RUTGERS LAW RECORD

The Internet Journal of Rutgers School of Law | Newark

www.lawrecord.com

Volume 40 **2012-2013**

A NON-INTENT BASED CHALLENGE TO EXCLUSIONARY ZONING: WHY RLUIPA CAN HELP ONE RELIGIOUS COMMUNITY WHEN CONSTITUTIONAL CHALLENGES FAIL*

Charis G. Orzechowski

I. INTRODUCTION

Does a religious community have a remedy when a municipality's intent-neutral zoning ordinance acts to completely exclude that group from living within its borders by prohibiting the only type of housing the religious group will use? That the zoning ordinance acts to discriminate against this group, excluding them from living within the municipality's border by excluding their housing, there can be little question. However, where the zoning ordinance is neutral on its face, and no intent to either interfere with the community's free exercise of religion,[1] or intent to discriminate against them in violation of the Fourteenth Amendment equal protection clause[2] is

*This note is dedicated to Dr. Gerald Benjamin of the State University of New York at New Paltz, who taught me to value local government, Prof. Patricia Salkin, Esq., Dean of Touro Law Center, who gave me the inspiration for this note, and to my husband, who has more patience than any person I know.

[1] For a discussion of why it is necessary to show interference with religious exercise on the face of the law, or prove intent to interfere, in order to apply strict scrutiny in a constitutional 1st amendment challenge against a municipality, see *Employment Division v. Smith*, 494 U.S. 872, 879 (1990); see also Prof. Patricia Salkin, Esq.'s article, GOD AND THE LAND: A HOLY WAR BETWEEN RELIGIOUS EXERCISE AND COMMUNITY PLANNING AND DEVELOPMENT, 2 ALB. GOV'T L. REV. viii (2009) (noting that courts cannot apply strict scrutiny to land use laws because zoning ordinances generally represent intent-neutral plans where "the government action at issue was neutral and generally applicable[]").

[2] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) (reinforcing in the context of discriminatory zoning that a 14th amendment Equal Protection clause challenge can only succeed where petitioners are

evidenced, courts will only apply rational basis review to a facial challenge of the ordinance in order to determine if the zoning ordinance is arbitrary and capricious.[3] Application of rational basis usually means that where a religious group cannot prove that the municipality's intent to discriminate against that group was a motivating factor in the decision to zone as it did, the possibility of constitutional challenge is foreclosed, and the group is left without remedy because the rational basis test favors the power of municipalities to zone as they see fit.[4]

This note will explore the ability of an excluded religious group to use the Religious Land Use and Institutionalized Person's Act of 2000 (RLUIPA)[5] to act as a non-intent based challenge to religious housing discrimination where the challenged municipality's zoning ordinance is neutrally and generally applied to all citizens, but where the ordinance as enacted completely forecloses the entire religious group from settling within that municipality's borders absent a change in religious behavior by the excluded group.

In particular, this note will focus on the unique challenges facing the Hasidic Jewish community of Kiryas Joel, in Orange County, New York, with respect to the zoning ordinance, and history behind the zoning ordinance, of the neighboring Village of Woodbury, New York. It will argue Kiryas Joel should apply for a variance to build the high-density, multi-family housing its members need to properly practice Hasidism on land Kiryas Joel owns in the Village of Woodbury, and that a denial of such an application to build such housing amounts to a "substantial burden" of the Hasidic community's religious exercise under RLUIPA. Therefore, Kiryas Joel can use the federal RLUIPA statute as a remedy for discrimination the community suffers because of

---

able to prove discriminatory intent, and that discriminatory impact alone, without more, is insufficient to prove such intent).

[3] Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 387-89 (1926) (holding that where a municipality's interference with a landowner's use of property fails constitutional challenge, all that is left for the court to consider is whether the municipality acted within the permissible scope of its police powers, or whether the government's action was not reasonable, but arbitrary).

[4] *Id.* at 391 (explaining that where the exclusion of certain land uses bears a "rational relation" to the municipality's stated goals that are met by using its police powers, the exclusion of that use will stand).

[5] 42 U.S.C. §§ 2000cc-2000cc-5 (2000).

Woodbury's intent-neutral and generally applied zoning ordinance that forbids almost all multi-family housing.

First, this note begins with a brief history of the Village of Woodbury, and why Kiryas Joel seeks to build within its borders. Second, it will explore how RLUIPA applies in the land use context, and the tests and standards New York federal courts use to apply its provisions. Third, this note applies the facts underlying the Kiryas Joel and Woodbury conflict to the RLUIPA test and standards, finding that Kiryas Joel can theoretically succeed in a RLUIPA "substantial burden" claim.

2. BACKGROUND: THE ACTORS AND THE CONTROVERSY

a. Municipalities and people in conflict:

The Hasidic Jewish Village of Kiryas Joel, in Orange County, New York has effectively been denied the ability to expand their religious community into the Village of Woodbury.[6] Kiryas Joel has been denied this ability because the parcel of land Kiryas Joel's developers purchased was within a town that reincorporated as the Village of Woodbury in 2006, that prohibited exactly the kind of high-density, multi-family housing that the Hasidic Jewish community of Kiryas Joel utilizes for its basic community structure with the Village of Woodbury's new zoning ordinance.[7]

Although Kiryas Joel has one of the fastest growing populations in New York State, with families that commonly have upwards of eight children,[8] it also currently has the highest proportion

[6] Chris Mckenna, *Kiryas Joel Sues Woodbury Over High-Density Zoning*, RECORDONLINE.COM (Nov. 7, 2011, 2:00 AM), http://www.recordonline.com (Find article using a title search within the home page), *also available at* http://failedmessiah.typepad.com/failed_messiahcom/2011/11/kiryas-joel-sues-neighbor-234.html (last accessed Nov. 15, 2011 at 1:14PM).
[7] *See* note 5 and accompanying text.
[8] Michael Hill, *Hasidic Enclave Has Growing Pains in Suburbia*, Rickross.com (2004), http://www.rickross.com/reference/ultra-orthodox/ultra43.html.

of people under the poverty line than anyplace else in the U.S.A.[9] The *New York Times* said that, "half of the residents receive food stamps, and one-third receive Medicaid benefits and rely on federal vouchers to help pay their housing costs."[10] However, the article also notes that Kiryas Joel's population does a lot with a little. Its members get tremendous federal and state grants to build hospital facilities, its members run businesses as non-profits, non-interest loans are used instead of interest-bearing ones and wealthier members give to poorer ones.[11] However, just the thought of being in close proximity with Kiryas Joel's high-density, multi-family home village life is enough to send non-Hasidic neighbors into a panic.[12]

Kiryas Joel's land use issue began in 2004, with its purchase of a 140 acre parcel of farmland in the Town of Woodbury.[13] News of the land deal spread quickly as concerned neighbors learned that the businessman they thought had purchased the farm quickly "flipped" it for cash to Kiryas Joel's developers.[14] Almost as quickly, the Town of Woodbury organized in 2004 to petition to become the Village of Woodbury,[15] a move that would simultaneously block attempts by Kiryas Joel to annex the purchased property and allow Woodbury to revise its zoning ordinance to nearly exclude the kind of high-density, multi-family housing that Kiryas Joel's residents use. In protest, representatives of Kiryas Joel launched a lawsuit challenging the incorporation of the new village

