TO: ATTORNEY IRA W. BLOOM

FROM: ATTORNEY DAVID F. SHERWOOD

RE: SEPTEMBER 16, 2017 GRACE FARMS SPECIAL PERMIT CONDITIONS REQUIRING DAILY VISITOR COUNT

DATE: 23 DECEMBER 2018

MEMORANDUM

This memorandum addresses the question of whether General Statutes § 52–571b\(^1\) or the federal Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc et seq. (RLUIPA),\(^2\)

\(^1\) General Statutes § 52–571b provides in relevant part:

(a) The state or any political subdivision of the state shall not burden a person's exercise of religion under section 3 of article first of the Constitution of the state even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) The state or any political subdivision of the state may burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest, and (2) is the least restrictive means of furthering that compelling governmental interest....

\(^2\) Title 42 of the United States Code, § 2000cc, provides in relevant part:

(a) Substantial burdens

(1) General rule

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.

(2) Scope of application

This subsection applies in any case in which—

*C * *

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) Discrimination and exclusion

(1) Equal terms

No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) Nondiscrimination

No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) Exclusions and limits

No government shall impose or implement a land use regulation that—

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.
applies to prohibit the imposition of conditions of approval requiring Grace Farms to maintain an accurate daily visitor count on the Grace Farms Foundation, Inc. September 16, 2017 special permit.³

The memorandum concludes that the substantial burden provision of RLUIPA does not apply to neutral and generally applicable land use regulations that are intended to protect the public health and safety, such as those at issue in the present case, and that the commission did not apply the regulations in a discriminatory manner in imposing the conditions of approval.

The land use-related provisions of RLUIPA prohibit state and local governments from imposing or implementing a land use regulation in a manner that: discriminates against or among religious institutions, 42 U.S.C. § 2000cc (b); or imposes a substantial burden on religious exercise, unless the regulation is the least restrictive means of serving a compelling government interest. 42 U.S.C. § 2000cc (a)(1).

The “general rule” of RLUIPA’s land use section “restores strict scrutiny to land use regulations that impose a substantial burden on religious exercise, but does not attempt to define the term ‘substantial burden.’ The ‘general rule’ applies where the substantial burden: (1) is imposed in connection with a federally-funded activity; (2) affects interstate commerce; or (3) is imposed for the implementation or imposition of a land use regulation in the context of a scheme whereby government makes ‘individualized assessments’ regarding the property involved.” A. Weinstein, “The Effect of RLUIPA’s Land Use Provisions on Local Governments,” 39 Fordham Urb. L.J. 1221, 1230-31 (2012).

“Any land-use regulation that a church would like not to have to comply with imposes a “burden” on it, and so the adjective “substantial” must be taken seriously lest RLUIPA be interpreted to grant churches a blanket immunity from land-use regulation.” World Outreach Conference Center v. City of Chicago and Trinity Evangelical Lutheran Church v. City of Peoria, 591 F.3d 531, 539 (7th Cir. 2009). In Cambodian Buddhist Society of Connecticut, Inc. v. Planning and Zoning Commission, 285 Conn. 381, 418-19 (2008), a Connecticut Supreme Court decision, the court quoted “a joint statement issued by the sponsors of the bill that ultimately became RLUIPA [which] specifically provides that ‘[t]his [a]ct does not provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provision in land use regulations, where available without discrimination or unfair delay.’ (Emphasis added.) 146 Cong. Rec. 16,700 (2000), joint statement of Senators Orrin Hatch and Edward Kennedy.” Because “RLUIPA’s substantial burden provision applies only when the government has made an ‘individualized assessment’ of the proposed [use]; 42 U.S.C. § 2000cc (a)(2)(C) (2000); [the court] conclude[d] that the provision applies only when the government has the discretion to apply a land use regulation in a manner that discriminates against religious institutions in general or against a particular religion or denomination.” Id. at 419.

