

OCTOBER 2010

REPORT



ISPU

“Not In Our Neighborhood”:

Managing Opposition to Mosque Construction



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*Proposed structure of the
Park 51 Development.
Courtesy SOMA architects.*



Executive Summary

This report is intended as a best practices guide for US municipal authorities—elected officials, municipal attorneys, planners and appointed review board members—as they steward and adjudicate development applications for mosques and related accessory uses and attempt to manage and reduce conflict around those proposals. Recommendations are drawn from case studies of mosque proposals made in the eighteen months following September 11, 2001, arguably the most tumultuous period for such developments until the storm of contention stirred by the so-called Ground Zero mosque, also known as the Park 51 development. The recommendations are grounded in the requirements of the key federal legislation for the review of religious land use proposals, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). This broad foundation makes the report informative for any type of religious land use proposal despite its specific focus on mosque developments.

Although the municipal reviews of mosque proposals examined for this report were not surrounded by the drama of a nationally networked, hyper-aggressive grassroots opposition movement nor the mainstream media glare that current mosque proposal reviews are encountering in the wake of Park 51, they were characterized by emotional responses from opponents. These reactions were based not only on fear and bias but also on legitimate land use concerns. The report begins by contextualizing opposition to Park 51 in a thirty-year crescendo of resistance to mosque proposals, including the inestimable impact of the 9/11 attacks. Next, the research methodology is outlined and the three subject mosque developments are briefly described.

Before key lessons from the case studies are detailed, the legal framework for reviewing religious land use proposals is outlined, with particular emphasis on the requirements of RLUIPA. Guidance is offered for municipalities to ensure code and process readiness for religious land use proposals generally. Particular focus is given to compliance with the essential RLUIPA requirement that religious land uses receive treatment that is fair and equal to that received by secular assembly uses. Additionally, the report provides practical guidance on training planning staff and review board members to lawfully adjudicate religious land use proposals.

As the report concentrates on issues particular to mosque proposals, proactive conflict management strategies are offered, including advance project review and pre-hearing impact mitigation strategies. To help ease communications between municipal officials and Muslim



communities and facilitate clarity in public hearings, this section additionally offers valuable introductory information on Islamic practice, typical design elements of mosques, and common facility uses. Careful attention is paid to the management of public hearings, and particularly public comment. Tools are provided for review board members to maintain focus on matters of purview. Clear instruction is offered on establishing a sound public record that demonstrates the municipality's fair and unbiased deliberations. Finally, recommendations are made for ensuring constitutional and regulatory compliance in review board decisions regarding religious land uses.

Protesters march in opposition to the proposed Park 51 mosque.



Introduction: Contextualizing Park 51

The controversy surrounding the so-called Ground Zero mosque, also known as Park 51, has catapulted real estate developments by Muslim American communities and grassroots opposition to such undertakings onto the national media stage. The symbolism of the development site, or, more accurately, its ascribed symbolism—it is not, in fact, located at Ground Zero, nor is it simply a mosque—and the emotions that the location inspires are impacting mosque developments across America. In Park 51’s wake, proposals from Tennessee to Minnesota and California are receiving national media attention and facing opposition fueled by the organizing power of national grassroots causes. What once would have been local land use controversies are now being presented as issues of national and international significance. Most importantly, they are serving as proxies for a number of more complex struggles commonly reduced to simple dichotomies: Islam versus the West, Islam versus Judeo-Christian culture, and the culture wars between “red” and “blue” America.

Arguably, the controversy over Park 51 is having a greater impact on the development efforts of local Muslim communities than did the 9/11 attacks themselves. Although the dramatic, well-organized national opposition movement to this single development is unprecedented, resistance to mosque proposals (as well as Islamic community centers, schools, and other related uses) is not new. Opposition to mosques has been documented since the early 1980s,¹ when proposals to develop such facilities increased to meet the needs of a growing and maturing Muslim American community.² Prior to the Park 51 controversy, however, conflicts over mosque development in American cities and suburbs were local affairs that rarely garnered attention beyond the municipalities in which they were proposed. Opponents tended to focus their critiques on such land use issues as parking, traffic, and noise, even if those stated reasons veiled their true intent to exclude Muslims from the neighborhood.³ Zoning and planning boards frequently yielded to public pressure and denied the necessary permits. As a result, Muslim American

Arguably, the controversy over Park 51 is having a greater impact on the development efforts of local Muslim communities than did the 9/11 attacks themselves.

