

# **WE CAN'T REGULATE THAT?**

## **LIMITATIONS ON MUNICIPAL LAND USE REGULATION IN TEXAS**

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### Terrence S. Welch

In 1981, Terry began his legal career in the Dallas City Attorney's Office and he currently is one of the founding partners of Brown & Hofmeister, L.L.P. Since 1981, Terry has represented numerous growing communities in North Texas. He routinely represents and advises local governments on a variety of issues, including employment, land use, civil rights, police, election, natural gas drilling and other regulatory matters.

Terry received his Bachelor of Arts degree at the University of Illinois at Urbana-Champaign in 1976, his law degree in 1979 from the University of Houston College of Law and a Master of Public Affairs in 1981 at the Lyndon Baines Johnson School of Public Affairs at The University of Texas at Austin. Terry has authored and presented over 200 papers to various groups, including the American Bar Association, the Texas City Attorneys Association, International Municipal Lawyers Association, the Texas Municipal League, the American Planning Association, the North Central Texas Council of Governments, CLE International, the National Business Institute and The University of Texas at Austin Continuing Legal Education Program. Terry's most recent publication was a chapter on municipal regulation of natural gas drilling in *Beyond the Fracking Wars*, published by the American Bar Association in late 2013. He has had four law review articles published in *The Review of Litigation*, *Southern Illinois University Law Journal*, *Baylor Law Review* and *The Vermont Journal of Environmental Law*. Terry also had published articles on urban sprawl in Texas and local government regulation of Confederate monuments in the *Zoning and Planning Law Report*. He was the 2004-05 Chair of the State and Local Government Law Section of the American Bar Association and Immediate Past Section Chair of the State and Local Government Relations Section of the Federal Bar Association. He also serves as the Chair of the Board of Trustees of Dallas Academy, an exceptional school for children with learning differences, located in the White Rock Lake area of East Dallas. In May 2014, Terry was appointed an adjunct member of the City of Dallas Civil Service Board and subsequently was appointed to the Civil Service Board in August 2015.

In his free time, Terry enjoys long distance running, having competed in 85 half-marathons as well as many other long-distance races. He completed his 49th marathon in Austin in February 2019. He has competed in the Chicago, New York, San Diego, White Rock/Dallas, Cowtown, Illinois, Marine Corps, Canadian International (Toronto), St. Louis, Austin and Berlin Marathons, all of which he ran very slowly!

## I.

### Introduction

As attorneys who regularly confront land use issues, we often encounter certain areas where local governmental regulatory authority is either completely or significantly circumscribed by state or federal statutory authority. As a result, local governments are not free to undertake regulation without facing the potential that they may have just acted contrary to state or federal law. The purpose of this paper is to address those areas where local government regulation is limited, either *in toto* or in part, ranging from broad issues like religious land use regulation to allowing propane gas tanks to be sold out front at the local convenience store. In no particular order, I have attempted to provide a synopsis of these diverse land use issues.<sup>1</sup>

## II.

### Religious Land Uses Under RLUIPA

The Religious Land Use and Institutionalized Persons Act ("RLUIPA" or "the Act") was signed into law by President Bill Clinton on September 22, 2000. The statute, although short in length but broad in application, addresses what Congress determined to be two areas in which the actions of state and local governments impose substantial burdens on religious liberty—state and local land use regulations and institutionalized persons in the custody of states and localities. While a detailed review of RLUIPA would take pages and is beyond the scope of this paper, I will focus on practical issues for local governments related to religious land uses; however, a brief overview of the statute—and the reasons underlying its adoption—follows.

#### **A. The Federal Statute**

RLUIPA is codified in Title 42, Section 2000cc *et seq.*, of the United States Code. To secure the rights of individuals to pursue and practice their religious beliefs, RLUIPA provides religious institutions protection from discrimination by local governments in land use regulations and the processing of applications for the construction of buildings to be used for religious purposes. Section 2(a) of RLUIPA establishes as a general rule that "[n]o 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—

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<sup>1</sup> I have opted to forego any discussion of the First Amendment's impacts on land use regulations as beyond the scope of this paper. Consequently, there is no discussion of topics such as sexually oriented businesses, donation bins, or sign regulations after *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015).

- (A) is in furtherance of a compelling governmental interest; and
- (B) is the least restrictive means of furthering that compelling governmental interest.<sup>2</sup>

In Section 2(a)(2) of the Act, this general rule is limited in scope by the following language, which specifies that this general rule applies in any case in which:

- (A) the substantial burden is imposed in a program or activity that receives federal financial assistance, even if the burden results from a rule of general applicability;
- (B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or
- (C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.<sup>3</sup>

Section 2(b) of RLUIPA contains non-discrimination and non-exclusion provisions that protect religious assemblies or institutions. Section 2(b)(1) provides that no state or local government “shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution” and Section 2(b)(2) provides that these governmental entities shall not “impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.”<sup>4</sup> In addition, Section 2(b)(3) states that “[n]o government shall impose or implement a land use regulation that . . . totally excludes religious assemblies from a jurisdiction; or . . . unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.”<sup>5</sup>

RLUIPA authorizes private parties to challenge violations of these provisions, specifying that “[a] person may assert a violation of this Act as a claim or defense in a

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<sup>2</sup> 42 U.S.C.A. § 2000cc-2(a)(1).

<sup>3</sup> *Id.*, § 2000cc-2(a)(2).

<sup>4</sup> *Id.*, § 2000cc-2(b).

<sup>5</sup> *Id.*

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