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Religious Exercise: Special Use/Special Protection

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September 20, 2020 was the 20th anniversary of the Religious Land Use and Institutionalized Persons Act (RLUIPA). 42 U.S.C. Sec. 2000cc. The Texas Religious Freedom Restoration Act (TRFRA) predated RLUIPA by a year—being adopted in 1999. Tex. Civ. Prac. & Rem. Code Ch. 110. The two acts provide broad protection from government regulations which impose a *substantial burden* on *religious exercise*, unless the government justifies that burden as the *least restrictive* way to achieve a *compelling government interest*. While RLUIPA provides other protections not included in TRFRA, most of the litigation concerning religious land uses has been based on these acts' identical substantial burden clause on religious exercise. Many important terms in RLUIPA and TRFRA are not defined in their respective statute. The United States Supreme Court has not decided a RLUIPA land use case, resulting in varying standards among the federal circuits. On the other hand, the Texas Supreme Court has provided extensive guidance on most aspects of TRFRA. *Barr v. City of Sinton*, 295 S.W.3d 287, 294 (Tex. 2009) (hereafter "*Barr*").

RLUIPA and TRFRA are so aligned that one court finished a detailed RLUIPA substantial burden analysis, then turned to TRFRA and stated:

> The analysis under TRFRA is identical. TRFRA provides, in language tracking that of RLUIPA, "a government agency may not substantially burden a person's free exercise of religion" unless the government agency demonstrates that the application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that interest. *Balawajder v. Texas Dep't Criminal Justice Inst'l Div.*, 217 S.W.3d 20, 26 (Tex. App.—Houston [1st Dist.] 2006, pet. denied); *see also* Tex. Civ. Prac. & Rem. Code § 100.003. Texas courts consider RUILPA to be the "federal counterpart" to TRFRA, and thus refer to federal caselaw interpreting RLUIPA when deciding cases filed under TRFRA. *Balawajder*, 217 S.W.3d at 26. Accordingly, the court will grant summary judgment for the government entity under TRFRA on the same grounds as under RLUIPA.

Hope in the City, Inc. v. City of Austin, A-07-CA-1038-SS, 2008 WL 11411105, at *8 (W.D. Tex. Oct. 20, 2008).

Further aligning RLUIPA and TRFRA is the fact that federal court decisions on RLUIPA and the Religious Freedom Restoration Act (RFRA) are considered germane to the interpretation and application of TRFRA. *See Barr*, S.W.3d at 296; Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141,1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by City of Boerne v. Flores*, 521 U.S. 507 (1997).

RLUIPA is constitutional. *Castle Hills First Baptist Church v. City of Castle Hills*, SA-01-CA-1149-RF, 2004 WL 546792, at *7 (W.D. Tex. Mar. 17, 2004). TRFRA has not been constitutionally challenged.

Texas Supreme Court Chief Justice Hecht says that TRFRA dictates a *process*, not a result, and the same is true for RLUIPA. *Barr* S.W.3d at 308. Following the process defined in the acts, and refined by the caselaw, sets the limit on government land use regulation on religious exercise.

A succinct report on RLUIPA, including a readable summary of its provisions and national caselaw was produced by the United States Department of Justice, the federal agency with enforcement power over RLUIPA, to memorialize its 20th Anniversary. U.S. DEPT. OF JUSTICE, *Twentieth Anniversary of the Religious Land Use and Institutionalized Persons Act*, September 22, 2020, https://www.justice.gov/crt/case-document/file/1319186/download (Attached as Exhibit A)

Several fine articles on religious protections have been delivered to previous UT Land Use Law conferences by Lynn Carter, Ryan Henry, Terry Welsh and Art Anderson, which are recommended for your review.

This article includes the fine research and writing of Gaspar Gonzalez, a South Texas College of Law Student, editor-in-chief of its Law Review, and a future attorney with Wilson Cribbs + Goren.

I. HISTORY OF TRFRA AND RLUIPA

The history of the United States and its Constitution reflects the importance according religious freedom in this country. TRFRA and RLUIPA *expand* the protections of the Constitution and prior caselaw. The history of TRFRA and RLUIPA is best explained by no less than Texas Supreme Court Chief Justice Nathan Hecht, who provided the following heavily footnoted narrative in *Barr*:

> In 1997, the United States Supreme Court in *City of Boerne v. Flores* [15] recounted its 1990 decision in *Employment Division, Department of Human Resources v. Smith* [16] and Congress' reaction to it. *Smith* had held that under the Free Exercise Clause of the First Amendment, [17] "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest." [18] Specifically, the Court held that a generally applicable Oregon statute criminalizing the use of peyote did not violate the Free Exercise rights of members of the Native American Church who ingested the drug for sacramental purposes. [19] *City of Boerne* explained that in *Smith*, the Court had "declined to apply the balancing test set forth in *Sherbert v. Verner*, 9citations omitted) under which we would have asked whether Oregon's prohibition substantially burdened a religious practice, and if it did, whether the burden was justified by a compelling government interest." [20] *Sherbert* had held that under the Free Exercise Clause, a member of the Seventh-day Adventist Church who refused to work on Saturday, the Sabbath Day of her faith, could not be denied unemployment benefits because she was not "available for work" as required by generally applicable state law. [21] *Smith* also distinguished another case involving a generally applicable law, *Wisconsin v. Yoder*, [22] in which the Court "invalidated Wisconsin's mandatory school-attendance law as applied to Amish parents who refused on religious grounds to send their children to school. That case implicated

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