1 See Kathleen M. Moore. *Al Mughtaribun: American Law and the Transformation of Muslim Life in the United States*. Chapter Six: “There Goes the Neighborhood: Mosques in American Suburbs.” Albany: State University of New York Press, 1995.

2 Mosques were developed in America throughout the twentieth century, but not in any notable numbers much before 1990. After 1965 and as a result of reforms in American immigration laws and increasing political upheaval in the Middle East and South Asia, Muslims began arriving in the United States in unprecedented numbers. These new immigrants soon outnumbered earlier generations of immigrants as well as indigenous African American Muslims, who typically congregated in storefront mosques. As a whole, however, these post-1965 immigrant Muslims did not establish purpose-built mosques in sizable numbers for several decades. Many Muslims believe that Islam discourages wealth accumulation via compounding interest, so communities often saved for several decades before having sufficient resources to plan and propose religious facilities. The increase of mosque construction after 1990 reflects this phenomenon, as well as the desire of Muslim Americans to provide proper Islamic education and community resources for younger generations.

3 Scholars and the general public tend to focus on 9/11 as the seminal event that changed Americans’ perceptions of Muslims generally and specifically of fellow citizens who are Muslim. However, the tragedy of 9/11 is only the most dramatic in a series of events that shaped the nation’s collective relationship to Islam through the 1980s and 1990s and amplified nativist and xenophobic prejudices against Muslim Americans. The negative reception of mosque developments in those decades was influenced by such events as the OPEC oil embargos of the 1970s, the 1979 Iran hostage crisis, the 1985 Achille Lauro hijacking, the 1989 Pan Am Flight 103 bombing, and the first World Trade Center attack in 1993.

Map highlighting anti-mosque incidents across the country over the past five years.



communities often spent years searching for developments sites before finally succeeding. In fact, it was not unusual for them to settle for parcels that were undesirable but more likely to be approved, or to make considerable compromises on their original plans.⁴

The tragedy and trauma of the September 11th attacks heightened the scrutiny of mosque proposals across the nation and influenced opposition strategies. In the years immediately following the attacks, the true emotions of some opponents were more freely expressed in public hearings—fears about terrorism and the role of mosques in terrorist training were openly invoked to justify their opposition to mosque projects and question the civil rights of Muslim Americans to develop real estate for worship purposes. Such topics dominated many hours of public sessions across the country, despite their irrelevance to land use reviews. Sophisticated opponents, however, understood that review boards could not deny necessary approvals on the basis of fear and bias and thus employed the language of land use to mask true desires to keep Muslims out.

Certainly, legitimate land use concerns have been at the core of many cases since 9/11. But addressing these issues productively amidst the din of anger and suspicion has been challenging for even the most seasoned review board members. Often, municipal officials and lay board members are dealing with levels of conflict they have never experienced and for which they are not trained or prepared. Yet even in this maelstrom, most mosque proposals made in the last decade were eventually approved for construction. Fortuitously, in 2000 Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA), thereby creating a safer climate in which to propose religious property developments of all kinds and reaffirming the cherished civil right to exercise one's religion freely. When lawsuits have been the only remedy for contentious mosque proposals, RLUIPA has helped ensure their approval.⁵ This legislation will be discussed later in the report.

Resistance to mosque proposals over the last decade was tame by comparison to what we see today. Protest, even if bruising, at least took place in the controlled environment of public

⁴ Documentation of mosque proposals from the 1980s and 1990s is thin. My assessment is based on the Moore chapter, cited above, on accounts found in the press review I conducted for my research, and on the community histories shared with me by case study participants. See also: Merlene Davis. "A Conversation with Ihsan Bagby, Islamic Studies Expert." Published in the Lexington Herald-Leader on Sunday, Aug. 22, 2010, and online at Kentucky.com: <http://www.kentucky.com/2010/08/22/1401896/merlene-davis-a-conversation-with.html> (accessed 9/26/2010).