[9] *See* Sam Roberts, *A Village With the Numbers, Not the Image, of the Poorest Place*, NYTIMES.COM (2011), http://www.nytimes.com/2011/04/21/nyregion/kiryas-joel-a-village-with-the-numbers-not-the-image-of-the-poorest-place.html?pagewanted=all.
[10] *Id.*
[11] *See id.*
[12] *See supra* note 8 (quoting interviewee Patrick Dwyer as saying "'[w]e have already lost equity in our homes. People in panic are underselling homes[]'").
[13] Vos Iz Neias, *Woodbury, NY: KJ Group Tries to Stop Woodbury Village Vote*, VOSIZNEIAS.COM (2006), http://www.vosizneias.com/4626/2006/08/03/woodbury-ny-kj-group-tries-to-stop/.
[14] Chris McKenna, *Ace Farm Flipped to Kiryas Joel*, RECORDONLINE.COM (2004), http://www.recordonline.com/apps/pbcs.dll/article?AID=/20040129/NEWS/301299997.
[15] Chris McKenna, *Religion vs. Zoning*, RECORDONLINE.COM (2005), http:/www.recordonline.com/apps/pbcs.dll/article?AID=/20050918/NEWS/309189997&cid=sitesearch.

and stalled the vote to implement the incorporation until 2006.[16] However, the lawsuit lost on procedural grounds and Kiryas Joel never got the chance to challenge the substantive change in zoning brought on by the incorporation of the new village.[17] The new Village of Woodbury was formed and encompasses all land in the Town of Woodbury that is not already the Village of Harriman.[18]

Although the threat of RLUIPA's "substantial burden" provision has been hanging over the heads of Woodbury residents since at least 2005, when Kiryas Joel's lawyers sent the Woodbury Town Supervisor a letter advising her that the new zoning ordinance and village incorporation would be challenged under both RLUIPA and the Fair Housing Act ("FHA"),[19] Kiryas Joel took no action to challenge the new zoning ordinance until 2011.[20] This note will argue that a RLUIPA challenge will likely be effective, but only if Kiryas Joel applies for a variance to develop high density, multi-family housing, and not if they go after the zoning ordinance as a whole.

b. Who are the Hasidim of Kiryas Joel?

Hasidic Judaism began in Eastern Europe during the 1700s.[21] The religious and day-to-day life of Hasidim is deeply spiritual, focused on "joy, faith, and ecstatic prayer, accompanied by song and dance."[22] The communities, also called "courts," remain well defined to this day, with members that maintain a distinctive and conservative style of dress and preserve Yiddish as the language that

[16] *See* In the Matter of Atkins Brothers, L.L.C. v. Conroy, 31 A.D.3d 539 (N.Y. App. Div. 2006) (ruling that the incorporation petition was legally sufficient and could move forward, and finding that the motion to challenge the petition, as well as a motion to join a necessary party, was filed too late); *see also supra* note 13.
[17] *Id.*
[18] *Id.*
[19] Chris McKenna, *Religion vs. Zoning*, RECORDONLINE.COM (2005), http://www.recordonline.com/apps/pbcs.dll/article?AID=/20050918/NEWS/309189997.
[20] *See supra* note 6 and accompanying text.
[21] A Life Apart: Hasidism in America, *A Brief Introduction to Hasidism*, PBS.ORG (last visited Mar. 2, 2012), *available at* http://www.pbs.org/alifeapart/intro.html.
[22] *Id.*

is spoken at home.[23] After World War II, many surviving Hasidic Jews emigrated to the United States.[24] Hasidic communities like Kiryas Joel were created by Holocaust survivors who settled in America and attempted to rebuild the old-world, tight-knit communities that they had treasured in Europe.[25] The movement to settle in America was fostered by Hasidic leaders like the Grand Rabbi Joel Teitelbaum of Satmar.[26] Hasidic enclaves are small and dense, emphasizing "neighborhood and institutions" like schools, prayer houses, ritual baths, and the religious leader's ("rebbe's") residence all within walking distance of the residences of each of the members of the community.[27]

Rabbi Joel Teitelbaum founded several communities in New York, including some of the largest in Brooklyn, NY.[28] After several years of growth in New York, the Rabbi led a smaller group of Hasidim out into the suburbs surrounding the city: that community in Orange County, NY, became Kiryas Joel.[29] The Hasidim of Kiryas Joel are no exception to the larger Hasidic population in their pursuit of a religious life as one small and supportive community,[30] periodically purchasing land in the neighboring municipalities with the goal of annexing that nearby territory as part of their village.[31] Kiryas Joel usually annexed land in order to build with sufficient density disallowed by the

---

[23] *Id.*
[24] *Id.*
[25] *See*, Kiryas Joel Voice, *Birth and Renewal*, KJVOICE.COM (last visited Nov. 15, 2011), http://www.kjvoice.com/aboutkjDet.asp?ARTID=2 (explaining how "[t]he late Grand Rabbi Joel Teitelbaum of Satmar led his disciples and followers..." to a new life in America); *see also* Rabbi Yonassam Gershom, *Welcome to Hasidism.info--the user-friendly FAQ on Hasidism (Chassidism): PART 1-A of 3*, HASIDISM.INFO (last updated Dec. 27, 2009), *available at* http://upstel.net/~rooster/hasid1.html (explaining that Hasidic Jewish communities originated in Europe in the 1700s, forming groups of Hasidim that can be found around the world today, and which, in America, continue to form tight-knit communities that identify with their European village of origin and their founding leader).
[26] *See supra* note 12, Kiryas Joel Voice.
[27] *See*, Immy Humes, *A Life Apart: Hasidism in America*, *Inside the Community: A Holy Life*, PBS.ORG (1998), http://www.pbs.org/alifeapart/intro_2.html (discussing how a Hasidic Jewish community is by definition, small and "walkable," features which further the religious needs of the members).
[28] *See Supra* note 13.
[29] *Id.*
[30] *See supra* note 5 and accompanying text.
[31] Chris Mckenna, *Owners Want Property Annexed to Kiryas Joel*, RECORDONLINE.COM (Aug. 6, 2004, 2:00AM), http://www.recordonline.com/apps/pbcs.dll/article?AID=/20040806/NEWS/308069996 (noting that members of Kiryas Joel own hundreds of acres in the surrounding municipalities, waiting for the day that the land can be annexed to Kiryas Joel, and high-density housing built to suit the village's growing needs).

municipality in which the parcel was originally located.[32] Annexation for high-density development supports the burgeoning population of the village at the same time as maintaining village attributes that its members cherish, such as the ability to keep schools and the house of the religious leader within walking distance from each member's home.[33] As Kiryas Joel expands, it will need to create high density housing. The current population of this 1.1 square mile village is 22,000 people and growing.[34]

c. The interests of a low-density, suburban municipality:

Surrounding municipalities value preserving current lower-density land use in preference to the type of high density housing that would enable Kiryas Joel to expand.[35] The Village of Woodbury values its quiet suburban life, open spaces and supportive public services. As soon as Kiryas Joel bought land in the neighboring Town of Woodbury with the intent of developing it for the village's expansion, the Town of Woodbury began a political process that resulted in the town's re-incorporation in 2006 as the Village of Woodbury.[36] The village's zoning ordinance allows only three zoning districts that permit other types of housing besides single family residences, and these three districts comprise less than 1% of the Village of Woodbury's total land area.[37] Furthermore, the Village of Woodbury's official response to a comment submitted during a public notice and comment period for the adoption of village zoning amendments notes that, "[m]ulti-family dwelling

---

[32] Chris McKenna, *Owners Want Property Annexed to Kiryas Joel*, RECORDONLINE.COM (2004), *available at* http://www.recordonline.com/apps/pbcs.dll/article?AID=/20040806/NEWS/308069996 (last accessed Mar. 2, 2012 10:01 PM).
[33] *See supra* note 9 (2004) ("Annexing the larger parcels into Kiryas Joel...would allow homes to be built there at a much higher density than would be allowed under the zoning codes in Monroe and Woodbury.").
[34] *See supra* note 5 (2011) (noting current population statistics for Kiryas Joel).
[35] *See supra* note 5 (noting the "jitters" of the surrounding neighbors faced with the prospect of the village's expansion).
[36] WELCOME TO THE VILLAGE OF WOODBURY (last accessed Nov. 15, 2011), http://villageofwoodbury.com/home ("The Village of Woodbury was incorporated on August 28, 2006. The Village of Woodbury encompasses all of the land formerly comprising the Town of Woodbury except for that portion of the Village of Harriman located in the Town of Woodbury. The Village took over all zoning and planning functions from the Town of Woodbury on June 1, 2007.")
[37] VILLAGE OF WOODBURY ADOPTED COMPREHENSIVE PLAN, 28, sect. 4.2 (2011), *available at* http://villageofwoodbury.com/public/Full_Comp_Plan_with_maps.pdf (noting that the three residential zones which permit two-family housing are the "R-0.25A, LC and HB districts").

units are allowed only by special permit in the HB zone, which makes up only 0.3% of the Village's land area."[38] Consequently, while the tranquil and rural character of the Village of Woodbury is thereby preserved, the Hasidim of Kiryas Joel are completely excluded from settling within this municipality.

Any of Kiryas Joel's attempts to annex those parcels that its developers had purchased in the Town of Woodbury reached a roadblock upon the incorporation of the Village of Woodbury. Efforts by Kiryas Joel to enjoin the Town of Woodbury from incorporating in its entirety as the Village of Woodbury failed, as did attempts to prevent the creation of the new zoning ordinance which would eliminate all permissible high-density, multi-family housing.[39] Furthermore, due to a technicality in New York State annexation law, Kiryas Joel would be unable to annex any part of the newly incorporated Village of Woodbury without the Town of Monroe (the town in which Kiryas Joel is situated) simultaneously annexing the same territory; all but destroying the Hasidim's hope for an expanded village of Kiryas Joel.[40] As of the inception of this note, Kiryas Joel has elected to sue the Village of Woodbury in NY State Supreme Court in an attempt to "invalidate a comprehensive plan and two zoning laws that Woodbury trustees adopted in June after seven years of planning and demands by Kiryas Joel that high-density housing be permitted."[41]

This note presumes that Kiryas Joel has one more option: to apply for a re-zoning or special use permit for the land its developers own, and when that is denied, claim that the Village of Woodbury's zoning violates RLUIPA's "substantial burden" provision. This would shift the burden

[38] VILLAGE OF WOODBURY, VILLAGE OF WOODBURY COMPREHENSIVE PLAN UPDATE AND ASSOCIATED ZONING AMENDMENTS FINAL GENERIC ENVIRONMENTAL IMPACT STATEMENT (FGEIS), III-13 (2011) *available at* http://villageofwoodbury.com/public/FGEIS_Second_Submission.pdf (discussing the village's limited ability to provide affordable housing).

[39] *See supra* note 15 and accompanying text.

[40] N.Y. GEN. MUN. LAW § 716 (McKinney 2011) (This stature sets forth the restrictions and prohibitions on annexation: stating that a village may annex part of another village, except where that annexation would change the borders of a town, unless the town in which the annexing village is located acts to annex the same territory of the neighboring town/village-annexee at the same time (subsection 7). *See generally*, §716 (Ostensibly, there is no prohibition on a village annexing part of a neighboring town, and thereby changing the border, as long as no other village is involved).

[41] *See supra* note 6 and accompanying text.

and require Woodbury to prove that its zoning ordinance serves "compelling government interests" and that those interests are narrowly tailored to those ends.[42]

3. RLUIPA: AN OVERVIEW

RLUIPA was enacted by Congress in 2000 in the aftermath of a U.S. Supreme Court decision that invalidated the Religious Freedom Restoration Act of 1993 ("RFRA"), an act which the High Court said "exceeded Congress' power under the enforcement clause of the Fourteenth Amendment. . . [because] RFRA purported to define rights rather than enforce rights already existing under the Constitution."[43] Congress remained determined to protect religious exercise in permissible ways not precluded by the Supreme Court's decision on RFRA. Congress created RLUIPA to enforce lower courts' application of strict scrutiny in certain cases of "individualized government assessments" where "the lower courts had rejected almost all claims for religious exemptions;" land use and "regulations governing the conduct of institutionalized persons."[44] The primary text of RLUIPA, 42 U.S.C. § 2000cc(a)(1) (2000) relevant to this note is as follows:

> 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.[45]

Furthermore, any individualized actions or rejections the Village of Woodbury would make regarding Kiryas Joel's prospective variance application to increase the land use intensity of parcels

---

[42] *See* Westchester Day School v. Village of Mamaroneck, 504 F.3d 338, 347-53 (2d Cir. 2007).
[43] Shelby D. Green, *Zoning In and Out Churches: Limits on Municipal Zoning Powers by the Religious Land Use and Institutionalized Persons Act*, 37 REAL EST. L. J. 163, 163-64 (2008) (explaining how RLUIPA was enacted "in the wake of" *City of Boerne v. Flores*, 521 U.S. 507 (1997)).
[44] Note, *Religious Land Use in the Federal Courts Under RLUIPA*, 120 HARV. L. REV. 2178, 2181 (2007) (exploring RLUIPA's background and offering projections for its effectiveness in application).
[45] RLUIPA § 2000cc-(a)(1) (2000) (emphasis added).

purchased by members of Kiryas Joel to high-density, multi-family residences falls under § 2000cc-(a)(2)(C), stating:

> [T]he 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.[46]

RLUIPA codifies the rights inherent in the free exercise clause of the First Amendment that create a heightened level of scrutiny for infringement of religious exercise. This heightened scrutiny is then specifically applied to land use cases where the government's action arguably imposed a "substantial burden" on the landowner's religious exercise.[47] If the plaintiff is successful shows that a government action *vis a vis* his or her land substantially burdened his or her religious exercise, the burden then shifts to the government to prove that the government's action furthered a "compelling interest" and that the government's action was "the least restrictive means of furthering that interest.[48] Two other aspects of RLUIPA jurisprudence are essential to note because each gives a clue as to how comprehensively Congress meant for this statute to apply. Firstly, "[r]eligious exercise under RLUIPA is defined as 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'"[49] Secondly, courts have emphasized "that the Act's aim of protecting religious exercise is to be construed broadly and 'to the maximum extent permitted by the terms of this chapter and the Constitution.'"[50]

[46] RLUIPA § 2000cc-(a)(2)(C).
[47] RLUIPA § 2000cc-(a)(1). *See* Green, supra note 43, at 163-167 (2008).
[48] RLUIPA § 2000cc-(a)(1)-(a)(2)(C). *See also Westchester Day Sch.*, at 353 (2007) (interpreting the federal statute).
[49] *Westchester Day Sch.*, 509 F.3d. at 347 (*quoting* RLUIPA § 2000cc-5(7)(A)).
[50] *Id.* (interpreting and quoting RLUIPA § 2000cc-3(g)).

