision Church*, the village's zoning regulations required many secular institutions to obtain special use permits as well in the residential zoning district in which the church wanted to locate.

A locality may regulate the size of a religious building. *Vision Church, supra* (upholding the village's assembly ordinance, which limited places of assembly by right to 55,000 square feet in not more than three buildings). Similarly, it appears that a locality may deny a special use permit for a certain sized building on a specific lot without necessarily substantially burdening religious exercise. *See, Living Water Church of God v. Charter Township of Meridian*, 384 F. Supp.2d 1123 (W.D.MI. 2005) (noting such in dicta, but holding that under the facts of the case and the church's history with the township, a substantial burden was found).

Even a standard, secular in nature, whose implementation has historically been guided by a "rule of thumb" may be sufficient to support a decision on a special use permit. In *Timberline Baptist Church v. Washington County*, 211 Ore. App. 437 (2007), the county denied the church's special use permit for a proposed school on land it owned outside of the urban growth boundary, though it approved the church's special use permits for a church and day care. The denial of a special use permit for the church school was based on a regulation that required that schools outside of the urban growth boundary be "scaled to serve the rural population." The evidence showed that the majority of the prospective students resided within the urban growth boundary. Applying the county's rule of thumb that, in order for a school to be scaled to serve the rural population, at least 75% of the students had to reside in the rural areas, the county denied the special use permit, and this decision was upheld by the state trial and appellate courts.

4. A special use permit decision that is based only on secular zoning considerations will likely not be found to impose a substantial burden on religious exercise

"Reasonable 'run of the mill' zoning considerations do not constitute substantial burdens." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004). The mere denial of a special use permit, without more, does not impose a substantial burden on religious exercise. *Westchester Day School v. Village of Mamaroneck*, 386 F.3d 183 (2d Cir. 2004).

These rules apply even when the resulting effect is to completely prohibit a religious congregation from building a church on its own land. *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007); *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024 (9th Cir. 2004) (no substantial burden will be found to be imposed where a zoning regulation renders the religious institution unable to provide education and/or worship on its property if the applicant is not precluded from using other sites within the locality and there is no evidence that the locality would not impose the same requirements on any other entity).

Generally, a special use permit that is guided by secular considerations (see section 7-1632(3) for examples of valid, secular standards) will not be found to impose a substantial burden on religious exercise. In *Vision Church, United Methodist v. Village of Long Grove*, 468 F.3d 975 (7th Cir. 2006), the village board was authorized to grant a special use permit if the special use: (1) was deemed necessary for the public convenience at that location; (2) was so designed, located and proposed to be operated that the public health, safety and welfare would be protected; (3) would not cause substantial injury to the value of other property in the neighborhood in which it was located; and (4) except as may be recommended by the village's planning commission and approved by the board, it conforms, except in the case of a planned development, to the applicable regulations of the district in which it is to be located. Standards such as these, which are similar to those set forth in Albemarle County Code § 31.2.4.1, are generally valid. *Vision Church, supra* (but see section 7-1633(4) for heightened evidentiary requirements). As explained by the *Vision Church* court:

> The requirement that churches obtain a special use permit is neutral on its face and is justified by legitimate, non-discriminatory municipal planning goals. As a general matter, special use designations are instruments of municipal planning that allow city officials to retain review power over land uses that, although presumptively allowed, may pose special problems. In this case in particular, the special use designation is substantially related to the municipal planning goals of limiting development, traffic and noise, and preserving open space; these goals, in turn, are reflected in the Village's Comprehensive Plan, "which seeks to ensure that the semi-rural atmosphere of the community is maintained while simultaneously permitting a wide variety of quality development in character with the existing motif of the community."

The court stated that the board's discretion under these standards was narrowly circumscribed by the zoning regulations. It is important that the village's standards applied to secular entities as well.

Likewise, conditions imposed by a locality in conjunction with the approval of a special use permit that are designed to address secular impacts from the religious use are valid. *Vision Church, supra* (conditions imposed included limitations on future development, limitations on the use of a particular outdoor area, and limitations on Sunday and weekly activities). The *Vision Church* court characterized these conditions as "no more than incidental burdens on the exercise of religion."

5. The expense required to comply with a locality's zoning regulations does not, in and of itself, impose a substantial burden

The cost to comply with a locality's zoning regulations does not, in and of itself, impose a substantial burden. *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752 (7th Cir. 2003) ("costs, procedural requirements, and inherent political aspects" of the application process which are "incidental to any high-density urban land use" are not sufficient to establish a substantial burden); *International Church of the*

Foursquare Gospel v. City of San Leandro, 2007 U.S. Dist. LEXIS 76831 (N.D.CA. October 2, 2007) ($460,000 in down payments and mortgage payments paid by the church for land it could not use under the city's zoning regulations, where it had unsuccessfully sought zoning approvals, were not a substantial burden on religious exercise).

This rule applies when the locality is applying its secular zoning regulations to a religious institution in a fair and nondiscriminatory manner. In *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F.Supp.2d 961 (N.D. Ill. 2003), a church desired to build a new church on property it owned. However, the zoning district in which the property was located did not allow a church use. The church unsuccessfully sought to amend the district regulations to allow churches as a permitted or special use. The church contended that a substantial burden arose from not being able to operate a church on the property, from the financial burden of renting space each week, and from the logistical problems of finding new property. The court rejected all of these claims, finding no substantial burden because "these monetary and logistical burdens do not rise to the level of a substantial burden . . . ."

If the locality is acting in a discriminatory manner against a religious institution, the costs incurred by the religious institution may be a factor in finding that the locality has imposed a substantial burden on religious exercise. *See analysis in section 7-1633.*

6. The denial of a special use permit does not substantially burden religious exercise if there are other lands available in the locality to establish a religious use

A substantial burden on religious exercise will not be found from the denial of a special use permit for otherwise legitimate secular reasons if there is other land in the locality to establish a religious use. However, if the locality has acted in a discriminatory manner against a religious institution, the availability of other land may be irrelevant, because the courts would find that the locality's discriminatory actions would, in and of themselves, impose a substantial burden on religious exercise. *See analysis in section 7-1633*.

There is no requirement under RLUIPA that religious institutions be allowed *by right* in any zoning district within the locality. *Vision Church, United Methodist v. Village of Long Grove*, 468 F.3d 975 (7th Cir. 2006). It is sufficient if religious institutions are only allowed by special use permit. *Vision Church, supra*.

