

# Deferential Treatment of Zoning and Land Use Applications

In New York, not all zoning and land uses are created equal. When it comes to the review and approval of zoning and land use applications, municipal authorities are required to accommodate and give certain uses deferential treatment. These specific uses that receive deferential treatment, include educational and religious uses, and other similar uses that uniquely serve the public health, safety and welfare. The standards for granting use and variance applications, or other types of approvals, such as conditional or special uses are set forth in the Town, Village or City laws.<sup>1</sup> These uniform standards apply in every jurisdiction other than New York City, and apply whether the case involves a commercial or residential use.

## Cornell University v. Bagnardi

As explained by the Court of Appeals in *Cornell University v. Bagnardi*,<sup>2</sup> educational and religious uses are entitled to deferential treatment and accommodation because these uses are presumed to further the public health, safety and morals. The Court in *Cornell* thus instructed local zoning authorities to afford these uses special treatment.

In *Cornell*, the City of Ithaca initially denied Cornell University's application to relocate an academic program to a house in an area abutting the campus. Upon the University discovering that the new area was not zoned for its desired type of use, and that it did not fit within the criteria to apply for a special permit, the University pursued a use variance. Use variances require a showing of unnecessary economic hardship. The Court of Appeals explained that the Zoning Board had found that, "Cornell would suffer no hardship if the variance was denied and concluded that there would be potential unspecified damage to the character of the neighborhood,"<sup>3</sup> if the variance was approved.

The Court then addressed the broader question as to whether Cornell had to show hardship for the variance. The *Cornell* Court referred to *Matter of Diocese of Rochester v. Planning Board*, to analyze this issue, noting that in New York, historically, schools and religious uses have enjoyed special treatment.<sup>4</sup> The Court explained that religious and educational uses are not per se exempt from zoning, and that there was no rigid rule requiring approval for these uses. The Court in *Cornell* rejected the notion that appropriate restrictions may never be imposed on religious or educational uses.

The Court held that the presumed beneficial effect could be rebutted by a showing of a *significant adverse effect* on the area's traffic congestion, property values or municipal services. Such a finding would have to be clearly shown on the record, in order to rebut the presumption. This rationale led to the general rule that "total exclusion of [educational] institutions from residential districts serves no end that is reasonable . . . [and] is beyond the scope of the localities' zoning authority."<sup>5</sup> Accordingly, municipalities and zoning authorities cannot prohibit or

exclude religious and educational uses from residential districts, but are instead required to make every effort to accommodate such uses.<sup>6</sup>

## Broad Interpretation of Cornell

Over time, the Court's *Cornell* holding has expanded to allow education and religious uses into other areas, and New York courts' broad interpretation of what constitutes religious and education use, has allowed the *Cornell* holding to become applicable to non-traditional religious and educational uses, such as: (i) allowing a school to expand into a historical zoned area;<sup>7</sup> (ii) approving church's land use proposal when the facility could only accommodate fifty-percent of the spaces required by the Town Code;<sup>8</sup> (iii) and allowing a charter library to receive the same special treatment as its parent University.<sup>9</sup>

New York courts have also applied a broad, expansive interpretation of the scope of First Amendment religious protections and the Free Exercise Clause in the context of land use and zoning. In 1982, the Court of Appeals stated that the scope of religious protections are not confined to a church or house of worship.<sup>10</sup> Over the years, New York courts have found that the term "religious use" includes, among other things: (i) guidance of indoor and outdoor activities for youth and community work;<sup>11</sup> (ii) school, meeting room, kindergarten, small games, open field and hard-top play areas;<sup>12</sup> (iii) gymnasium;<sup>13</sup> (iv) teaching of secular subjects;<sup>14</sup> (v) meetings of the Boy Scouts and Girl Scouts;<sup>15</sup> (vi) a religious correspondence school, including necessary publishing machinery;<sup>16</sup> (vii) and a children's day care center for working mothers in disadvantaged circumstances.<sup>17</sup> More recently, the Second Department has declared that, under New York law, "religious use" is broadly viewed as any "conduct with a religious purpose," whether or not such conduct would be considered a requirement of one's worship.<sup>18</sup>

## RLIIPA

Besides New York case law, in 2000 the United States Government enacted legislation to protect religious institutions through the Religious Land Use and Institutionalized Persons Act of 2000 (RLIIPA). RLIIPA was enacted in order to "protect the free exercise of religion from unnecessary government interference."<sup>19</sup> This Act applies not only to states and counties, but also to municipalities and governmental created agencies. When it comes to land use, the Act prohibits unreasonable limits on religious assemblies and institutions, while also prohibiting total exclusion from a jurisdiction.

When bringing a RLIIPA case, a claimant has to present evidence that by denying the zoning or rezoning application, a *substantial burden* is placed on the claimant's religious exercise. A substantial burden exists when a land use regulation "directly coer-



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es the religious institution to change its behavior."<sup>20</sup> While RLIIPA does not provide religious institutions with absolute immunity from land use regulations, it is a tool that they use when challenging a zoning boards denial.