4. MAKING A CASE FOR A "SUBSTANTIAL BURDEN" IN NEW YORK: TESTS, STANDARDS AND CASES

Courts in the Second Circuit have ironed out several standards and tests that are used to determine if the "substantial burden" provision of RLUIPA protects a land owner's free exercise rights from infringement, even when there is no evidence that the government either intended to infringe on the plaintiff's religious rights or intended to discriminate against the plaintiff or the plaintiff's religious beliefs.[51] The tests and standards are applied systematically, creating a proof-chain through which the courts can determine whether the government's action can be enjoined.[52] Because this note argues that Kiryas Joel can use this statute and these tests and standards to its advantage against the exclusionary actions of the Village of Woodbury, an overview of the relevant Second Circuit RLUIPA land use jurisprudence is included below.

a. Religious Exercise:

A plaintiff must first prove whether a "religious exercise" that has been infringed. As stated *supra*, Congress intended to interpret this term broadly,[53] and expanded the definition to include activities that go beyond the central tenants of the religion to include activities that are an exercise of that religion, yet are not "compelled by, or central to" it.[54] Although New York courts largely stay true to the expansive intent of the statute, they have also been careful to cabin in the definition to exclude more secular activities that plaintiffs have attempted to fit under the umbrella of religious exercise.[55]

---

[51] *See generally* Fortress Bible Church v. Feiner, 734 F.Supp.2d 409 (S.D.N.Y. 2010).
[52] *Id.*
[53] RLUIPA § 2000cc-3(g).
[54] RLUIPA § 2000cc-5(7)(A).
[55] *See e.g.*, *Westchester Day Sch.* 504 F.3d at 347-48 (noting that denying a permit for general improvements to a religious school, such as a new headmaster's residence or more office space, does not infringe religious exercise); Yeshiva Imrei Chaim Viznitz of Boro Park, Inc. v. City of New York, No. 10 CV 05986(HB), 2011 U.S. Dist. WL 3273273, 1* (S.D.N.Y. Jul. 27, 2011) (holding that the Yeshiva's proposed improved catering facilities were not religious exercise).

Westchester Day School finds that while "all conceivable improvements proposed by religious schools" cannot be defined as religious exercise, the plaintiff's proposed expansion of the school's classroom space, that was wholly used for "religious education and practice," met Congress' inclusive definition.[56] *Fortress Bible Church v. Feiner* utilizes case law from other districts to further refine the definition of religious exercise to mean "'facilities to be constructed [and] to be devoted to a religious purpose,'" where "such religious purpose need not implicate 'core religious practice.'"[57] Furthermore, the *Fortress* court notes that "RLUIPA does not protect the buildings or structures *per se*, but rather protects their use *for the purpose of religious exercise*."[58] Consequently, it becomes clear how denying a building permit that would allow the church to accommodate rising membership in *Fortress,* where the plaintiffs believed that expanding the church's membership was a mandatory task from God, was found to be a cognizable infringement on religious exercise.[59] On the other hand, it becomes equally clear how the court in *Yeshiva Imrei* decided that the plaintiff's proposed catering facility, although located in close proximity to the room in which prayers were held, and although the plaintiffs asserted that the funds generated from the catering business would help support its religious mission, was not a religious exercise sufficient to support a substantial burden claim under RLUIPA.[60]

b. Substantial Burden:

The Second Circuit utilized U.S. Supreme Court free exercise jurisprudence to construct RLUIPA "substantial burden" tests and standards.[61] New York federal courts agree that:

---

[56] *Westchester Day Sch.* 504 F.3d at 347-48.
[57] 734 F.Supp.2d 409, 499 (S.D.N.Y. 2010) (interpreting and citing Guru Nanak Sikh Society of Yuba City v. County of Sutter, 326 F. Supp.2d 1140, 1151 (E.D.Cal. 2003)).
[58] *Id.*
[59] See *Id.* at 500.
[60] See *Yeshiva Imrei*, 2011 U.S. Dist. WL 3273273 at *5-*6 (finding the issue indistinguishable from the plaintiff's Article 78 claim and upholding the decision of the Article 78 court which found no religious exercise).
[61] *Westchester Day Sch.* 504 F. 3d at 348.

> [A] substantial burden on religious exercise exists when an individual is required to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion...on the other hand."[62]

Clarified further, the court of the Southern District of New York asserts that:

> In the context of land use applications, however, "where there has been a denial of a religious institution's application, courts appropriately speak of government action that directly *coerces* the religious institution to change its behavior, rather than government action that forces the religious entity to choose between religious precepts and governmental benefits."[63]

The *Fortress* opinion then suggests that a two-part test established in *Sherbert* helps find whether there has been a substantial burden under RLUIPA. This test examines: 1) the nature of the denial, and 2) the effect of the denial on the religious institution.[64] However, it must be noted first that RLUIPA only applies to individualized actions directed at a plaintiff such as the denial of an application to re-zone, or denial of a building permit. "[G]enerally applicable burdens, neutrally imposed," such as zoning ordinances, "are not 'substantial.'"[65]

To find whether the government's "definitive rejection" of the "submitted plan" satisfies the first prong of the test, *the nature* of the denial, New York courts must simply find that the denial was definitive.[66] The reasoning here is simple. If the denial is definitive, the government's action can be interpreted as a direct cause of the "substantial burden on the free exercise of religion."[67] Alternately, if the denial is conditional, or leaves open the "possibility of a resubmission with modifications" it is far less likely that a court will find the municipality's action to be a substantial burden.[68] The government is probably not in a position to *coerce* the applicant party where the government has left it up to the party to determine its own course of action. However, as in *Fortress*

---

[62] *Id.* (citing Sherbert v.Verner, 374 U.S. 398, 404 (1963)).
[63] *Fortress Bible Church* 734 F. Supp 2d. at 501 (citing *Sherbert*, 374 U.S. at 349).
[64] *See Id.*
[65] *Westchester Day Sch.*, 504 F. 3d at 350.
[66] *Fortress Bible Sch.*, 734 F. Supp. 2d at 501-02.
[67] *Id.*
[68] *Id.*

where the "government's purported willingness to consider a modified plan [is found] to be wholly disingenuous," courts will consider that disingenuous offer to be a definitive action.[69]