In addition, there is no requirement that a majority, or even a significant minority, of the total area of the locality be available for religious uses. One court has said that all that is required is that there be "plenty of land on which religious organizations can build churches (or, as is common nowadays, convert to churches buildings previously intended for some other use) in a community." *Petra Presbyterian Church v. Village of Northbrook*, 489 F.3d 846 (7th Cir. 2007). Other courts have not required as much. In *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), two synagogues challenged local zoning ordinances that prohibited churches and synagogues in seven of the town's eight zoning districts. The synagogues sought to purchase property downtown to accommodate their membership, and claimed that making their congregants walk the extra distance to an acceptable location was a substantial burden on their religion, since their religion required that they walk to temple. The court rejected the claim that the synagogues would be unable to find suitable land for purchase in an acceptable zoning district, noting that the limited amount of land is merely a hardship faced by all potential landowners. The court also held that the inconvenience of having to walk "a few extra blocks" did not rise to the level of a substantial burden required by RLUIPA. In *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303 (6th Cir. 1983) (pre-RLUIPA), the congregation challenged the city's zoning scheme, which designated only 10 percent of the city's area for a use classification on which a church could be built. The court observed that the *Lakewood* ordinance did not prohibit the congregation, or any other faith, from worshiping in the city altogether. The congregation remained free to practice its faith through worship "whether the worship be in homes, schools, other churches, or meeting halls throughout the city." In *Christ College, Inc. v. Board of Supervisors of Fairfax County*, 944 F.2d 901 (4th Cir. 1991) (unpublished) (pre-RLUIPA), the court rejected a school's claim that the county's denial of a special use permit substantially burdened its religious exercise, stating:

> The fact that local regulations limit the geographical options of a religious school, however, does not prove that any party's right to free exercise is thereby burdened. There must at least be some nexus between the government regulation – here, a zoning law – and impairment of ability to carry out a religious mission. It is not enough that an entity conducting a religious program of mission would prefer to be located on residential property. That preference must be linked to religious imperative. No such limit was proved here and the court was correct in concluding the zoning regulations did not burden appellants' free exercise of religion.

Finally, there is no requirement that the cheapest land within the locality be available for religious uses. In *Lakewood*, the court rejected the congregation's claim that the zoning ordinance imposed a substantial burden because land in commercial zoning districts (in which churches were permitted uses) was more expensive and less conducive to worship than the lot owned by the church. The court said that although the "lots available to the Congregation may not meet its budget or satisfy its tastes," the Free Exercise Clause did "not require the City to make all land or even the cheapest or most beautiful land available to churches." *Lakewood* is cited with approval in *Timberline Baptist Church v. Washington County*, 211 Ore. App. 437 (2007), a recent RLUIPA case. *Compare*, *Living Water Church of God v. Charter Township of Meridian*, 384 F. Supp. 2d 1123 (W.D.MI. 2005), where the court found a substantial burden resulting from the township's denial of the church's application on arbitrary grounds and other inappropriate actions; the court noted that the church was small and with limited funds and the burden, therefore, was not merely an inconvenience.

Albemarle County's zoning regulations meet the requirements discussed above. Religious uses are allowed by right in all commercial zoning districts and allowed by special use permit in all residential zoning districts, including the Rural Areas zoning district. The only zoning districts in which religious uses are not permitted are the County's three industrial zoning districts and the Monticello Historic District. The land area in which religious uses are allowed easily exceeds more than 90% of the County's 726 square miles.

In order to successfully claim that other lands in the locality are not available, a religious institution is required to make some kind of showing that other lands in the locality are not reasonably available. *Guru Nanak Society of Yuba City v. County of Sutter,* 456 F.3d 978 (9th Cir. 2006); *International Church of the Foursquare Gospel v. City of San Leandro*, 2007 U.S. Dist. LEXIS 76831 (N.D.CA. October 2, 2007). The religious institution need not show that there is no other possible location. *Guru Nanak, supra*. One state court has said that, at the least, the religious institution must show "that it could not reasonably locate and acquire an alternative site" for its desired uses. *Timberline Baptist Church, supra.* The *Timberline* court also said that it was insufficient for the church to claim that the need to look for and acquire other property was itself a substantial burden because such a search would be time consuming and costly. Another state court identified the following factors relevant to a religious institution that wanted to establish a religious school: (1) whether there are alternative locations in the area that would allow the school consistent with the zoning laws; (2) the actual availability of alternative property, either by sale or lease, in the area; (3) the availability of property that would be suitable for a school; (4) the proximity of the homes of parents who would send their children to the school; and (5) the economic burdens of alternative locations. *Shepherd Montessori Center v. Ann Arbor Charter Township*, 259 Mich.App. 315 (2003).

Even if acquiring other land is not an option, a substantial burden will not necessarily be found where there are alternatives available on-site. In *Episcopal Student Foundation v. City of Ann Arbor*, 341 F.Supp.2d 691 (E.D.MI. 2004), the church argued that several of its key functions had been limited because of the lack of space in its current location. Because purchasing alternative property was not an option, the church argued that demolishing its current facilities and constructing a new one was the only way to meet its needs. The court disagreed, however, and pointed to several other ways that the church could have met its needs. The court said that the church could stop renting its second floor space to commercial tenants or it could lease another church for certain times that it needed the additional space. The court said that "[a]lthough 'these alternatives may be less appealing or more costly', neither the RLUIPA, nor the Constitution, requires Ann Arbor to subsidize the real estate market." Additionally, the court found that the church was able to provide the services it claimed it could not, although they might not be provided in the exact way that the church desired.

7. The denial of a special use permit does not substantially burden religious exercise if the religious institution has the opportunity to revise and resubmit another application

If the locality gives the religious institution the opportunity to revise and resubmit another application, it is less likely that the denial of a special use permit would be found to substantially burden religious exercise. *Vision Church, United Methodist v. Village of Long Grove*, 468 F.3d 975 (7th Cir. 2006) (church was free to submit modified plans to the Board that could have "cure[d] the problems and deficiencies cited by the Board"); *Westchester Day School v. Village of Mamaroneck*, 386 F.3d 183 (2d Cir. 2004). This rule appears to be particularly applicable when the locality's reasons for its denial of the special use permit are legitimate secular reasons. However, a religious institution that has been repeatedly rejected by a locality or has been discriminated against by the locality may be able to demonstrate a substantial burden. See analysis in section 7-1633.

In *Westchester Day School,* a religious school challenged the village's denial of a permit that would have allowed the school to expand and renovate. The court did not find that the denial imposed a substantial burden because the village "did not purport to pronounce the death knell of the School's proposed renovations in their entirety, but rather to deny only the application submitted, leaving open the possibility that a modification of the proposal, coupled with the submission of satisfactory data found to have been lacking in the earlier proceedings, would result in approval."

