

## COMMENT

### An Empirical Look at Churches in the Zoning Process

There is a heated debate in the land use literature over the extent of bias against churches in the zoning process.<sup>1</sup> On one side, scholars argue that oppressive zoning schemes discriminate against unpopular sects and restrict the creation of new churches.<sup>2</sup> A growing minority of academics, however, suggest that we should approach any claims of widespread discrimination with caution.<sup>3</sup> In their eyes, religious institutions already wield too broad an influence over city planners and zoning codes.<sup>4</sup>

In response to the ongoing debate, this Comment attempts to examine empirically whether churches face discrimination in the zoning context. Specifically, in this Comment I scrutinize the records of New Haven, Connecticut, to determine whether religious institutions are treated fairly in the zoning appeals process. Under the terms of the city charter, property owners may lodge zoning appeals whenever they want to pursue construction, renovation, or expansion projects that violate the provisions of the local zoning

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1. For the sake of convenience I will use the word “church” to stand for all houses of worship.
  2. See, e.g., Von G. Keetch & Matthew K. Richards, *The Need for Legislation To Enshrine Free Exercise in the Land Use Context*, 32 U.C. DAVIS L. REV. 725 (1999); Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755 (1999); Michael Paisner, Note, *Boerne Supremacy: Congressional Responses to City of Boerne v. Flores and the Scope of Congress’s Article I Powers*, 105 COLUM. L. REV. 537 (2005).
  3. See, e.g., Marci Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311 (2003).
  4. See, e.g., Marci Hamilton, *Struggling with Churches as Neighbors: Land Use Conflicts Between Religious Institutions and Those Who Reside Nearby*, FINDLAW, Jan. 17, 2002, <http://writ.news.findlaw.com/hamilton/20020117.html> (arguing that religious lobbyists have unduly influenced federal land use policy).

ordinance.<sup>5</sup> The city then convenes a public hearing and weighs the needs of the applicant against the goals of the zoning code.

Unlike previous studies on this topic, my research examines the treatment of churches on a decision-by-decision level. To compile the data for this project I studied every zoning exemption application filed with the New Haven Board of Zoning Appeals (BZA) over a nine-year period,<sup>6</sup> tracking the type of relief sought, the parties involved, and the BZA's decision.

This study contributes to the ongoing discussion over the regulation of religious land uses by answering two questions. First, to what extent does the BZA treat churches differently than secular applicants? Second, are there disparities between the fates of small religious sects and mainstream denominations in applications for zoning exemptions? My research casts some doubts upon the dominant narrative, which suggests that churches have been routinely victimized by local zoning boards. Instead, this Comment shows that New Haven religious institutions, both large and small, face little discernable discrimination from municipal land use regulations. This finding also calls into question the wisdom of recent calls for federal involvement in local land use decisions.

## I. EMPIRICAL FINDINGS

### A. Data and Methods

My study of zoning exemptions in New Haven begins in 1992, during the height of a chaotic exchange between Congress and the Supreme Court over the nature of the Free Exercise Clause,<sup>7</sup> and ends with the enactment of the

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5. NEW HAVEN, CONN., CHARTER, tit. I, § 185 (1992), available at <http://www.municode.com/resources/gateway.asp?pid=11090&sid=7>.
  6. In this Comment the term "zoning exemption" encompasses both zoning variances and zoning exceptions. New Haven requires property owners to apply for a variance if a building project violates the terms of the zoning ordinance. The city's zoning code mandates special exceptions for certain uses that, because of their unique character, cannot be classified into a particular district.
  7. The exchange began in 1990, when the Supreme Court upheld an Oregon law criminalizing the use of peyote in Native American religious ceremonies. *Employment Div. v. Smith*, 494 U.S. 872 (1990). The Court held that the Free Exercise Clause does not apply to laws aimed at restricting general behavior rather than specific religions. Congress perceived the Court's ruling as a heavy-handed attack on religion and, in response, passed the Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified in scattered sections of 5 and 42 U.S.C.). RFRA effectively negated *Smith*; it superseded any law, federal or state, that substantially burdened religion, unless it was the least restrictive means of

Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000,<sup>8</sup> a federal law that profoundly reshapes the rights of churches in land use disputes. New Haven offers several advantages for a study of this type. First, the laws and demographics of the city render it an excellent test case for scholars concerned about the fate of churches in zoning disputes. Like many medium-sized university towns, New Haven is full of the educated elites who are often accused of being “hostile to religion and to churches.”<sup>9</sup> The laws of Connecticut also make no special allowance for religious land uses in zoning disputes.<sup>10</sup> Accordingly, if a general bias against churches exists, we should expect to find it in the New Haven city records.<sup>11</sup>

Second, New Haven has a heterogeneous mix of spiritual communities that roughly mirrors the distribution of religious groups at the national level.<sup>12</sup> Established Catholic, Protestant, and Jewish populations must compete for space with smaller, mostly black, evangelical congregations, a growing

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furthering a compelling state interest. In turn, the Court ruled that RFRA, as applied to the states, unconstitutionally exceeded Congress’s enforcement power under the Fourteenth Amendment. *City of Boerne v. Flores*, 521 U.S. 507 (1997). I chose to begin this study in 1992 primarily for administrative reasons; the BZA did not record data chronologically before this date.

8. 42 U.S.C. § 2000cc (2000).
9. Laycock, *supra* note 2, at 760 (“Some Americans are hostile to all religion. They believe it is irrational, superstitious, and harmful. . . . [I]n my experience, this view is overrepresented in elite positions.”); see U.S. Census Bureau, State and County Quickfacts (June 8, 2006), <http://quickfacts.census.gov/qfd/states/09/0952000.html> (showing that New Haven has a higher concentration of college graduates than the average American city).
10. In Connecticut, the decisions of local zoning administrators receive great deference. Courts treat the denial of permits for religious uses no differently than any other permit denial. See, e.g., *First Presbyterian Church v. New Haven Bd. of Zoning Appeals*, No. CV-94-0361421, 1995 WL 80058, at \*4 (Conn. Super. Ct. Feb. 9, 1995) (refusing to apply strict scrutiny when the local zoning board denied a church a special exception permit).
11. In fairness, New Haven may have some drawbacks for a study of this type. Arguably, Yale University has enough influence on local politics to skew the decisions of the BZA. In my research, however, I found no indication that Yale opposed any zoning application for purely self-interested reasons. Moreover, the BZA did not always rule as Yale wished. For instance, Yale supported the BZA application of the Christ Presbyterian Church, which was ultimately denied. See Letter from Joseph Mullinix, Vice-President of Fin. & Admin., Yale Univ., to New Haven Bd. of Zoning Appeals (Apr. 18, 1997) (on file with the New Haven City Plan Commission).
12. Census takers are not allowed to ask questions about religious affiliation. For statistics on New Haven County, see Ass’n of Religion Data Archives, County Membership Report, [http://www.thearda.com/mapsReports/reports/counties/09009\\_2000.asp](http://www.thearda.com/mapsReports/reports/counties/09009_2000.asp) (last visited Nov. 30, 2006). For statistics on the size of American religious groups, see Adherents.com, Largest Religious Groups in the United States of America (Dec. 7, 2005), [http://www.adherents.com/rel\\_USA.html](http://www.adherents.com/rel_USA.html).

Spanish-speaking minority, and an enclave of Muslim immigrants. This variety of active religious organizations should allow us to draw useful conclusions about the city's treatment of small, unpopular, and evangelical religious groups.