Then, if the denial is determined to be definitive, courts move to the second prong of the test, the *effect of the denial* on the applicant party. *Westchester Day School* established that "[t]here must exist a close nexus between the coerced or impeded conduct and the [plaintiff's] religious exercise for such conduct to be a substantial burden on that religious exercise."[70] A definitive denial that merely has a "minimal impact on the institution's religious exercise" will not satisfy the second prong of the substantial burden test.[71] The burden of this prong is most clearly illustrated by *Westchester Day School's* classroom hypothetical: where a classroom can be rearranged to meet the same "religious needs" which purportedly could only have been met by the denied application for renovation, this "effect" nexus does not exist.[72]

Because a finding of "substantial burden" ties the hands of municipalities and raises policy concerns associated with one group of citizens who are able to assert their rights contrary to the wishes of another group, courts have ruled that "generally applicable burdens, neutrally imposed, are not 'substantial.'"[73] Consequently, plaintiffs cannot show that the municipality's individualized action substantially burdened them where either: 1) there are "quick, reliable, and financially feasible alternatives [that the plaintiff] may utilize to meet its religious needs absent its obtaining the construction permit;" or 2) where "the denial was conditional" and the plaintiff merely refused to comply with the conditions, leading to the denial.[74] This is a strict test, and would be the death knell for claims by plaintiffs seeking a variance in a zone that prohibits the plaintiff's preferred mode

---

[69] *Id.* at 502.
[70] *Westchester Day Sch.* 504 F.3d at 349 (explaining that even a definitive denial will be insufficient to prove a substantial burden where it cannot be shown that the denial of the building application had more than a "minimal impact on the institution's religious exercise").
[71] *Id.*
[72] *See Id.*
[73] *Id.* at 350 (paraphrasing the U.S. Supreme Court finding on substantial burden in Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 389–91 (1990)).
[74] *Id.* at 352.

of development where the municipality had zoned other parcels that could meet the plaintiff's needs. New York courts are clear:

> [W]hen an institution has a ready alternative—be it an entirely different plan to meet the same needs or the opportunity to try again in line with a zoning board's recommendations— its religious exercise has not been substantially burdened.[75]

In *Westchester Day School*, the court found that the meaningless building conditions imposed by the ZBA, coupled with the school's lack of alternatives to accommodate its rapidly growing student body, absent a permit for new development, constituted a substantial burden on the school's religious exercise.[76] On the other hand, the District Court for the Western District of New York found no substantial burden on a church's religious exercise when the church was denied a permit to build in a zone that did not permit churches, and where the plaintiff church admitted to having other realistic options besides the contested parcel.[77]

c. No alternative: what do courts require plaintiffs to show to satisfy the "no ready alternative" prong of the substantial burden test above?

With respect to the "no ready alternative" prong test, courts have never specifically addressed what sort of alternative must be contemplated by the entity seeking reprieve under RLUIPA. What does "no ready alternative" mean? The Second Circuit may have implicitly defined the term using descriptive language in *Westchester Day School* by finding that there were "no ready alternatives" absent those that are "quick, reliable, and financially feasible" alternatives.[78]

The cases suggest that the definition of suitable "alternatives" is highly fact specific and is often tailored for that religious facility's convenience, with some exceptions. A plaintiff's RLUIPA claim for denial of *new construction* can be destroyed by having alternative plots for development

---

[75] *Id.*
[76] *Id.*
[77] *See* Wesleyan Methodist Church of Canisteo v. Vill. of Canisteo, No. 10 CV 6346 CJS, 2011 WL 2149444, *1 (W.D.N.Y. Jun. 1, 2011).
[78] *Westchester Day Sch. 504 F.3d* at 352.

available within the district. *Wesleyan Methodist Church* plaintiffs were not allowed to build their new church in the preferred parcel within the "light industrial zone" because other zones within the municipality were already zoned to allow churches, whereas the light industrial zone was not.[79] *Westchester Day School* is an example of a *pre-existing* religious school that wanted to expand.[80] Westchester Day School prevailed and the court ruled that it could develop new buildings on its present parcel despite the challenged denial by the town ZBA.[81] In *Fortress Bible Church*, a church with *other alternate sister-facilities in close proximity* applied to build a larger church/school on one of its properties and was denied the building permits to do so by a municipality that claimed that the proposed construction was too large.[82] Again, the Southern District Court of New York reversed the denial of the desired building permit, finding the church's present facilities "inadequate," the offer of approval for a smaller facility "disingenuous" and the use of the church's sister-facilities as an alternate to new construction unsatisfactory given the nature of the church's needs.[83] Indeed, the court that decided *Fortress* declared that even if the town's offer to approve a smaller facility was genuine, the lengthy process Fortress Bible Church would have to endure directly contravened the Second Circuit's directive in *Westchester Day School* to be "quick, reliable, and financially feasible."[84]

d. Shifting the Burden to Prove a Compelling Government Interest:

Once the plaintiff has established that the government's individualized action placed a "substantial burden" on its religious exercise, the burden shifts to the defendant government to defend the legitimacy of its action and prove that the denial of the plaintiff's petition "was 1)

[79] *Wesleyan Methodist Church* at *1.
[80] *See Westchester Day Sch. 504* F.3d 338 (2007).
[81] *See id.*
[82] *Fortress Bible Church*, 734 F.Supp.2d at 504-05.
[83] *Id.* at 504.
[84] *Id.*

necessary to further a compelling governmental interest, and 2) was the least restrictive means of furthering that compelling interest."[85]

New York federal courts have outlined several prerequisites that defendant's must satisfy before courts find that the government's interest was compelling. The second circuit adopted the compelling interest requirement from Supreme Court RFRA jurisprudence: defendants "must show a compelling interest in imposing the burden on religious exercise in the particular case at hand, not a compelling interest in general."[86] Also, the Southern District of New York set fourth some "compelling interest" requirements in the 2010 *Fortress* case that were affirmed by the Second Circuit on September 24, 2012.[87] The Southern District grounded its compelling interest standards in Supreme Court free exercise precedent, stating that a government interest will be found compelling only where: a) the interests "are those that protect public health, safety, or welfare;[88] b) the interests are "of the highest order;"[89] c) that "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation" in "sensitive constitutional areas;"[90] and d) that "the compelling interest standard is the 'most demanding test known to constitutional law.'"[91] In *Fortress*, defendants were not found to have a compelling interest for denying the Plaintiff's SEQRA application, despite the town having cited concerns such as traffic impact, inadequate parking, public nuisance creating a danger to children, and "adverse impacts to the town's police and fire resources."[92] The court in *Westchester Day School* found that the defendants lacked a compelling interest where the village's only

[85] RLUIPA § 2000cc-a(1); *Fortress Bible Church*, 734 F.Supp. 2d at 505.
[86] *Westchester Day Sch. 504 F.3d* at at 353 (2007)(citing Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 432 (2006) (holding that the "mere invocation of general" government concerns is insufficient to be a compelling purpose)).
[87] *Fortress Bible Church*, 734 F.Supp. 2d at 505. (*Fortress Bible Church* was affirmed on appeal in the Second Circuit (Fortress Bible Church v. Feiner, 2012 WL 4335158, No. 10–3634–cv (2d Cir. Sep. 24, 2012)).
[88] *Id.* (citing Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)).
[89] *Id*, (citing *Sherbert* at 406.).
[90] *Id* (citing City of Boerne v. Flores, 521 U.S. 507, 534 (1997)).
[91] *Id.*
[92] *Id.* at 505 (finding that legitimate concerns which would pass the rational basis test fail the compelling interest test).

stated interests were "enforcing zoning regulations and ensuring residents' safety through traffic regulations" as those interests were too generalized.[93]

There is currently no New York case law that addresses the "least restrictive" means prong of the government's compelling interest test. However, where a court requires that a government action that serves a compelling purpose be "the least restrictive means of furthering that interest," courts generally agree that the means by which the government objective is achieved must be the very best option for doing so, with no reasonable and less intrusive means available at its disposal.