However, three years later in *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007), the record was more fully developed and the court found a substantial burden where the locality's justifications for its denial of the school's application "set forth in the Resolution do not bear the necessary substantial relation to public health, safety or welfare, and the zoning board's findings are not supported by substantial evidence." Once the court found that the village's decision was arbitrary and capricious, it then turned to whether the village's denial of the school's application was conditional or final – if it found it to be a final decision, the court would find that it substantially burdened religious exercise. The court looked at four issues: (1) whether the zoning board classified the denial as complete; (2) whether any required modification would itself constitute a burden on religious exercise; (3) whether cure of the problems noted by the zoning board would impose so great an economic burden as to make amendment unworkable; and (4) whether the zoning board's stated willingness to consider a modified proposal was disingenuous. The court concluded that the denial of the school's application was final for three reasons: (1) the zoning board could have approved it subject to conditions intended to mitigate the adverse impacts rather than deny the application in its entirety; (2) modification of the proposal would have required the school to begin the application process anew and this would have imposed a great economic burden; and (3) the zoning board members were not credible when they testified they would give reasonable consideration to another application from the school.

The initial denial of a special use permit may not necessarily be "final" for purposes of RLUIPA. In *International Church of the Foursquare Gospel v. City of San Leandro*, 2007 U.S. Dist. LEXIS 76831 (N.D.CA. October 2, 2007), the court rejected the church's claim that the city's denial of a rezoning request was "final" for purposes of RLUIPA because the church had not previously applied for a conditional use permit or rezoning and been denied.

7-1633 Circumstances when the denial of a special use permit will likely be found to impose a substantial burden on religious exercise

There appear to be five general circumstances when the courts will find that the denial of a special use permit imposes a substantial burden on religious exercise – when the locality's decision directly and substantially burdens religious exercise, when the locality has schemed to endlessly delay the application, when the locality limits the religious institution to options that are not viable, when the locality bases its decision on vague and subjective standards, and when the locality arbitrarily and capriciously applies its standards.

In the following subsections, it is apparent that in many of the cases cited that delays, the lack of options, and decisions that were based on inadequate or inappropriately applied standards allowed the courts to conclude that the locality's actions were a mere pretext to discriminate against the religious institution and find that the locality's actions imposed a substantial burden on religious exercise. Often, more than one of these factors were in play at the same time.

1. A decision that directly burdens religious exercise may impose a substantial burden

The denial of a special use permit may impose a substantial burden when religious exercise is directly affected. *Westchester Day School v. Village of Mamaroneck*, 386 F.3d 183 (2d Cir. 2004) (not finding a substantial burden under the facts of that case). One typical case where a direct burden will be found is when the religious institution has outgrown its facilities and the denial of the permit (either to relocate or expand) prevents the religious institution from engaging in its essential religious activities and, presumably, other lands are not reasonably available.

In *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F.Supp.2d 1203 (C.D.CA. 2002), the church wanted to construct a new church facility on property the city wanted to condemn in favor of building a retail shopping center. The court found that the church was "unable to practice its religious beliefs in its current location" and that the church's small facilities and increasing membership would not allow it to meet as a single body, which was part of its religious doctrine. The court found that the need for a large facility for services and other church related-activities were essential to the church.

2. Endless delays in the process may impose a substantial burden

Schemes by localities to endlessly delay action on an application may be found to substantially burden religious exercise. In *Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895 (7th Cir. 2005), a church sought to build a new church on a lot requiring a zoning approval and the city rejected a variety of viable options offered by the church and the options offered by the city were not viable. The court said the city was simply playing a delay game with the church, adding:

> The church could have searched around for other parcels of land (though a lot more effort would have been involved in such a search than, as the [commission] would have it, calling up some real estate agents), or it could have continued filing applications with the [commission], but in either case there would have been delay, uncertainty, and expense. That the burden would not be insuperable would not make it insubstantial.

The facts in *Saints Constantine & Helen* were such that the court was convinced that the city was acting in a discriminatory manner, stating that "repeated legal errors by the City's officials casts doubt on their good faith" and that the city was "flaunting as it were its own incompetence."

Delay of a land use approval alone, in the absence of evidence tying the locality's actions to intentional discrimination, does not establish that religious exercise has been substantially burdened. *Vision Church, United Methodist v. Village of Long Grove*, 468 F.3d 975 (7th Cir. 2006) (religious exercise was not substantially burdened where the church was still seeking permission to build on its property seven years after it was purchased; noting that the delay issue should have more properly been considered as a land use matter in state court).

3. The denial of viable options may impose a substantial burden

Schemes by localities to allow only those options that are not viable to the religious institution may be found to substantially burden religious exercise. *See, e.g.*, *Guru Nanak Society of Yuba City v. County of Sutter,* 456 F.3d 978 (9th Cir. 2006) and *Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895 (7th Cir. 2005).

In *Guru Nanak*, the society twice sought a conditional use permit from the county to operate a temple. In both instances, the board of supervisors denied the permits, even though Guru Nanak was willing to cooperate with the county and to abide by all of the conditions recommended by the county's staff. The court found that the county was substantially burdening religious exercise because: (1) the county's broad reasons given for its denials could easily apply to all future applications by Guru Nanak (the board stated that it wanted to preserve agricultural land and, if the temple was approved, it would be "leapfrog development"); and (2) Guru Nanak readily agreed to every mitigation measure suggested by the county's planning division, but the county, without explanation, found such cooperation insufficient. The court said:

> The net effect of the County's two denials – including their underlying rationales and disregard for Guru Nanak's accepted mitigation conditions – is to shrink the large amount of land theoretically available to Guru Nanak under the Zoning Code to several scattered parcels that the County may or may not ultimately approve. Because the County's actions have to a significantly great extent lessened the prospect of Guru Nanak being able to construct a temple in the future, the County has imposed a substantial burden on Guru Nanak's religious exercise.

The court noted that the board of supervisors told Guru Nanak that the county would informally assist the society in finding another site closer to the city. The court recognized that "[a]dmittedly, the availability of other suitable property weighs against a finding of a substantial burden." The court nonetheless found a substantial burden under the facts, observing that "RLUIPA does not contemplate that local governments can use broad and discretionary land use rationales as leverage to select the precise parcel of land where a religious group can worship."

In *Saints Constantine & Helen, supra*, the church sought a rezoning of its land from a residential district to an institutional district to allow a church use, but the city was concerned about the use of the land for non-church purposes if the church did not build its facilities. The church agreed to add an overlay district that would limit the use of the land to religious purposes. The city council rejected this option because it mistakenly believed that if the church sold the land the successor owner would not be bound by the use restrictions imposed by the overlay district. The city proposed two options of its own – that the church seek a conditional use permit for the church use under the current residential district regulations or that the church agree to an overlay district that would overlay the residential district so that if the property sold and the overlay district's use restrictions went away, the underlying residential zoning would remain. The court found that the conditional use permit was not a viable option because the city's zoning regulations required that construction begin within one year, which was impossible for the church because it had to engage in fundraising. The court also found that the second option was legally erroneous and the court saw this option as evidence of the city's delaying tactics. *Saints Constantine & Helen* is a notorious case in RLUIPA jurisprudence and is further discussed in section 7-1633(5).