Third, and perhaps most importantly, the New Haven city government has maintained a remarkable set of zoning dossiers on every BZA application filed since 1954. The dossiers include original zoning exemption applications, copies of all supporting documents (such as blueprints and traffic congestion studies), recommendations from the New Haven City Plan Commission, statements of support from neighbors, and the ultimate decisions of the BZA. In all, this study found that property holders filed 659 applications for variances and special exceptions between 1992 and 2000; forty-six came from religious institutions.<sup>13</sup>

Discrimination is, of course, a notoriously difficult thing to measure. To uncover the presence of bias against religious groups I began this study by comparing the overall approval rate for church applications to the approval rate for applications by nonreligious institutions.<sup>14</sup> If extensive discrimination exists, we would expect the BZA to reject church applicants at a much higher rate.<sup>15</sup> I then sharpened the analysis by examining specific subgroups of applicants. To start, I compared exemption requests from churches to requests from secular institutions that produce similar negative externalities. Absent discrimination, land uses that produce comparable noise and traffic disruptions should receive exemption permits at the same rate.<sup>16</sup> Next, I isolated the

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13. The variety of purposes for which congregations seek zoning variances raises the conceptual issue of what, exactly, constitutes a religious activity. For the purpose of this study, any property owned by a congregation or intended for use by members of a congregation was considered as put to religious use.

14. For the sake of simplicity, I divided BZA decisions into two categories: approvals and denials. Of course, exemption decisions are often more complicated. Commonly, the BZA approves an exemption on the condition that the applicant agrees to certain design limitations. While an empirical analysis of these "approvals with conditions" was beyond the scope of this project, I could not detect any difference in the type of conditions attached to church approvals during my impressionistic reading of the decisions.

15. Given the complexity of land use decisions, there is "no precise way to measure religious animus"; nonetheless, permit decisions should affect all land use applicants "in a consistent way." Keetch & Richards, *supra* note 2, at 729; see also Mark Chaves & William Tsitsos, *Are Congregations Constrained by Government? Empirical Results from the National Congregations Study*, 42 J. CHURCH & ST. 335 (2000) (showing that aggregating permit decisions provides a basic understanding of how churches are constrained by government).

16. It is possible, however, that the BZA could reject churches at a lower rate and still harbor bias. If, for example, churches present only the most meritorious claims while secular applicants submit hundreds of groundless applications, the data could hide evidence of bias.

applications for major church construction projects to determine whether New Haven's zoning code deterred the building of new houses of worship. Finally, my research contrasted the treatment of small, minority religious groups with that of larger, more mainstream congregations.

In the end, this Comment should be read as an attempt to present an accurate picture of the extent to which the churches of New Haven are constrained by municipal zoning procedures. Although more small-scale studies of this type are needed, this Comment questions the prevailing belief that zoning "has become the most widespread obstacle to the free exercise of religion."<sup>17</sup>

## B. Results

### 1. Religious Versus Secular Uses

When churches file requests for zoning exceptions, how do they fare? The central finding of my research is that there is little difference between the denial rate experienced by churches and the denial rate experienced by other applicants. The city records show that during the period studied, the New Haven BZA granted over 76% of exemption requests from religious institutions.<sup>18</sup> In comparison, the overall grant rate for secular applicants was 80%—a small, statistically insignificant difference.<sup>19</sup> This finding challenges the panicked rhetoric embedded in much of the current legal literature, which insists that zoning boards pressure religious institutions to "limit their physical presence in America's cities and towns."<sup>20</sup> Three times out of four, and at roughly the same rate as secular applicants, churches in New Haven were

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Cf. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984) (predicting that trial rates are influenced by local decision standards and the parties' uncertainty in estimating case quality). Fortunately, however, both the secular and religious application pools examined in this study contained applicants of varying sophistication who presented claims of varying merit. It seems that the cost of presenting BZA applications is so low (\$83 for exceptions and \$67 for variances) and the overall grant rate so favorable that both individual citizens and religious institutions can afford to file applications with little merit.

17. Laycock, *supra* note 2, at 783.
18. The data are available at Stephen Clowney, Churches in the Zoning Process Appendix tbl.2 (Dec. 1, 2006), <http://www.yalelawjournal.org/abstract.asp?id=632>.
19. See *id.* tbl.1.
20. Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929, 929 (2001).

allowed to evade the terms of local zoning codes to pursue construction and renovation projects.

Skeptics could argue, however, that comparing “religious institutions” with “secular applicants” produces misleading conclusions. After all, the secular applicants category includes dozens of requests from corner liquor stores, auto repair garages, and industrial facilities attempting to locate in residential areas—applicants that hardly seem to resemble houses of worship.<sup>21</sup> A richer, more layered analysis would measure churches against secular establishments that produce similar externalities—such as restaurants, social clubs, and theaters.