5. WHY RESIDENTS OF KIRYAS JOEL WHO APPLY FOR A VARIANCE TO DEVELOP LAND IN THE VILLAGE OF WOODBURY WOULD LIKELY SUCCEED IN A RLUIPA CLAIM IF DENIED PERMISSION TO SO DEVELOP

Kiryas Joel may be unable to annex the territory it has purchased in the Town of Woodbury, now the Village of Woodbury, as part of its own village. However, this does not mean that Kiryas Joel is left without a remedy in the face of the facially neutral, yet religiously exclusionary, zoning ordinances enacted by the Village of Woodbury. If Kiryas Joel is content to expand its community into the neighboring Village of Woodbury without immediately fighting to annex the territory, and expand by purchasing the land it desires and applying for a zoning modification or variance to develop the kind of high-density, multi-family housing that it requires to house its members, and if Woodbury denies that petition (which it is highly likely to do), Kiryas Joel can respond to this individualized government action with a very viable "substantial burden" claim under RLUIPA. A RLUIPA "substantial burden" challenge to an exclusionary zoning scheme that has the effect of excluding an entire religious group is a novel issue in New York State, and has never been addressed by the Second Circuit, or any of the District Courts. In the scenario proposed above, there is no

[93] *Westchester Day Sch. 504 F.3d* at 353.

need to challenge the Village of Woodbury's entire zoning ordinance. Kiryas Joel can succeed in a RLUIPA claim by challenging the zoning of the particular plat it owns.

a. Denying Kiryas Joel the Ability to Develop High-Density, Multi-Family Housing Would be an Infringement of Religious Exercise

The type of high-density, multi-family housing that the residents of Kiryas Joel require is necessary and intrinsically tied to the religious exercise of this religious community, specifically because high-density allows the Hasidic Jews of this community to practice many aspects of their religion.[94] Recalling that RLUIPA defines "religious exercise" as: "any exercise of religion, whether or not compelled by, or central to, a system of religious belief,"[95] with the understanding that the provision is to be "construed broadly and 'to the maximum extent permitted by the terms of this chapter and the Constitution,'"[96] it is easy to see how Hasidic life and practices satisfy the provisions of a land use act created specifically to protect religious people like them from being "zoned out" of a municipality with the mere enactment of a facially neutral zoning law. These Hasidim, despite being the fastest growing community in New York State, and currently having over 22,000 residents, have remained in a close-knit and walkable neighborhood of under 1.2 square miles specifically to continue practicing Hasidic Judasim as they have always known it.[97] To accommodate that quantity of individuals, and yet retain the relatively small footprint that enables these people to live within walking distance of the religious school and their rebbe's home, among other important destinations, any new development would have to accommodate a very high density. Living in a high-density community, within walking distance of religious activities is made even more critical by the fact that from sundown on Friday to sundown on Saturdays, it is prohibited for Orthodox Jews to drive or

[94] *See supra* note 9 and accompanying text.
[95] RLUIPA § 2000cc-5(7)(A).
[96] *Westchester Day Sch. 504 F.3d* at 347 (citing RLUIPA § 2000cc-3(g)).
[97] *See supra* note 6 and accompanying text.

ride in a car.[98] Just as in the case of *Westchester Day School* or *Fortress Bible Church* where the plaintiffs sought to expand their facilities to accommodate the religious needs of their constituents, and to better enable those facilities to cater to a growing membership in need of more services and more space, so too would a denial of Kiryas Joel's ability to expand into suitable plats be an infringement on their religious exercise that is more than a mere inconvenience, it is a total denial of Kiryas Joel's ability to meet the religious needs of its members.

If the Village of Woodbury denies Kiryas Joel's application to build, the consequences of that denial are nothing like what the court held in *Third Church of Christ Scientist v. City of New York* where New York City's denial of plaintiff's application to renovate amounted to nothing more than a "revocation of permission to hold catered social events" and denied the RLUIPA claim.[99] RLUIPA and New York federal courts do not require that the religious practice effected be one that is "central to[] a system of religious belief."[100] Catering facilities fail this generous provision.[101] On the other hand, Kiryas Joel's high density housing passes. The high-density housing is not just housing, it is the vehicle that enables Hasidic Jews in Kiryas Joel to worship the way they do, stay close to religious leaders the way they feel they must and provide a community that enables the kind of maximum religious immersion they value.[102]

In Kiryas Joel's case, the denial of high-density, multi-family development upon purchased land takes away housing in which families raise their children into a religious way of life and

---

[98] Rabbi Aaron B. Twerski, *Expert Report* 1, 10 (filed Nov. 9, 2007) *filed in connection with* Bikur Cholim v. Village of Suffern, 664 F. Supp.2d 267 (S.D.N.Y. 2009) (Expert report testifies to the fact that practitioners of Orthodox Judaism commonly stay in a Shabbos house near to a hospital so that on the Sabbath, when driving is prohibited, family members may walk from the Shabbos house to visit the sick in the hospital, which is their religious duty.).
[99] 617 F.Supp.2d 201, 208-09 (S.D.N.Y. 2008) (utilizing the test articulated in *Westchester Day Sch. 504 F.3d* at 348 that asks whether the facilities would be used for religious purposes, or would merely be "religiously-affiliated;" suggesting that a useful way to think about the distinction is whether a proposed gymnasium in a religious school will be used just for gym class or to hold services too).
[100] RLUIPA § 2000cc-5(7)(A).
[101] *See*, *e.g.*, *Yeshiva Imrei* at *5.
[102] *See supra* note 12 and accompanying text.

extinguishes the small-town way of life that enables Hasidic Jews to be fundamentally who they are spiritually.

b. "Substantial Burden" is provable:

If the Village of Woodbury denies Kiryas Joel's application to develop high-density, multi-family housing on the parcel of land it purchases, Kiryas Joel can successfully claim that the denial affects a "substantial burden" on its religious exercise under RLUIPA § 2000cc-2(a)(1). Kiryas Joel can satisfy *Sherbert's* two-part test for finding a substantial burden where New York Courts can find that: 1) the nature of the denial [is definitive], and 2) the effect of the denial on the religious institution represents a "close nexus" between the religious exercise and the denied land use application.[103]

i. First Prong: The Nature of the Denial

Satisfying the first prong of the test, *the nature of the denial*, is theoretically possible if Kiryas Joel opts to take a course of action *vis a vis* the contested parcel that it has not yet taken.[104] The Village of Kiryas Joel must apply for a land use variance directly from the Village of Woodbury without first attempting to annex the land for its own village. The application would likely be denied, because as previously discussed, the Village of Woodbury only allows high-density, multi-family housing by special permit on .3% of its land.[105] New York RLUIPA jurisprudence mandates a finding of definitive action on the part of the government entity.[106] If Kiryas Joel applies for a variance to build high-density, multi-family housing, and that application is either denied by the

[103] *See generally, Westchester Day Sch. 504 F.3d. See Sherbert* at 349.
[104] *See supra* note 6 and accompanying text.
[105] *See supra* note 25 and accompanying text.
[106] *Fortress Bible Church* at 501.