4. <u>A decision based on vague and subjective standards may impose a substantial burden</u>

When a locality's zoning regulations rely on vague and subjective standards, the courts may find that the religious institution has been substantially burdened by a decision based on those standards unless the locality makes a strong evidentiary showing to support a decision based on such standards. The two cases below illustrate the importance of having sufficient evidence to support the locality's decision.

In *Vision Church, United Methodist v. Village of Long Grove*, 468 F.3d 975 (7th Cir. 2006), the court upheld the village's denial of a special use permit for a 99,000 square foot religious facility. Under the village's zoning regulations, the village board was authorized to grant a special use permit if the special use: (1) was deemed necessary for the public convenience at that location; (2) was so designed, located and proposed to be operated that the public health, safety and welfare would be protected; (3) would not cause substantial injury to the value of other property in the neighborhood in which it was located; and (4) except as may be recommended by the village's planning commission and approved by the board and conforms, except in the case of a planned development, to the applicable regulations of the district in which it is to be located. The *Vision Church* court

concluded that these standards narrowly circumscribed the board's discretion. The village was also clearly aided by its regulations pertaining to places of assembly which put an objective cap on their size allowed by right (55,000 square feet).

In *Cambodian Buddhist Society of Connecticut v. Newtown*, 2005 Conn. Super. LEXIS 3158 (2005), the court upheld the locality's denial of a special use permit for only two of the six reasons given by the town. The four grounds for which the court found the evidence to be insufficient to support were the following: (1) the proposed use was not in general harmony with the general character of the neighborhood; (2) the proposed use was not consistent with the purpose and intent of the zoning regulations; (3) the proposed use may substantially impair the property values in the neighborhood; and (4) the architectural design of the proposed buildings must be in harmony with the design of other buildings on the lot and within 1,000 feet of the perimeter of the lot for which the special exception is sought. These grounds are typical standards applied to special use permit applications. The *Newtown* court noted that there was insufficient evidence to support the town's decision on these four grounds. Citing a number of Connecticut cases, the court cautioned: "Application of some of the more intrinsically vague standards, such as architectural harmony and integrity of the neighborhood, are viewed with stricter scrutiny, both because of the more obvious religious overtones of features such as architecture and of the possibility of exclusion for suspect reasons."

5. A decision based on the arbitrary and capricious application of standards may impose a substantial burden

When a locality's zoning regulations are applied in an arbitrary and capricious manner against a religious institution, the courts are likely to find that the religious institution has been substantially burdened. The arbitrary application of laws to religious organizations may reflect bias or discrimination against religion. *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007).

The courts have found that a locality has arbitrarily and capriciously applied its standards to a special use permit where:

- The locality's justifications for its denial of the school's application "set forth in the Resolution do not bear the necessary substantial relation to public health, safety or welfare, and the zoning board's findings are not supported by substantial evidence." *Westchester Day School, supra*.

- The "decision maker cannot justify" the challenged ruling, the city had no legitimate concerns on which to base its denial, and the city acted with standardless discretion; "repeated legal errors by the City's officials casts doubt on their good faith" in an attempt to mask a discriminatory motive. *Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895 (7th Cir. 2005).

- Government officials "inconsistently applied" specific policies and disregarded relevant findings "without explanation." *Guru Nanak Society of Yuba City v. County of Sutter,* 456 F.3d 978 (9th Cir. 2006).

- The arbitrary grounds for denying the application were not contained in the ordinance. *Living Water Church of God v. Charter Township of Meridian*, 384 F. Supp. 2d 1123 (W.D.MI. 2005).

Where the arbitrary, capricious, or unlawful nature of a locality's "challenged action suggests that a religious institution received less than even-handed treatment, the application of RLUIPA's substantial burden provision usefully backstops the explicit prohibition of religious discrimination in the later section of the Act." *Westchester Day School, supra*.

7-1640 Whether the substantial burden on religious exercise is justified by a *compelling governmental interest*

RLUIPA does not define *compelling governmental interest*. Like *substantial burden*, the meaning of

compelling governmental interest must be ascertained from the case law.

A *compelling governmental interest* is an interest of "the highest order" because "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation" on religious exercise. *Sherbert v. Verner*, 374 U.S. 398 (1963). The traditional examples of compelling governmental interests include the allocation and collection of taxes, maintaining the integrity of the social security system, eradicating racial discrimination in education, the operation of military conscription laws, enforcing child labor laws, and protecting public health and safety. *Testimony of Steven K. Green, Legal Director, Americans United for Separation of Church and State, before the House Committee on the Judiciary, Subcommittee on the Constitution, July 14, 1998.*

In the realm of land use regulation, the courts have identified a very limited number of compelling, or possibly compelling, governmental interests under RLUIPA. In *Westchester Day School v. Village of Mamaroneck*, 386 F.3d 183 (2d Cir. 2004), the court acknowledged that traffic concerns *may* be a compelling governmental interest, presumably if the locality makes a sufficient evidentiary showing, stating: "While it is true that there are no authoritative cases holding that a traffic concern satisfies the 'compelling interest' test, nor are there authoritative cases holding that a traffic concern cannot satisfy the test"; *but see, Mintz v. Roman Catholic Bishop*, 424 F.Supp.2d 309 (D. Mass. 2006) (though not expressly ruling out traffic concerns as being compelling, the court noted that they "were not universally considered compelling."). Protecting the public health and safety is a compelling governmental interest; thus, a locality has a compelling governmental interest in enforcing its land use regulations. *Murphy v. Zoning Commission of the Town of Milford*, 289 F.Supp.2d 87 (D.Conn. 2003). In *Christian Methodist Episcopal Church v. Montgomery*, 2007 U.S. Dist. LEXIS 5133 (D.S.C. 2007), the court found that the town had a compelling governmental interest in requiring the landowners to sign the application for a land use permit, or to assign the right to do so to a tenant, rather than to allow the tenant-church to sign the application without requiring the landowners to be involved in the application process.

Neither aesthetic concerns nor historic preservation under local regulatory schemes have been found to be a compelling governmental interest. *See, Whitton v. City of Gladstone*, 54 F.3d 1400 (8th Cir. 1995) ("a municipality's asserted interests in . . . aesthetics, while significant, have never been held to be compelling"); *American Legion Post 7 v. City of Durham*, 239 F.3d 601 (4th Cir. 2001) (flag case; city has *substantial* governmental interest in preserving its aesthetic character); *Munns v. Martin*, 131 Wn.2d 318 (1997) ("City's interest in preservation of aesthetic and historic structures is not compelling and it does not justify the infringement of [the church's] right to freely exercise religion"); *First Covenant Church of Seattle v. City of Seattle*, 120 Wash.2d 203 (1992) (city's interest in preserving historic structures was not compelling enough to justify infringement on free exercise); *Keeler v. Mayor and City Council of Cumberland*, 940 F.Supp. 879 (D.MD. 1996) (historic preservation is not a compelling governmental interest).