⁵ For an analysis of outcomes for religious land use claimants under RLUIPA, particularly as compared with previous federal legal regimes, see: "Religious Land Use in the Federal Courts under RLUIPA," Harvard Law Review. June 2007, Volume 120 Issue 8, pages 2178-2199.

sessions and within the framework of public debate—Muslim American applicants had the opportunity to respond to accusations and counter speculation with facts. Now, however, a vocal and organized opposition is in the streets with placards and bullhorns, shaping public opinion through national media coverage. Certainly, the Park 51 development is fanning the flames of Islamophobia and negatively impacting responses to mosque proposals nationwide. But it is a mistake to treat Park 51 as either the culmination of America’s collective 9/11 pain or the single catalyst for the national drama unfolding daily on our television and computer screens. Park 51 is being proposed in the eye of a perfect storm.

The national grassroots movement against mosque development, and the “Islamization” of America that the movement claims will follow mosque construction, rises against a backdrop of broad cultural angst. The limited success of the extended wars in Iraq and Afghanistan is straining the nation’s patience and resources. Periodic terrorist activity across the globe, along with thwarted attempts on American soil, contributes to increasing fear and tension. The economy has collapsed, and in a pattern typical of financial hardship, the very immigrants who were once welcomed by a flush nation are being villainized and aggressively rejected by a growing nativist contingency. Although the brunt of this backlash is focused on Mexican and Central and South American laborers, the general sentiment is extending to all immigrants—especially those who are Muslim. In a statistical void, bloggers and other pundits describe the growth of Islam in America as exponential, which only feeds rising nativist anxieties.⁶

On the political front, reactions triggered by the 2008 election add further drama to the Park 51 saga. A conservative base shocked by the election of Barack Obama and a Democratic Congress has rebelled against the two-party status quo and added a powerful player to the local and national political stage. The Tea Party is built on a foundation of anger over taxation in general, and healthcare reform and the Wall Street bail out in particular. The movement, which also has a strong evangelical Christian orientation, is gaining traction nationwide, expanding its membership and garnering the affiliation of political candidates at all levels. Paradoxically, these Right-leaning Tea Partiers draw on the lessons of Saul Alinsky, the decidedly leftist father of community organizing. Openly following his Rules for Radicals, Tea Partiers have quickly and

⁶ Pamela Geller, the author of the blog “Atlas Shrugs” and co-founder of several groups dedicated to fighting the “Islamization” of America, is widely credited with having brought Park 51 to the national spotlight and coining the misnomer “Ground Zero Mosque.” Certainly, she is a powerful voice and a media darling, appearing regularly on network and cable television as an “expert” on Islam. Analyses that treat Geller as the causal force behind the controversy, I would argue, are far too simple and dismiss the larger societal trends discussed here. See: Daniel Burke, “Pamela Geller, ‘Queen Of Muslim Bashers,’ At Center Of N.Y. ‘Mosque’ Debate.” The Huffington Post: http://www.huffingtonpost.com/2010/08/20/pamela-gellerqueen-of-mus_n_689709.html. Accessed 9/16/2010.

efficiently organized disparate individuals with “inchoate anger”⁷ to respond to a variety of issues, including mosque development proposals across the country. Their influence on and participation in mosque protest rallies is seen in over-the-top tactics designed to garner media attention.⁸ The dissemination of images and accounts from these unfortunate events seems to be emboldening local grassroots opponents to mosque proposals and inspiring copycat responses far from Ground Zero. Adding to the fury, politicians at every level of government are weighing in on Park 51 and other mosque proposals in increasing numbers during this 2010 election season.⁹

The combination of protest and politics places tremendous pressure on municipal officials, planners and review board members who are managing mosque development proposals. Although the national turmoil has a direct impact on their reviews, at least psychologically, it is largely out of their control—street protests and related dramas must be permitted and respected as an expression of citizens’ free speech rights. The only venue, then, which local planning officials really have for managing and reducing conflict and shaping dialogue about mosque development is within the local public hearing process.

This report seeks to deliver a tool kit for elected office holders, planners, municipal attorneys and review board members so that they feel prepared and confident to manage a religious land use application generally, and a mosque proposal specifically. What follows are lessons drawn from three case studies of mosque developments proposed within eighteen months of the 9/11 attacks. Although these particular mosque proposals did not face the nationally networked, hyper-aggressive opposition movement that current mosque development proposals are encountering, they were often, and to varying degrees, up against emotional, angry and bigoted responses. Many of the lessons learned from those cases, therefore, are applicable and informative for municipal officials today.