Village of Woodbury, or granted with conditions that courts would finds to be meaningless,[107] then the denial would satisfy New York Standards for the purposes of moving on to the second prong of the test.

It is important to remember that courts qualify the first *denial prong* with a secondary two-prong test of its own. First, as addressed above, the denial cannot be found to be conditional in the sense that the religious institution's application will be granted so long as the institution complies with some reasonable requirements that do not, in and of themselves, coerce the institution to change its behavior.[108] Second, even where the denial is definitive, the religious institution cannot be found to have other reasonable, expedient alternatives to the development it applied for. To reiterate, the religious institution cannot have "quick, reliable, and financially feasible"[109] alternatives and still expect the court to find that the government has substantially burdened its religious exercise. Kiryas Joel's theoretical application for a variance can satisfy this *no alternatives* test so long as courts continue to read the test liberally, as New York federal court precedent suggests that they will. For example, New York trial courts held that the church in *Fortress Bible Church* had no reasonable alternatives to building a new church even where the congregation was divided between two sister-churches.[110] Kiryas Joel is a village surrounded by land; some developed, much undeveloped, and probably mostly unavailable for purchase or development.[111] Kiryas Joel's situation is clearly analogous to many of the cases in which the religious institutions won. Surely, the *Westchester Day School* plaintiffs were not foreclosed from seeking an alternate site, and certainly the

---

[107] *See*, *Westchester Day Sch. 504 F.3d* at 349 (noting that even a denial with conditions will effectively be a denial where the conditions are, "a conditional denial may represent a substantial burden if the condition itself is a burden on free exercise, the required modifications are economically unfeasible, or where a zoning board's stated willingness to consider a modified plan is disingenuous").
[108] *Id.*
[109] *Westchester Day Sch. 504 F.3d* at 352.
[110] *See generally*, *Fortress Bible Church* (2008).
[111] *See*, Orange County GIS Base Map, GIS.ORANGECOUNTYGOV.COM (last accessed Feb. 28, 2012 7:30 PM) *available at* http://74.43.125.86/orangecountygisbasemap/index.html (focusing map on the Village of Kiryas Joel and selecting the NYSDOP 2010 satellite image).

plaintiffs in *Fortress* could have built a new church elsewhere if a suitable plat was available. In fact, *Wesleyan Methodist Church* plaintiffs lost where they admitted that other, alternative sites where the new church could be built were already zoned for churches, were suitable for construction and yet were rejected.[112] New York federal courts do not require that zero viable alternatives exist, but merely that the chosen alternative is the only one that is "quick, reliable, and financially feasible."[113]

By purchasing a construction-ready, undeveloped plat within the Village of Woodbury, right on its own border, Kiryas Joel most likely has what it takes to satisfy this "no alternatives" test. After all, not all surrounding undeveloped land will be available for purchase, some will not be suitable for high-density, multi-family housing, and some may again spread the borders of the village too far for residents to be able to walk wherever they need to. The "no alternatives" test is very fact specific.[114] There is no guarantee that Kiryas Joel can satisfy it, or satisfy it with any other plat besides the one it currently owns within the Village of Woodbury. However, Orange County NY's GIS website reveals that Kiryas Joel has used up nearly all of the land available to it that is zoned residential, and it is surrounded on all sides by non-residential zones in adjoining municipalities.[115] Additionally, considering that it is in fact the zoning plan of the Village of Woodbury that creates part of the requisite hardship necessary for Kiryas Joel to satisfy this test, circumstances suggest that courts will find in favor of the Hasidic community and allow high-density development.

Daniel P. Lennington, author of *Thou Shalt Not Zone: The Overbroad Applications and Troubling Implications of RLUIPA's Land Use Provisions*,[116] makes a compelling case for why religious institutions should not easily be able to satisfy the "substantially burdens" test of RLUIPA, merely because a

---

[112] *See*, *Wesleyan Methodist Church* at *2.
[113] *Westchester Day School* at 352.
[114] *See id.*
[115] *See supra* note 11 and accompanying text. Select the map of Kiryas Joel, then apply building footprint and zoning layers. Zoom in to view zoning by individual parcel. It will reveal Kiryas Joel as an island of nearly-used-up residential plats surrounded by parcels zoned as parks and vacant land.
[116] *See generally*, 29 Seattle U. L. Rev. 805 (2006) (arguing that "Congress did not intend for religious institutions to be immune from local zoning laws," and positing that RLUIPA's exceptionally broad and inclusive language with regard to "'burdens' on religious exercise" should be interpreted to more closely mean "intentional discrimination").

religious institution's application for variance is denied. However, even Mr. Lennington points out that "Congress' intent in passing RLUIPA, . . . was aimed at preventing local governments from intentionally discriminating against religious land uses;"[117] precisely the kind of challenge Kiryas Joel is justified in bringing against a village that incorporated after the undesirable type of development was proposed, and forbade exactly the type of development necessary for Kiryas Joel to grow.

The Second Circuit's language for finding a substantial burden in the land use context is: "when there has been a denial of a religious institution's building application, courts appropriately speak of government action that directly *coerces* the religious institution to change its behavior."[118] The very denial of an application to build high-density, multi-family housing would coerce the Hasidim of Kiryas Joel to change their religious behavior. As set out above, the village may become so overcrowded that people must leave their rebbe, schools and temples behind. Development that is granted, but too low in density, creates an un-walkable village, forcing residents on the outskirts to worship in isolation on the Sabbath or else sacrifice their beliefs to take advantage of transportation. The community that is meant to be a world within the larger, outside world would force certain families outside of the fold, but to live in sparse neighborhoods. A denial of a permit for high-density housing is tantamount to a complete denial of the ability to develop, completely removing the ability of this religious enclave to meet the needs of its growing membership.

ii. Second Prong: Effect on the Religious Institution

Definitive denial of a variance for high-density, multi-family housing for this Hasidic Jewish community leads to the second prong of the "substantial burden" test, *effect of the denial.* Kiryas Joel's ability to develop in suitable neighboring plats is essential to saving the Village from some dire choices; split up, have members move away, or become completely un-walkable in contravention of

[117] Daniel P. Lennington, *supra* note 86 at 806.
[118] *Westchester Day Sch. 504 F.3d* at 349.

its dearest values. While overcoming the Village of Woodbury's zoning scheme is contentious, the very denial of a variance for high-density housing would coerce Kiryas Joel to change its religious behavior to accommodate lower density housing because the denial itself would create the need for the growing Hasidic population to choose between creating an un-walkable section of community, or forcing overflowing members out to other communities.