In *Cambodian Buddhist Society of Connecticut v. Newtown*, 2005 Conn. Super. LEXIS 3158 (2005), the court upheld the locality's denial of a special use permit for only two of the six reasons given by the town. The four grounds for which the court found the evidence to be insufficient to support were the following: (1) the proposed use was not in general harmony with the general character of the neighborhood; (2) the proposed use was not consistent with the purpose and intent of the zoning regulations; (3) the proposed use may substantially impair the property values in the neighborhood; and (4) the architectural design of the proposed buildings must be in harmony with the design of other buildings on the lot and within 1,000 feet of the perimeter of the lot for which the special exception is sought. These grounds are typical standards applied to special use permit applications. The *Newtown* court noted if it had found that the town's decision had substantially burdened religious exercise, none of these four grounds rose to a *compelling governmental interest*.

Localities also have argued that other motivations are based on a *compelling governmental interest,* including building density, controlling blight, and revenue generation. None of these arguments have been successful. *See, Living Water Church of God v. Charter Township of Meridian*, 384 F.Supp.2d 1123 (W.D.MI. 2005) (building density was not a compelling governmental interest because, under the facts of the case, the

building density interests identified by the township were "arbitrary" and "meaningless."); *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F.Supp.2d 1203 (C.D.CA. 2002) (declining to rule on whether controlling blight was a compelling governmental interest because the city's regulations were not aimed at controlling blight; and declining to rule on whether revenue generation was a compelling governmental interest because the city's regulations were not aimed at revenue generation).

7-1650 Whether the substantial burden on religious exercise is the *least restrictive means possible* to achieve the compelling governmental interest

If a land use regulation substantially burdens religious exercise, it is valid under RLUIPA only if it serves a compelling interest using the *least restrictive* means possible to achieve that interest. *42 U.S.C. § 2000cc(a)(1)*. This means that the locality must show that there are no other alternative forms of regulation that would fulfill the compelling governmental interest. *Sherbert v. Verner*, 374 U.S. 398 (1963). For example, if the issue surrounding a special use permit is the amount of traffic generated by a proposed religious use, the conditions must address the number of cars, not the number of people. *Murphy v. Zoning Commission of the Town of Milford*, 289 F.Supp.2d 8 (D.Conn. 2003).

As a practical matter, the outright denial of a religious claimant's land use application will rarely be the least restrictive means of achieving a governmental interest when reasonable conditions of approval could address the asserted interest. *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F.Supp.2d 1203 (C.D.Cal. 2002) ("The City has not demonstrated that there is no other way to provide for revenue without taking the property and preventing [plaintiff] from building its church. Municipalities have numerous ways of generating revenue without preventing tax-free religious land uses. . . [T]he City has done the equivalent of using a sledgehammer to kill an ant.")

7-1660 RLUIPA's prohibition of discriminatory land use regulations

RLUIPA also requires that land use regulations: (1) treat a religious assembly or institution on equal terms with nonreligious assemblies and institutions; (2) not discriminate against any assembly or institution on the basis of religion or religious denomination; and (3) not totally exclude religious assemblies, or unreasonably limit religious assemblies, institutions or structures, from the locality. *42 U.S.C. § 2000cc(b).*

7-1700 Right to farm

The Right to Farm Act (*Virginia Code § 3.1-22.28,* which becomes *Virginia Code § 3.2-300 et seq.* on October 1, 2008*; see also, Virginia Code § 15.2-2288*) may be viewed as a limited, express preemption of a locality's zoning power which prohibits localities from requiring a special use permit for any production agriculture or silviculture activities in an agricultural zoning district. Although the Right to Farm Act does not specifically prohibit all local regulation of industrial farming, any restrictions must "bear a relationship to the health, safety and general welfare" of the locality's citizens. *Virginia Code § 3.2-301; see, 2001 Va. AG LEXIS 60* (insufficient facts to determine whether the Right to Farm Act permits an airstrip on a farm used to conduct surveillance of crops, livestock and property and to pick up repair parts and supplies). The Act also limits the circumstances under which an agricultural operation is deemed a nuisance. *Virginia Code § 3.2-302*.

The Attorney General has opined that a locality does not have the authority to adopt an ordinance limiting the circumstances under which agricultural operations may be deemed to constitute a nuisance, trespass, or other interference with the reasonable use and enjoyment of land. *1998 Va. Op. Atty. Gen. 13*.

7-1800 Satellite dishes and other video antennas

Under federal law, satellite dishes less than one meter in diameter are not subject to zoning regulations that would otherwise restrict their use. The following information is distilled from the Federal Communications Commission's website at http://www.fcc.gov/mb/facts/otard.html#QA.

47 C.F.R. § 1.4000 has been in effect since October 1996, and it prohibits restrictions that impair the installation, maintenance or use of antennas used to receive video programming. The rule applies to video antennas including direct-to-home satellite dishes that are less than one meter (39.37') in diameter (or of any size in Alaska), television antennas, and wireless cable antennas. The rule prohibits most restrictions, including zoning and building regulations, that: (1) unreasonably delay or prevent installation, maintenance or use; (2) unreasonably increase the cost of installation, maintenance or use; or (3) preclude reception of an acceptable quality signal. The rule does not prohibit legitimate safety restrictions or restrictions designed to preserve designated or eligible historic or prehistoric properties, provided the restriction is no more burdensome than necessary to accomplish the safety or preservation purpose.

The simplest example of a prohibited zoning regulation would be one that prohibited the protected satellite dishes because the regulation would prevent viewers from receiving signals. Procedural requirements, such as those requiring permits prior to installation are likely prohibited because this process can unreasonably delay installation, maintenance or use of the satellite dish. A permit fee would be an unreasonable expense.

7-1900 Silvicultural activities

Virginia Code § 10.1-1026.1 places several limitations on the local regulation of silvicultural activity, including a requirement that a local ordinance may not prohibit or unreasonably limit such activity, and may not impose a permit or fee requirement to engage in such activity.

In *Dail v. York County*, 259 Va. 577 (2000), the Virginia Supreme Court held that the county's zoning regulations governing silvicultural activity were not preempted by Virginia Code § 10.1-1026.1. The court concluded that: (1) the provisions of the forestry ordinance prohibiting the clear cutting of trees and regulating the thinning of forests were neither a prohibition nor an unreasonable limitation of silvicultural activity; and (2) the provisions of the county's forestry ordinance requiring submission and approval of a forest management plan by the zoning administrator did not impose a permit requirement for silvicultural activities.