7 Kate Zernike, “Shaping Tea Party Passion Into Campaign Force” *The New York Times*, Published 8/25/2010. Accessed via the Times website 9/16/2010: http://www.nytimes.com/2010/08/26/us/politics/26freedom.html?_r=1&scp=1&sq=saul%20alinsky%20&st=cs

8 A dramatic example was seen in protests against a mosque proposal in Temecula, California. Participants were encouraged to bring dogs to Friday prayers there in order to offend and intimidate Muslim worshippers, many of whom consider dogs and pigs ritually unclean and polluting. See: Tim O’Leary, “Temecula Mosque Proposal Targeted in Pending Protest,” *Fallbrook Bonsall Village News*. First published 7/23/2010, Issue 29, Vol. 14. Accessed 9/23/2010 via <http://www.thevillagenews.com/story/49601/9/23/2010>.

9 In perhaps the most blatantly racist campaign ad to date, Republican candidate for North Carolina’s second district Renee Ellmers equates Park 51 to so-called victory mosques in Jerusalem, Cordoba and Constantinople, and uses the terms “Muslim” and “terrorist” interchangeably. http://www.salon.com/news/politics/war_room/2010/09/22/mosque_ad_north_carolina (accessed 9/30/2010). The “victory mosque” concept is heavily advocated by Pamela Geller and her collaborating partner Robert Spencer, proprietor of Jihadwatch.org. See, among others: Anne Barnard and Alan Feuer, “Outraged, and Outrageous.” Published in the *New York Times* 10/8/2010. http://www.nytimes.com/2010/10/10/nyregion/10geller.html?_r=1&scp=1&sq=pamela%20geller&st=cse (accessed 10/8/2010).

Part One: Research Design and Description of Case Studies

In the course of my research, I identified the following three cases of controversial mosque development from among nationwide press coverage of proposals made within eighteen months of September 11, 2001. For comparability among cases, I focused particularly on mosques with primarily immigrant-origin memberships, located in suburban districts—the areas of fastest growth for the Muslim American population.¹⁰ Geographic distribution, neighborhood type, and the form of public review (e.g. use variance, site plan review, and design review) were also considered. My final selections were The Muslim American Community Association in Voorhees, New Jersey (20 miles outside Philadelphia); the Islamic Center of the Northeast Valley in Scottsdale, Arizona; and the Islamic Center of Savannah, Georgia.

To build a multi-faceted and balanced understanding of each case study, I interviewed the mosque leaders and any consulting professionals with whom they worked (e.g. lawyers, planners, and architects); municipal planning staff, attorneys and review board members; neighbors and others who opposed the developments; and those who advocated for the Muslim American community. In addition, I reviewed public files and press coverage related to the cases.¹¹ Key findings included the importance of careful site selection; the critical need for advance conflict management on the parts of the Muslim community and the municipal planning staff; the advantages of public education, focused public relations and coalition building; and the necessity for Muslim Americans to engage in the broader public sphere. Summaries of the case studies follow.

The Muslim American Community Association, Voorhees, New Jersey

Voorhees Township, New Jersey is a dense suburban community located twenty miles east of Philadelphia. Beginning in the 1950s, the post-World War II housing boom transformed this agricultural area into suburban subdivisions. In the 1960s and 1970s, white urban dwellers moved to Voorhees en masse to escape Philadelphia's post-industrial decline and racial violence. Since the 1980s, the township has experienced continued dramatic population growth and development expansion. Although still predominantly white, its demographic profile has diversified some and includes a small but thriving Muslim American community made up primarily of South Asian immigrants.

¹⁰ See Ihsan Bagby, et al. *The Mosque in America: A National Portrait, A Report from the Mosque Study Project*. Washington, DC: Council on American-Islamic Relations, 2001.

¹¹ Data from the three source groups were analyzed using cross-study synthesis to emphasize similarities and differences among the mosque developments. Findings were considered in the theoretical contexts of land use planning and law, conflict management, and Islamic architecture.

Abandoned design for the Muslim American Community Association, Voorhees, New Jersey, including the cupola that was misrepresented by opposition members as a minaret.
Keith Haberem, Architect.



Between March 2003 and November 2004, Muslim leaders sought public approvals to build a mosque and community center in the township. They selected a blighted corner parcel located on the edge of an upper middle class residential neighborhood, hoping to rehabilitate the two abandoned structures for their use. The neighborhood was predominantly a mix of older, modest ranch housing and large-scale custom homes but it also included a private school and some commercial uses adjacent to the mosque site. The site itself consisted of three parcels, two zoned for residential use and one for commercial use. Houses of worship were allowed as of right on the residentially zoned parcels, but not in the commercial zone. Because of this a use variance was required.