The Second Circuit found the second *effect prong* satisfied, and therefore the school's religious exercise in *Westchester Day School* "substantially burdened," where the *effect* of the ZBA's denial of a permit to renovate and expand the school facilities restricted the school's ability to meet the needs of its growing enrollment.[119] A denial of an application to build a larger church was deemed to satisfy the *effect* prong of the substantial burden test in *Fortress Bible Church*, where preventing the church from acquiring larger facilities was found to hamper its mission to bring in new members.[120] The plight of Kiryas Joel is directly analogous to the plaintiffs in these two cases. The effect of a denial for a high-density, multi-family housing variance would be to cause Kiryas Joel's population to suffer conditions that would prevent the religious community from meeting the needs of its burgeoning population and create circumstances that would encourage its members to disperse, in direct contravention of the Hasidic religious practices of remaining in close proximity to religious and community facilities.

Furthermore, denying an application to build the high density housing that the Village of Kiryas Joel requires meets *Westchester Day School's* test for whether a "close nexus exists" between the religious exercise and the "impeded conduct."[121] Just like a religious school's permit to build new facilities for religious instruction and worship is necessary to that religious exercise, so too is an application to build more of the only type of housing that a religious community like Kiryas Joel

---

[119] *See*, *id.* at 348-51.
[120] *See generally*, *Fortress Bible Church* (2008).
[121] *Westchester Day Sch. 504 F.3d* at 349.

needs to facilitate worship, closeness to religious leaders and religious schooling, proximity to worship, religious instruction in the home, and reinforcement of faith and religious values made possible by being surrounded by like-minded neighbors is necessary to ensure the continued inclusion of a growing Hasidic population in exactly those religious endeavors.

c. The Village of Woodbury is Unlikely to Show a "Compelling Government Interest:"

Once Kiryas Joel shows that its religious exercise has been substantially burdened by the Village of Woodbury's total prohibition of high-density, multi-family housing, the burden shifts to the Village of Woodbury to show that the denial of a variance to the Hasidic Jewish community of Kiryas Joel serves a *compelling government interest* and that its zoning ordinance is the *least restrictive means* for accomplishing that purpose.[122] Furthermore, RLUIPA jurisprudence requires that courts investigate the governmental interests protected in the zoning scheme that the denial itself is meant to further.[123] The Supreme Court of the United States' strict scrutiny cases provided the "compelling interest" test jurisprudence from which the Second Circuit draws. Compelling interests are those governmental interests of the most acute nature, to protect health, safety and welfare.[124]

The Village of Woodbury is unlikely to prove any compelling government interests, or prove that the zoning ordinance as challenged by Kiryas Joel is narrowly tailored to meeting those interests. Recall that the court in *Fortress* reversed the town's denial of plaintiff's SEQRA application, despite the town having cited concerns such as traffic impact, inadequate parking, public nuisance creating a danger to children, and "adverse impacts to the town's police and fire resources."[125]

[122] *See*, RLUIPA § 2000cc-(a)(1).
[123] *See*, RLUIPA § 2000cc-(a)(2)(C).
[124] *Id.*
[125] *Fortress* at 505.

Compare the Village of Woodbury's interests. First, the Comprehensive Plan of the Village of Woodbury states five goals meant to guide the zoning ordinance and future planning, including, "[1] Maintain and Strengthen the Village Character, [2] Create Gathering Places for Village Residents and Visitors, [3] Care for a Changing, Diverse Population, [4] Promote Economic Development, [and] [5] Foster Stewardship of Natural Resources."[126] None of these goals belies a grave health or safety concern that the zoning ordinance's prohibition of high-density, multi-family housing is meant to address. Second, the Comprehensive Plan's "vision" involves preserving characteristics of village life, including "the quality of its public safety and community services,"[127] but fails to state that increased need for public protection or services cannot be provided if necessary. Third, it is reasonable to conclude that many other extraneous concerns, including the political ire of neighbors and environmental concerns that fall short of tragic, will fail to meet the RLUIPA compelling interests test. Lastly, note that the Second Circuit held that municipalities "must show a compelling interest in imposing the burden on religious exercise in the particular case at hand, not a compelling interest in general."[128] Woodbury will have to show that it is the potential high-density housing on that particular plat that causes a government interest sufficient to deny Kiryas Joel's application for a variance. Furthermore, how the Village of Woodbury could argue that a total denial of high-density, multi-family development on a plat over 100 acres in size is narrowly tailored to compelling government interests leaves much to the imagination.

6. CONCLUSION

Exclusionary zoning ordinances are difficult to challenge. Plaintiffs can only show constitutional violations where intent to discriminate is evidenced. Consequently, Kiryas Joel has

[126] WOODBURY COMPREHENSIVE PLAN at I-2 (2011).
[127] *Id.*
[128] *Westchester Day Sch. 504 F.3d* at 353 (finding that the mere invocation of a governmental concern like increased traffic irrelevant to the RLUIPA compelling interests inquiry).

had a great deal of difficulty challenging the Village of Woodbury's zoning ordinance, and suffered a huge setback to the expansion of its religious community when the Village of Woodbury was incorporated. As of the time this note was written, the Village of Kiryas Joel's suit seeking to invalidate the Village of Woodbury's entire zoning ordinance had not yet gone to trial. This note argues conservatively that Kiryas Joel can challenge this discriminatory zoning without having to prove intent to discriminate by utilizing the "substantial burden" provision of RLUIPA to invalidate any theoretical denial of an application for a variance to build high-density, multi-family housing on the parcel that affiliates of Kiryas Joel already own within the Village of Woodbury. The main reason for this conservative approach is that RLUIPA requires that the government make an "individualized assessment" with regard to the religious institution, and the general applicability of an uncontested zoning ordinance does not bring the plaintiffs within the purview of RLUIPA. However, more sophisticated scholars will find the question of whether the Village of Woodbury's sudden incorporation, ostensibly in response to the Village of Kiryas Joel's plans to annex territory within its borders, in fact constitutes a legally cognizable "individualized action" sufficient to satisfy RLUIPA.

However, this does not mean the Village of Woodbury must fear a complete usurpation of its lands, parcel by parcel. By their very definition, Kiryas Joel's religious needs are finite: a "walkable village" can only be a certain size before it becomes un-walkable for those on the outskirts. Therefore, Kiryas Joel can only make the RLUIPA "substantial burden" argument, using the rationale of requiring land that enabled them to create a walkable village, just so many times. Once Kiryas Joel's proposed land use outpaces the feet of its residents, its argument for infringement of religious exercise becomes much weaker.

Under the present circumstances, Kiryas Joel should abandon any attempts to annex its new parcel for now, apply for a variance to construct the type of high-density, multi-family housing

essential to its religious community, and then use RLUIPA to challenge the Village of Woodbury's denial of the desired development. Woodbury asserts that there was no intent to discriminate against Kiryas Joel. That is the beauty of RLUIPA. Woodbury can be truthful and Kiryas Joel can still win.