Similar to the expansive interpretation of "religious use," under New York case law, there is no single definition of what constitutes an educational use. In the cases

that have addressed the issue, some courts have held that an institution qualifies as an educational use if it has a curriculum, adequate physical facilities to conduct its educational function and a staff qualified to implement its educational objectives.<sup>21</sup>

## Defining Educational Use

Courts have found the following uses, among others, qualify as an educational use: (i) a private institution that instructs 500 children, three hours per day, five days per week, ten months per year, and that employs teachers licensed by the state to teach in public schools;<sup>22</sup> (ii) a private school

earliest stage of the application process so that the municipal authorities will acknowledge their obligation to provide deferential treatment. This acknowledgement will increase the likelihood of success in an application, and potentially lead to approval at an earlier stage in the application process.

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approved by the Board of Regents that devotes a portion of its time to religious instruction;<sup>23</sup> (iii) programs maintained by Boards of Cooperative Educational Services;<sup>24</sup> (iv) a manufacturing plant operated by a school for the handicapped, and employing students from the school;<sup>25</sup> (v) art classes conducted by a nonprofit association;<sup>26</sup> and (vi) the instruction of a small number of preschool children in a home equipped for such purpose although it is not registered under the New York education law;<sup>27</sup> and (vii) a summer program run by a private school even though it consisted of physical training and recreational aspects not offered by the private school between September and June.<sup>28</sup>

An educational institution has also been defined as an organization, which has an objective with educational value, performs some educational function and is organized exclusively for those purposes.<sup>29</sup>

## Advice for Practitioners

Given the expansive interpretation of the types of educational and religious uses entitled to accommodation and deferential treatment, and the RLIIPA statute applicable to religious uses, it is important to identify the potential for a proposed use to fit within the framework of accommodation. This should be done at the

1. Town Law §267.
2. *Cornell University v. Bagnardi*, 68 N.Y.2d 583, 589 (1986); City of Ithaca Zoning Ordinance §30.58[B][3].
3. See *Cornell University*, 68 N.Y.2d at 590.
4. *Id.* at 593 (citing *Diocese of Rochester v. Planning Bd. of Brighton*, 1 N.Y.2d 508 (1956)).
5. *Matter of E. Hampton Library v. Zoning Bd. of Appeals of the Vill. of E. Hampton*, 31 Misc. 3d 1231(A) (Sup. Ct. Suffolk Co., 2011).
6. *Matter of Genesis Assembly of God v. Davies*, 208 A.D.2d 627, 628 (2d Dept. 1994); *Lawrence Sch. Corp. v. Lewis*, 174 A.D.2d 42, 43 (2d Dept. 1992); *Harrison Orthodox Minyan, Inc. v. Town Board of Harrison*, 159 A.D.2d 572, 573 (2d Dept. 1990).
7. *Trs. of Union Coll. v. Members of the Schenectady City Council*, 91 N.Y.2d 161, 167 (1997).
8. *Matter of Genesis Assembly of God v. Davies*, 208 A.D.2d 627, 628 (2d Dept. 1994).
9. *East Hampton Library*, 31 Misc.3d 1231(A) at

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10. *Rochester Christian Church, Inc. v. State of N.Y. Public Service Commission*, 55 N.Y.2d 196, 202-04 (1982).
11. *Community Synagogue v. Bates*, 1 N.Y.2d 445, 448 (1956).
12. *Diocese of Rochester*, 1 N.Y.2d at 516.
13. *Shaffer v. Temple Beth Emeth*, 198 A.D. 607, 609 (2d Dept. 1921); *Matter of Temple Israel of Lawrence v. Plaut*, 10 Misc.2d 1084 (Sup. Ct. Nassau Co. 1957).
14. *Westbury Hebrew Congregation v. Downer*, 59 Misc.2d 387, 388 (Sup. Ct. Nassau Co. 1969).
15. *Matter of Garden City Jewish Center*, 157 N.Y.S.2d 435, 438 (Sup. Ct. Nassau Co. 1956).
16. *Matter of Faith For Today v. Murdock*, 11 A.D.2d 718 (2d Dept. 1960).
17. *Unitarian Universalist Church v. Shorten*, 63 Misc.2d 978 (Sup. Ct. Nassau Co. 1970).
18. *McGann v. Inc. Village of Old Westbury*, 293 A.D.2d 581, 583 (2d Dept. 2002).
19. Peter W. Salisch, Jr. & Timothy J. Tryniecki, *Land Use Regulation: A Legal Analysis and Practical Application of* and Use Law 298 (Aen W. Webster et al. eds., 2d ed. 2003).
20. *Fortress Bible Church v. Feiner*, 694 F.3d 208, 219 (2d Cir. 2012).
21. *Brookville v. Paulgene Realty Corp.*, 11 N.Y.2d 672 (1962).
22. *Jane David Holding Corp. v. Murdock*, 150 Misc. 697 (Sup. Ct. Kings Co. 1933).
23. *Brandeis School v. Vill. of Lawrence*, 18 Misc.2d 550 (Sup. Ct. Nassau Co. 1959).
24. *Durand v. Board of Co-op. Educational Services*, 70 Misc.2d 429 (Sup. Ct. Westchester Co. 1972).
25. *Stoller v. Bd. of Zoning and Appeals*, 40 A.D.2d 867 (2d Dept. 1972).
26. *Imbergamo v. Barclay*, 77 Misc.2d 188 (Sup. Ct. Suffolk Co. 1973).
27. *People v. Collins*, 191 Misc. 553 (County Ct. Westchester Co. 1948).
28. *Rorie v. Woodmere Academy*, 52 N.Y.2d 200 (1981).
29. *Imbergamo*, 77 Misc.2d at 191.