7-2000 State health commissioner – pertaining to certificates of public need issued for hospitals

The state health commissioner's issuance of a certificate of public need under Virginia Code § 32.1-102.3 to authorize the construction of a hospital does not preempt a locality's comprehensive plan policies and zoning regulations. *See, Northern Virginia Community Hospital, LLC v. Loudoun County Board of Supervisors*, 70 Va. Cir. 283 (2006) (sustaining the county's demurrer on this issue).

In *Northern Virginia*, the circuit court noted that the primary purposes of comprehensive planning and zoning are to determine the proper uses of land, to assure compatibility and orderly growth, to plan for adequate facilities, and to achieve the orderly use of land through zoning regulations. Although some of these factors are also considered by the health commissioner when considering a certificate of public need for a hospital, he "is not concerned with the impact such a facility will have on the overall development of the community" and his primary function is "to determine a need for those facilities within a designated area to be served." *Citing City of Norfolk v. Tiny House, Inc.*, 222 Va. 414 (1981), the *Northern Virginia* court stated:

> There is evident nothing in the provisions of law governing the issuance of Certificates of Public Need that would suggest that the General Assembly '[intended] to usurp the police power of local governments or to prevent them from achieving the orderly use of land through zoning ordinances.'

The court concluded by observing that the Loudoun County board of supervisors "did not seek to undermine the Commissioner's statutory authority to evaluate health needs or limit his authority to authorize the construction of health care facilities based upon findings of need."

7-2100 State uses and buildings

State-owned lands and buildings are exempt from zoning regulations provided that they are used for public purposes and are not used or occupied by a nonpolitical entity or person. *Virginia Code § 15.2-2293*. However, state-owned lands are subject to zoning regulations in the following circumstances:

- Public travelways: Airspace that is superjacent or subjacent to any public highway, street, lane, alley or other way that is not required for the purpose of travel, or other public use, by the Commonwealth or other political jurisdiction owning it. *Virginia Code § 15.2-2293(B).*

- Other public land: Airspace that is: (1) not associated with a public travelway; (2) superjacent to any land owned by the Commonwealth or other political jurisdiction; and (3) occupied by a nonpolitical entity or person. *Virginia Code § 15.2-2293(C).*

Superjacent airspace includes any use or structure on top of (*e.g*., a structure) or above (*e.g*., an antenna affixed to a pole) the ground.

In 1985-86 Va. Op. Atty. Gen. 108, the Attorney General discussed in a footnote the question of whether private wharves, piers and docks were subject to local zoning regulations where the subaqueous beds of bays, rivers, creeks and shores are the property of the Commonwealth. Recognizing that private landowners had riparian rights, the Attorney General concluded that "the State's use of State-owned bottom is not subject to local regulation, but the exercise of a riparian landowner's property rights which encroach on State-owned bottom is validly subject to local regulation."

7-2200 State Water Control Board and Department of Health – pertaining to private wells

The State Water Control Board, in conjunction with the Department of Health, permits the construction of private wells. *Virginia Code § 32.1-176.1 et seq*. The Water Control Board is enabled to promulgate regulations pertaining to the location and construction of private wells *(Virginia Code § 32.1-176.4)* and may issue ground water withdrawal permits upon terms, conditions, and limitations necessary for the protection of the public welfare, safety and health. *Virginia Code § 62.1-266*.

In *Miller v. Commonwealth of Virginia*, 2005 Va. App. LEXIS 64 (2005) (unpublished), the Virginia Court of Appeals held that the King George County zoning regulations prohibiting more than two buildings from connecting to a single well without a special exception was not preempted by the laws pertaining to the State Water Control Board. Specifically, the court found that although the State Water Control Board had determined that Miller was allowed to have up to four connections to his well, that authorization did not supersede the county's zoning regulations requiring a permit if three or more connections were to be made. The court distinguished the facts in this case to the locality's prohibition of biosolids at issue in *Blanton v. Amelia County*, 261 Va. 55 (2001), discussed in section 7-500.

7-2300 Telecommunications Act of 1996 and related laws; wireless telecommunications

In the Telecommunication Act of 1996, Congress "struck a balance between the national interest in facilitating the growth of telecommunications and the local interest in making zoning decisions" over the siting of towers and other facilities that provide wireless services. *360 Communications v. Board of Supervisors of Albemarle County*, 211 F.3d 79 (4th Cir. 2000). While expressly preserving local zoning authority (*47 U.S.C. § 332(c)(7)(A)*), the Act requires that decisions denying wireless facilities be in writing and supported by substantial evidence (*47 U.S.C. § 332(c)(7)(B)(iii))*. The Act also prohibits localities from adopting regulations that prohibit or have the effect of prohibiting wireless services, or unreasonably discriminate against functionally equivalent providers. *47 U.S.C. § 332(c)(7)(B)(i)*. The only complete preemption contained in 47 U.S.C. § 332(c)(7)(B) is found in subparagraph (iv), which preempts localities from regulating the placement, construction, and modification of wireless facilities on the basis of the environmental effects of radio frequency

emissions if those facilities comply with the Federal Communications Commission's regulations concerning emissions.

Because section 332(c)(7) does not affect or encroach upon the substantive standards to be applied under established principles of state and local law, *Cellular Telephone Company v. Town of Oyster Bay*, 166 F.3d 490 (2d Cir. 1999), a locality retains its authority to:

- Determine the appropriate height, location and bulk of wireless facilities. *Virginia Code § 15.2-2280(2).*

- Allow wireless facilities, by special use permit, subject to suitable regulations and safeguards. *Virginia Code § 15.2-2286(A)(3).*

- Deny applications for special use permits if the requisite findings for the granting of a permit cannot be made. *See, e.g., County of Lancaster v. Cowardin*, 239 Va. 522 (1990).

- Deny applications for special use permits if the proposed uses are inconsistent with the comprehensive plan. *National Memorial Park, Inc. v. Board of Zoning Appeals of Fairfax County*, 232 Va. 89 (1986).

- Prohibit uses, including wireless facilities, within certain zoning districts. *Resource Conservation Management, Inc. v. Board of Supervisors of Prince William County*, 238 Va. 15 (1989).

Of course, the exercise of this authority must otherwise comply with state and local land use laws, and may not violate the limitations set forth in section 332(c)(7)(B). Moreover, section 332(c)(7)(A)'s preservation of local zoning authority does "not alter the FCC's general authority over radio telecommunications granted by earlier communications legislation." *Southwestern Bell Wireless, Inc. v. Johnson County Board of County Commissioners*, 199 F.3d 1185 (10th Cir. 1999) (rejecting the assertion that preserving local zoning authority allows local regulation of radio frequency interference, and holding that such regulation is preempted by federal law and does not violate the Tenth Amendment).