In the zoning context, restaurants are arguably the category of use most analogous to religious assemblies.<sup>22</sup> Both increase traffic, create sporadic parking shortages, attract outsiders to the community, and are busiest on weekends. If widespread bias against churches exists, we should expect to find that purely secular uses, such as restaurants, fare better in the zoning appeals process. In fact, the opposite is true: the New Haven BZA approved only 67% of requests from restaurants, in contrast to the 76% approval rate for congregations.<sup>23</sup> The BZA also slightly favored churches in its consideration of major construction projects. Between 1992 and 2000, the board approved 66% of requests to construct or expand religious buildings and 64% of requests for new construction and expansion of restaurants.<sup>24</sup> Churches, it seems, fared no worse—and often fared better—than restaurants in the zoning process, even though they subject neighbors to similar externalities.

No evidence of bias emerged when the comparison was expanded to include all places of secular assembly. This set of data included exemption requests from every property that produced comparable noise, safety, and traffic disruptions to churches—including schools, day-care centers, restaurants, social clubs, community centers, health clubs, and meeting halls. Once again, religious institutions and places of secular assembly had nearly

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21. See Clowney, *supra* note 18, tbl.1.

22. See Storzer & Picarello, *supra* note 20, at 969, 970 (comparing churches and restaurants). A comparison of churches and theaters would also have been useful; however, no theaters applied for zoning permits in the period of study.

23. The discrepancy here cannot be explained by restaurant requests for alcohol permits. Indeed, if we disregard requests for alcohol permits, the restaurant approval rate actually tumbles to 60%, further increasing the disparity. As a result of the small sample size these differences are not statistically significant. Compare Clowney, *supra* note 18, tbl.2, with *id.* tbl.3.

24. Compare *id.* tbl.2, with *id.* tbl.3. This difference is also not statistically significant.

identical rates of approval for zoning exemptions.<sup>25</sup> In sum, the empirical evidence consistently fails to unearth any sign of bias against religious assemblies in the zoning process.

## 2. *Minority and Majority Religions*

Even though religious institutions as a whole may have few problems in New Haven, we should consider the fate of small, unpopular, and nontraditional religious denominations in land use disputes. According to some scholars, “minority religions have a much harder time obtaining approval for construction of a house of worship . . . than do majority religions.”<sup>26</sup> Mainstream denominations, these commentators argue, easily secure permission to build grand churches on desirable plots, while unfamiliar, politically weak, and unconventional faiths are effectively excluded from land within the city limits.<sup>27</sup>

Although politically popular, empirical support for this position remains thin and unpersuasive. Initially, a study from Brigham Young University (BYU) seemed to confirm the existence of an acute, nationwide pattern of discrimination against minority sects.<sup>28</sup> However, recent scholarship has challenged that study’s methodology and conclusions.<sup>29</sup> This Comment, too,

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25. The BZA granted 76% of applications from churches and 78% of applications from the properties most similar to churches—another small, statistically insignificant difference. Compare *id.* tbl.2, with *id.* tbl.4. Within the category of secular places of assembly, however, the BZA approved different uses at very different rates. It approved 100% of requests from schools, 90% from small day-care facilities, 88% from commercial properties, 60% from fraternity houses, 60% from places of amusement, and 25% from private social clubs. See *id.* tbl.4. The low number of applications from each individual category (for instance, only four private social clubs applied for exemptions) makes drawing meaningful conclusions almost impossible.
26. Keetch & Richards, *supra* note 2, at 729.
27. See Laycock, *supra* note 2, at 759-62.
28. See Keetch & Richards, *supra* note 2, at 729-31; *id.* app. A, at 736-42 (reporting the results of the BYU study).
29. For a comprehensive discussion of the problems with the BYU study, see Caroline R. Adams, *The Constitutional Validity of the Religious Land Use and Institutionalized Persons Act of 2000: Will RLUIPA’s Strict Scrutiny Survive the Supreme Court’s Strict Scrutiny?*, 70 *FORDHAM L. REV.* 2361, 2397-2400 (2002). In short, the BYU study relied on outdated statistics and only examined zoning decisions appealed to the courts. See Keetch & Richards, *supra* note 2, app. A, at 736. Scholars also argue that the study violated its own stated methodology by assigning Judaism to the category of minority religions. The study claimed that any religious group comprising more than 1.5% of the U.S. population was a majority religion; however, the authors labeled Jews, who make up roughly 2% of the population, as a religious minority. *Id.* app. A, at 737.