³Two conditions of approval are at issue:

83. Every vehicle or pedestrian entering the site shall stop at the security booth /security gate during all hours the facility is open.
84. So that an accurate count can be made of the number of visitors and vehicles on the site at any time, each vehicle or pedestrian entering the site shall produce identification (such as a driver’s license) unless such person is:
   a. a Grace Farms staff person;
   b. a passenger in a vehicle where the driver has produced identification;
   c. a passenger on a Grace Farms bus or other authorized bus-type vehicle;
   d. a person logged in from previous visits under a “Grace Farms Pass.”
In Cambodian Buddhist Society, the provisions of the town of Newtown's zoning regulations allowed religious facilities to be built in a residential zone by special exception. The court noted that the Newtown regulations treated such uses more, not less, favorably than certain other nonresidential uses that are not allowed by special exception. Moreover, although the commission had some discretion to determine whether a proposed specially permitted use is consistent with residential use, the regulations did not grant the commission the discretion to apply the standards differently to religious facilities than it applied them to the other uses allowed by special exception, such as clubs, private schools, seasonal camps, certain public utility buildings, hospitals, sanitary landfills, nurseries and horse boarding stables. Rather, in reviewing each application for a special exception, the commission was to consider “the impact of such uses and structures upon the neighborhood and surrounding area and upon the public health, safety, convenience and welfare; and certain other criteria unrelated to the specific nature of the proposed use.” (Citations omitted; internal quotation marks omitted.) Id at 420. The court “therefore conclude[d] that, because the town's zoning regulations do not allow for an ‘individualized assessment,’ as that term is used in first amendment jurisprudence, the substantial burden provision of 42 U.S.C. § 2000cc (a)(1) [did] not apply to the society’s claim.” Id.

Cambodian Buddhist Society is directly applicable to the conditions of approval at issue here. The conditions require only an accurate count of the total number of visitors and vehicles to the site, making no distinction between religious and non-religious purposes for the visit. The requirements of paragraphs 83 and 84 of the Grace Farms special permit approval do not allow for an “individualized assessment” of religious facilities. To the contrary, the intent of the conditions is not to single out religious use of the Grace Farms property for disparate treatment, but rather to include traffic associated with religious use of the property with all other traffic in order to obtain accurate counts of the number of all vehicles and persons visiting the property. Like the Newtown planning and zoning commission, “the commission’s concerns [are] motivated not by religious bigotry but by neutral considerations that it would apply equally to any proposed use of the property.” Id. at 421. There is no credible argument that the conditions of approval set forth in paragraphs 83 and 84 of the September 16, 2018 special permit do not violate RLUIPA.

With respect to the applicability of General Statutes § 52-571b, the Cambodian Buddhist Society court said:

Accordingly, although we agree with the conclusion of the District Court in Murphy v. Zoning Commission, [289 F.Supp.2d 87, 114 (2003), that § 52–571b applies to some forms of government conduct to which RLUIPA does not apply, we do not believe either that the legislature intended that the construction of a place of worship would constitute religious

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4 With respect to the applicability of General Statutes § 52-571b, the court said:

Accordingly, although we agree with the conclusion of the District Court in Murphy v. Zoning Commission, [289 F.Supp.2d 87, 114 (2003), that § 52–571b applies to some forms of government conduct to which RLUIPA does not apply, we do not believe either that the legislature intended that the construction of a place of worship would constitute religious exercise or that, in the absence of evidence of discrimination against a particular religious use or religious uses in general, the application of land use regulations that are intended to protect the public health and safety to such a use generally would be subject to strict scrutiny under the statute. We therefore reject the society's claim that § 52–571b provides broader protection than RLUIPA in this context and conclude that § 52–571b does not apply under the circumstances of this case.

exercise or that, in the absence of evidence of discrimination against a particular religious use or religious uses in general, the application of land use regulations that are intended to protect the public health and safety to such a use generally would be subject to strict scrutiny under the statute. We therefore reject the society's claim that § 52–571b provides broader protection than RLUIPA in this context and conclude that § 52–571b does not apply under the circumstances of this case.

Cambodian Buddhist Society of Connecticut, Inc. v. Planning and Zoning Commission, 285 Conn. 381, 425 ((2008). Accordingly, it is also clear that the conditions of approval set forth in paragraphs 83 and 84 of the September 16, 2018 special permit do not violate General Statutes § 52-571b.