7-2310 The decision must be in writing

The requirement that a decision be in writing is easily satisfied. A letter stamped with the word "Denied," or writing the word "Denied" on the wireless provider's application, satisfies the requirement. *AT&T Wireless PCS, Inc. v. City Council of City of Virginia Beach*, 155 F.3d 423 (4th Cir. 1998); *AT&T Wireless PCS, Inc. v. Winston-Salem Zoning Board of Adjustment,* 172 F.3d 307 (4th Cir. 1999). There is no need for a locality to issue a written rationale with factual and legal conclusions. *Virginia Beach, supra*; *Winston-Salem Zoning Board of Adjustment, supra; Cellco Partnership v. Board of Supervisors of Roanoke County,* 2004 U.S. Dist. LEXIS 27348 (W.D. Va. 2004) (explanation for denial is not required; board's adoption of resolution denying special use permit and sending applicant a rejection letter satisfied the Act).

If a locality elects to adopt a more formal written opinion to support its decision, it need not be adopted at the time of the decision. *Winston-Salem Zoning Board of Adjustment*, *supra* (rejecting any assertion that such a practice is pretextual).

7-2320 The decision must be supported by substantial evidence

The United States Supreme Court has defined "substantial evidence" to mean "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera v. NLRB*. 340 U.S. 474 (1951). It requires more than a mere scintilla but less than a preponderance. *360 Communications v. Board of Supervisors of Albemarle County*, 211 F.3d 79 (4th Cir. 2000). In reviewing the decision of an elected body, the courts will consider the "reasonable mind" to be that of a reasonable legislator. *AT&T Wireless PCS, Inc. v. City Council of City of Virginia Beach*, 155 F.3d 423 (4th Cir. 1998). The courts will not substitute their judgment for the governing body's but will uphold the decision if it has "substantial support in the record as a whole." *Id*.

The court's inquiry is to ask whether a reasonable legislator would accept the evidence in the record as adequate to support the governing body's decision. *USCOC of Va. RSA # 3, Inc. v. Montgomery County Board of Supervisors*, 343 F.3d 262 (4th Cir. 2003).

Following is a list of some of the facts found by the courts in the Fourth Circuit (the federal appeals court and the trial courts for the circuit that includes Virginia) to be *substantial evidence* under the Act:

- Facility's consistency with the comprehensive plan: The governing body may consider whether the proposed facility is consistent with the comprehensive plan. In *Montgomery County*, the location and design of the applicant's 240-foot tower did not conform to the comprehensive plan or the regional approach for wireless facilities. In *Albemarle County*, the applicant proposed to construct a 100-foot tower on a mountain top, and the county's comprehensive plan and open space plan discouraged the construction of structures that would modify ridge lines and would contribute to erosion in mountainous areas. *See also*, *Crown Castle Atlantic, LLC v. The Board of Supervisors of Loudoun County*, 2002 U.S. Dist. LEXIS 22000 (E.D.Va. 2002) (documented concerns about the proposed height and design of the tower and the evidence that the tower could be shorter and still achieve similar functional results, as well as the location of the proposed tower, adequately supported the board's finding that the application did not substantially conform to the comprehensive plan).

- Facility's compliance with applicable zoning regulations: The governing body may consider whether the proposed facility complies with applicable zoning regulations. In *Albemarle County*, the proposed tower violated the zoning ordinance's limitations on a structure's proximity to neighboring lots. Although the tower's noncompliance with the zoning regulations was not the only evidence presented to justify the denial of the application, it was a significant factor in the court's substantial evidence analysis. In *Montgomery County*, the court held that the proposed facility's noncompliance with the county's zoning regulations was, in and of itself, substantial evidence.

- Height of the facility: The governing body may consider the height of a proposed facility. *Montgomery County, supra* (rejecting the argument that the board's decision was impermissibly based solely on aesthetic considerations in violation of Virginia law under *Board of Supervisors of James City County v. Rowe*, 216 Va. 128 (1975) since Virginia localities are enabled to regulate the size, height and bulk of structures under Virginia Code § 15.2-2280(2)).

- Design of the facility: The governing body may consider whether the design of a proposed facility is proper, to the extent the design implicates the structure's size and bulk. *Montgomery County, supra* (the board could properly consider the adverse impacts arising from the applicant's more visually intrusive lattice design).

- Location of the facility: The governing body may consider the location of the facility on the lot, since Virginia law expressly enables a locality to regulate the location of structures under *Virginia Code § 15.2-2280(2). See, Montgomery County, supra*.

- Impacts of the facility on surrounding neighborhood: The governing body may consider the impacts of the facility on the surrounding neighborhood. *AT&T Wireless PCS, Inc. v. Winston-Salem Zoning Board of Adjustment,* 172 F.3d 307 (4th Cir. 1999) (board considered visual impacts of tower on surrounding neighborhood); *Cellco Partnership v. Board of Supervisors of Roanoke County*, 2004 U.S. Dist. LEXIS 27348 (W.D.Va. 2004) (concerns regarding property values, aesthetics, and fit within the surrounding community are objectively reasonable and constitute substantial evidence supporting the board's decision).

These factors may be presented to the governing body in a number of ways, ranging from the testimony of members of the public, to staff reports, to the decision-makers' personal knowledge. Widespread public opposition to the construction of a telecommunications tower also may provide substantial evidence to support a local government's denial of a permit. *See, Virginia Beach, supra; Petersburg Cellular Partnership v. Board of*

Supervisors of Nottoway County, 205 F.3d 688 (4th Cir. 2000) (noting that public opposition, if based upon rational concerns, provides substantial evidence to deny a permit); *Albemarle County, supra* (determining that public opposition was a factor that contributed to a finding of substantial evidence); *Winston-Salem, supra* (same). However, public opinion does not mandate a particular local zoning decision under the Act. *Montgomery County, supra*.

The governing body's known experience also may be a source of substantial evidence. *Nottoway County, supra; Roanoke County, supra* ("known experiences" would allow the board to reasonably conclude that the tower would have an adverse impact on residential property values and would not be aesthetically pleasing).

Neither the governing body nor the public is obligated to call, at its expense, experts to opine about the adverse impacts arising from a proposed wireless facility when its effects are reasonably apparent to non-experts. *See, Virginia Beach, supra* ("In all cases of this sort, those seeking to build will come armed with exhibits, experts, and evaluations. Appellees, by urging us to hold that such a predictable barrage mandates that local governments approve applications, effectively demand that we interpret the Act so as always to thwart average, non-expert citizens . . .").