The zoning board of appeals (ZBA) conducted the use variance hearings and site plan review. The sessions were complex and carried out in the glaring spotlight of regional and national media coverage. Levels of public participation and tension during the review process were high but not unprecedented.¹² Media accounts of the opposition to the proposal leave the impression that the conflict was entirely based on fear inspired by 9/11 and the American-led invasion of Iraq, which had taken place only three weeks before the first public hearing. However, careful analysis demonstrates that the confluence of a more complex set of factors escalated conflicts and nearly paralyzed the public process. The most problematic of these are presented below.

Increasing residential development pressures had reached an apex in Voorhees not long before the mosque proposal; the neighborhood around the mosque had been heavily impacted by related traffic issues. The most recent comprehensive plan process, which received high public participation, had focused particularly on broadening the commercial tax base. Mosque opponents seized upon the loss of the development parcel to a tax exempt religious entity. The ZBA's members received poor legal advice for their deliberations and therefore had difficulty understanding the bounds of their review.¹³ Similarly, board members and the public alike were insufficiently educated about hearing processes and requirements, and public comment was poorly controlled. Factually inaccurate statements made by members of the public and ZBA

¹² Voorhees planning staff and ZBA members reported that more people have come out for hearings on gas stations and a new Wal-Mart than did for the mosque review. The nature of the tension itself was unusual because of its primary causes—9/11 and the war in Iraq.

¹³ The ZBA attorney provided no guidance on the Religious Land Use and Institutionalized Persons Act. Instead, it was the applicant's attorney who, in a memo to the ZBA chair, offered a primer on the law and its requirements. During a pre-vote discussion period for the use variance, a ZBA member read into the public record information on RLUIPA that he had gathered on the internet. This was the first mention of the law in a public session, and ZBA members I interviewed reported that it was not discussed in caucus or executive sessions, either.



Muslim American Community Association, Voorhees, New Jersey, as built.

members were allowed to stand in the public record, and, gaining validity by neglect, they compounded with repetition and influenced deliberations. Additionally, fear-based diatribes went unchecked in comment periods and drowned out matters of purview and legitimate land use concerns.

The township and neighborhood were relatively homogenous in terms of race and ethnicity; most municipal officials and opponents had no prior experience with and little knowledge of Islam and Muslims. Public statements indicated that not a small number based their understanding of the way mosques work on such ubiquitous images as Mecca's Grand Mosque during Hajj season. Misperceptions about mosques were only exacerbated by the mosque's leaders, who provided ambiguous information about the mosque's anticipated occupancy and use patterns. Even if this information had been clear, weaknesses in the zoning code made the deliberation of mosque-specific issues (such as calculating occupancy for a congregation that prays on the floor without seats) difficult and confusing. From a design perspective, opponents requested that the mosque's design "blend in" with the surrounding residential architecture and "not look like a mosque." This request was highly problematic because Muslim leaders and mosque opponents had very different understandings of how this subjective concept should be interpreted in the design.

The final straw for opponents came after the site plan had been approved and zoning permits had been issued for the project. When the Muslim community applied for a building permit, it was clear that its architect had made substantial modifications to the approved design without requesting municipal approval. A stop work order was issued and public hearings were reopened. Given the lengthy and detailed review process that already had taken place, the late-stage changes further eroded the mosque leadership's credibility with the municipality and the surrounding neighborhood and reignited tensions.¹⁴

In the end, despite believing they were on solid legal ground to pursue the modified mosque design, the Muslim community withdrew it, reverted to the approved design and proceeded with construction. The president commented that lawsuits never make good neighbors. After

Opponents requested that the mosque's design 'blend' in with the surrounding residential architecture and 'not look like a mosque'.

¹⁴ There was considerable disagreement between the ZBA and the mosque's attorney about design purview. The mosque had undergone site plan review, not design review. The development site was not in an historic district; the applicant's attorney therefore felt that the specifics of its form beyond height and setback requirements were not the purview of the ZBA. Opponents and a majority of the ZBA disagreed and found the changes to be "significant" as defined by statute. This finding required the Muslim community either to submit to a new site plan review or revert to the elevations and plans as approved. They opted for the latter.