questions the prevalence of discrimination against smaller sects.<sup>30</sup> If anything, minority religions had slightly *more* success in the zoning process than the mainstream denominations: the BZA approved 77% of the applications from small churches versus 75% from larger sects.<sup>31</sup>

Although most Americans admit that they have a negative opinion of small and unconventional faiths,<sup>32</sup> no evidence indicates that the zoning board in New Haven acted on these larger, society-wide prejudices. Throughout the 1990s, the BZA showed no interest in excluding small, unpopular religious denominations and instead granted exemptions to a range of less familiar congregations including the Church of the Redeemer, the Church of the New Beginnings, and the Iglesia Cristiana Tercera Estrella de Jacob.<sup>33</sup>

## II. RLUIPA AND THE CONSTITUTION: WHY THE DATA MATTER

Some members of the clergy and legal academics ardently believe that religious groups in the United States face significant obstacles when they attempt to construct, relocate, or expand places of worship.<sup>34</sup> The federal government apparently agrees. In response to concerns that the right to religious land use “is frequently violated,”<sup>35</sup> Congress invoked its Fourteenth Amendment power to pass RLUIPA. The Act seeks to protect the right of individuals to gather and worship according to their religious beliefs by severely limiting the power of local governments to pass zoning laws that

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30. As in the BYU study, I considered any religious group comprising more than 1.5% of the U.S. adult population to be a majority religion. I acknowledge that there are serious drawbacks to this scaling system. For one, it fails to consider that members of minority religious groups often cluster together in urban areas to form local majorities. Nonetheless, I adopted the BYU methodology to facilitate comparisons between the two studies.

31. See Clowney, *supra* note 18, tbl.2. As before, this difference is statistically insignificant.

32. See PollingReport.com, Religion, <http://www.pollingreport.com/religion.htm> (last visited Nov. 30, 2006) (describing a CBS News Poll conducted April 6-9, 2006). According to the poll, Muslims, Scientologists, and Mormons face notably high levels of mistrust in the United States.

33. See Clowney, *supra* note 18, tbl.2.

34. See Storzer & Picarello, *supra* note 20, at 929 (“According to zoning boards . . . churches may belong neither on Main Street nor in residential neighborhoods.” (footnote omitted)); Diana B. Henriques, *Religion Trumps Regulation as Legal Exemptions Grow*, N.Y. TIMES, Oct. 8, 2006, at A1 (quoting Rabbi Joseph Konikov, who compared zoning practices in Orlando, Florida, to “Communist Russia”).

35. 146 CONG. REC. S7774 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

intrude upon religious practices.<sup>36</sup> RLUIPA invalidates all local land use laws that substantially burden religious exercise, unless the government can demonstrate that there is a compelling state interest behind the regulation and that the law is implemented in the manner least restrictive of religious exercise.<sup>37</sup> For example, citing RLUIPA, a federal district court in Connecticut invalidated parking regulations that limited the number of people who could attend a local prayer group.<sup>38</sup>

Although RLUIPA has been hailed by religious organizations as a proper way to protect the “rights of sincere religious believers,”<sup>39</sup> a heated debate has emerged among legal academics and federal judges about the constitutionality of RLUIPA’s land use provisions.<sup>40</sup> The heart of the dispute concerns the nature of Congress’s power under Section 5 of the Fourteenth Amendment. In brief, the Supreme Court has ruled that Congress’s Section 5 enforcement powers are entirely remedial,<sup>41</sup> and that Congress must demonstrate a clear “pattern or practice” of unconstitutional discrimination before it can pass laws under its Section 5 power.<sup>42</sup> Mere anecdotal evidence is not enough.<sup>43</sup> Before acting, Congress must identify “widespread and persisting” examples of discriminatory laws that target churches or religious believers.<sup>44</sup>