7-2330 A locality's regulations or decisions may not prohibit or have the effect of prohibiting wireless service

Section 332(c)(7)(B)(i)(II) forbids regulations that prohibit or have the effect of prohibiting the provision of personal wireless services:

> The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

As a general rule, the prohibition clause applies only to blanket prohibitions or general bans or policies, rather than individual zoning decisions. *AT&T Wireless PCS, Inc. v. City Council of City of Virginia Beach*, 155 F.3d 423 (4th Cir. 1998). If the rule was otherwise, local zoning authority would be effectively nullified by mandating approval of all, or nearly all, applications. *Virginia Beach, supra.* However, a wireless service provider may show that the locality has adopted "[p]olicies that do not explicitly ban new service but do, when applied on a case-by-case basis, guarantee the rejection of every application." *Virginia Beach, supra*. This provides protection for wireless providers who are unable to enter a new market, but are unable to show unreasonable discrimination by a locality. *Id*.

To establish that the denial of an application constitutes an *effective* prohibition, the wireless service provider must show a significant gap in wireless coverage and, in the case of a single application denial, that further application efforts are likely to be fruitless. *360 Communications Co. v. Board of Supervisors of Albemarle County*, 211 F.3d 79 (4th Cir. 2000). A wireless provider bears a *heavy* burden of proof to establish that the locality's regulation or decision has the effect of prohibiting service. *Albemarle County, supra.*

The simple fact of denial with respect to a particular site is not enough to establish a prohibition of wireless service. *Albemarle County, supra.* "[T]here must be something more, taken from the circumstances of the particular application or from the procedure for processing that application, that produces the 'effect' of prohibiting wireless services." *Albemarle County, supra*. The wireless provider might show that the locality has indicated that repeated individual applications will be denied because of a generalized hostility to wireless services. *Albemarle County, supra.* The courts have recognized the "theoretical possibility that the denial of an individual permit could amount to a prohibition of service if the service could only be provided from a particular site," but noting "that such a scenario 'seems unlikely in the real world.'" *Albemarle County, supra*. Whatever those circumstances may be, the prohibition clause does not divest the locality of its discretion, under its site-specific review, to determine whether certain uses are detrimental to a zoning area. *AT&T Wireless PCS, Inc. v.*

Winston-Salem Zoning Board of Adjustment, 172 F.3d 307 (4th Cir. 1999) (denial of tower in residential area on lot on which a historic building was located was supported by substantial evidence).

In *Montgomery County,* the board denied the 240-foot tower sought by U.S. Cellular, but approved the construction of a 195-foot tower, which would provide wireless capabilities to a significant area of the county currently without quality wireless service. The court found no prohibition because the board's careful consideration of the application provided no indication that future tower requests would be "fruitless." The court concluded that "[f]ar from seeking to prohibit service, Board members indicated a willingness to ensure coverage for the entire target area."); *see also, Cellco Partnership v. Board of Supervisors of Roanoke County*, 2004 U.S. Dist. LEXIS 27348 (W.D.Va. 2004) (no prohibition where board denied application for 127-foot tower and associated facilities where board had previously approved 12 special use permits for towers, wireless service provider already provided service to a substantial portion of the county, and the proposed facilities would duplicate services already provided); *Crown Castle Atlantic, LLC v. The Board of Supervisors of Loudoun County*, 2002 U.S. Dist. LEXIS 22000 (E.D.Va. 2002) (no prohibition of service even though denial of 140-tower left significant gap in coverage because there was no evidence that further amendment to the current application or seeking approval for a facility at another location would be fruitless).

7-2340 A locality's regulations may not unreasonably discriminate among providers of functionally equivalent services

Section 332(c)(7)(B)(i)(I) prohibits regulations that unreasonably discriminate against functionally equivalent wireless services (*i.e*., PCS versus cellular or one wireless company versus another):

> The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof . . . shall not unreasonably discriminate among providers of functionally equivalent services . . .

Congress intended that localities not favor one technology over another, or favor one service provider over another. However, this limitation does not require that all wireless providers be treated identically. The fact that a decision has the effect of favoring one competitor over another, in and of itself, is not a violation of the discrimination clause. The discrimination clause provides a locality with the flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable zoning requirements even if those facilities provide functionally equivalent services. *H.R. Conf. Rep. No. 104-458, 104th Congress, 2nd Sess. 208 (1996).*

The denial of an application for a wireless facility that is based on land use principles is not "unreasonable discrimination." *AT&T Wireless PCS, Inc. v. City Council of City of Virginia Beach*, 155 F.3d 423 (4th Cir. 1998). For example, if a city council approves a special use permit for a wireless facility in a commercial district, it is not necessarily required to approve a permit for a competitor's facility in a residential district. *H.R. Conf. Rep. No. 104-458, 104th Congress, 2nd Sess. 208 (1996).*

7-2350 A locality must act on a request for a permit within a reasonable period of time

Section 332(c)(7)(B)(ii) requires that a locality act on a request for a wireless permit within a reasonable period of time:

> A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

The Act does not define what a "reasonable period of time" is. This requirement was not intended to give preferential treatment to the wireless industry in the processing of requests, or to subject their requests to any but the generally applicable timeframes for a zoning decision. *Sprint Spectrum L.P. v. City of Medina*, 924

F.Supp. 1036 (W.D.Wash. 1996). Rather, it only requires that an application be acted upon within the period provided under Virginia law and local ordinance. However, a decision made after the period provided by law is not necessarily a violation of this limitation because, as its language provides, the "nature and scope" of the request must be considered, and each situation must be independently examined. *Virginia Metronet v. James City County*, 984 F.Supp. 966 (E.D.Va. 1998) (fourteen month delay between submission of application and decision not unreasonable *per se*).

7-2360 A locality may not regulate radio frequency emissions and interference

One clear area of federal preemption under the Telecommunications Act is the regulation of radio frequency emissions and interference. With respect to emissions, 47 U.S.C. § 332(c)(7)(B)(iv) provides:

> No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

Attempts by state or local governments to regulate in the field of radio frequency interference have been found to be preempted by federal law. *Freeman v. Burlington Broadcasters Inc.*, 204 F.3d 311 (2d Cir. 2000); *Southwestern Bell Wireless Inc. v. Johnson County Board of County Commissioners*, 199 F.3d 1185 (10th Cir. 1999). In *Freeman*, the court struck down a permit condition requiring users of a communications tower to remedy any interference with reception in homes in the area. In *Southwestern Bell*, the court voided a zoning regulation that prohibited wireless telecommunications towers and antennas from operating in a manner that interfered with public safety communications.

In *In the Matter of Petition of Cingular Wireless, et al., WT Docket No. 02-100*, the Federal Communications Commission ("FCC") issued a memorandum opinion and order in an administrative proceeding pertaining to Anne Arundel County, Maryland. At issue was a county ordinance requiring that, prior to county issuance of a zoning certificate, owners and users of telecommunications facilities had to show that their facilities would not degrade or interfere with the county's public safety communications systems. The FCC found that the county ordinance regulating radio frequency interference was preempted by federal law.