Scholars who oppose RLUIPA have argued that the law fails to pass constitutional muster because Congress failed to show a widespread pattern of discrimination against churches.<sup>45</sup> The primary study presented during the legislative hearings on RLUIPA, the BYU study discussed above, has recently

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36. For an extended discussion of how RLUIPA operates, see Storzer & Picarello, *supra* note 20, at 945-76.
37. 42 U.S.C. § 2000cc(a)(1) (2000).
38. *Murphy v. Zoning Comm’n*, 148 F. Supp. 2d 173 (D. Conn. 2001).
39. Roger Severino, *Score One for the Faithful in the Culture Wars!*, JEWISH WORLD REV., May 6, 2004, [http://www.jewishworldreview.com/0504/shul\\_ruling.php3](http://www.jewishworldreview.com/0504/shul_ruling.php3).
40. *Compare* *Elsinore Christian Ctr. v. City of Lake Elsinore*, 291 F. Supp. 2d 1083 (C.D. Cal. 2003) (holding RLUIPA unconstitutional), *rev’d*, No. 04-55320, 2006 WL 2456271 (9th Cir. Aug. 22, 2006), *with* *Freedom Baptist Church v. Twp. of Middletown*, 204 F. Supp. 2d 857 (E.D. Pa. 2002) (upholding RLUIPA’s constitutionality under the Commerce and Free Exercise Clauses as applied against the states through Section 5).
41. *See, e.g., Bd. of Trs. v. Garrett*, 531 U.S. 356, 368 (2001) (“Congress’ § 5 authority is appropriately exercised only in response to state transgressions.”).
42. *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).
43. *See id.* at 530-31.
44. *Id.* at 526.
45. *See* Adams, *supra* note 29, at 2383-86.

been discredited.<sup>46</sup> The evidence Congress cited certainly “does not support the existence of persistent, ongoing religious land use discrimination, let alone the need to remedy such abuse by permanently constraining the discretion of local zoning authorities throughout the nation.”<sup>47</sup>

The results of my study lend empirical support to the claim that pervasive discrimination against churches does not exist in the context of land use. Before RLUIPA, New Haven’s zoning officials managed successfully to balance their duty to protect freedom of worship with their obligation to respect the rights of secular landowners. At the BZA level, religious institutions received exemptions more than three-quarters of the time and regularly won authorization to pursue major construction and expansion projects.<sup>48</sup> Most significantly, this study found that the BZA made no important distinctions between religious and secular uses or between minority and mainstream religions. In the great majority of cases, the municipal zoning appeals scheme allowed religious assemblies, both large and small, to pursue their theological missions; they constructed churches, established day-care centers, and launched homeless shelters. It seems parking concerns and neighborhood character, not discrimination, were the main regulators of church behavior.<sup>49</sup>

Although the results of a single, small-scale study cannot be considered determinative, the conclusions of this Comment hint that federal involvement in disputes over zoning is misplaced. The experience of New Haven suggests that local governments remain capable of impartially evaluating rival interests in land use disputes. While we must strive to protect the full flowering of religious expression, we should think twice before abandoning the long-held tradition of local land use decision-making.

STEPHEN CLOWNEY

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46. See *id.*; Ariel Graff, *Calibrating the Balance of Free Exercise, Religious Establishment, and Land Use Regulation: Is RLUIPA an Unconstitutional Response to an Overstated Problem?*, 53 UCLA L. REV. 485, 498-503 (2005); see also *supra* notes 28-30 and accompanying text.

47. Graff, *supra* note 46, at 501.

48. See Clowney, *supra* note 18, tbl.2.

49. Parking was a special concern for churches. Almost 40% of exemption applications from churches included requests for parking variances. See *id.*