*Proposed design for mosque
in Scottsdale, Arizona.
Sal Ramel, Architect.*



concerted efforts by the Muslim community since the mosque opened, tensions have eased in the neighborhood. My interviews with former neighborhood opponents reveal that none of their fears about traffic, noise, or criminal activity on the mosque site has come to fruition. In fact, most said that the Muslim American Community Association is an excellent neighbor and an amenity in the neighborhood.

The Islamic Center of the Northeast Valley, Scottsdale, Arizona

The Scottsdale case study is particularly interesting because the single approval that the mosque proposal required was design review. The development site is in a predominantly white, upper-middle class, single-family residential zone in which houses of worship are allowed as of right, so a use variance or other zoning approval was not required. Still, the proposal, put forward by a mostly South Asian immigrant Muslim community, was contentious and the ensuing debate reached far beyond the issues over which the board had jurisdiction.

To be sure, 9/11 had a tremendous impact on the Scottsdale proposal. The first public hearing was scheduled just three weeks after the attacks, but postponed by one month to allow emotions to calm. Despite the delay, fears about terrorism were openly cited in public comments. Planning staff assigned to the proposal reported receiving anonymous phone calls threatening reprisals if they shepherded the mosque to approval. Interestingly, though, data analysis and interviews seem to support the theory that legitimate land use concerns did trump fear for those living closest to the development site.¹⁵ Chief among those concerns was the question of the mosque's compatibility with a neighborhood of custom and semi-custom single-family homes, built in flurry of construction activity beginning around 1995. Even though the Muslim community was within its rights to build in the neighborhood, opponents spent a good deal of energy arguing otherwise.

The only real legal ground on which one could oppose the Scottsdale mosque complex (which includes educational and social spaces as well as an imam's residence) was its design, the area of purview for the review board. Strict city-established guidelines for the neighborhood, as well as those of surrounding private homeowners' associations, dictate a specific muted "desert" color palette and low-slung forms approximating a southern Mediterranean style.

¹⁵ As of this writing, data analysis for the Scottsdale case study is ongoing.



Mosque structure in Scottsdale, Arizona reflects design compromises.

As originally designed, the mosque complex had a contrasting palette and colorful stained glass windows. Opponents and some design review board members felt that the comparative brightness of the proposed structures was aesthetically incompatible with the neighborhood. More troubling for the neighbors, however, was the overall height of the complex, particularly the proposed dome and minaret. The potential loss of mountain and city views, for which most property owners had recently paid a premium, was a source of particular agitation. So troubling was it, in fact, that a number of them attempted to broker a land swap to move the mosque to a parcel of land on a nearby commercial thoroughfare.

The leaders of the Muslim community were aware of their rights under the Religious Land Use and Institutionalized Persons Act and invoked it when they felt that opponents were having an undue influence on the design review board’s deliberations. RLUIPA was more of a big stick than an actual threat for the mosque’s leaders, who wanted very much to be accepted by and contribute to the broader community. Indeed, they made significant modifications to their original design in order to appease surrounding property owners.

To reduce the complex’s intrusion on surrounding vistas and still achieve the height necessary to meet their programmatic needs, the Muslim community decided to excavate substantially below grade before building. To meet this significant expense, the prayer hall and minaret were relegated to a phased plan and have not yet been built;¹⁶ prayers take place in the complex’s social hall. This solution satisfied most opponents, and those I interviewed reported being pleasantly surprised by the limited impact that the mosque actually has had on their neighborhood. Arguably, the Scottsdale Muslim community made compromises beyond what it needed to make—the original height of the complex met the standing zoning code for the neighborhood and could lawfully have been approved had they decided to press on.

The Islamic Center of Savannah, Georgia

The Savannah mosque development was selected as a contrast case for the larger study. The faith community that built and attends the Islamic Center of Savannah is the city’s second Muslim

16 My interviews with Scottsdale mosque opponents suggest that many incorrectly believe that the minaret and dome were removed from the plans as part of the viewshed negotiation. In fact, the design review board approved the minaret and dome as part of the phased plan and both will be constructed when funds are available. It will be interesting to see how neighbors respond once that construction begins.

*The Savannah
community
garnered national
headlines when
the local mosque
structure was
firebombed in 2003;
however, there
was no resistance
to the new mosque
development.”*

congregation and consists primarily of Pakistani, Indian, and Arab Americans.¹⁷ Beginning in November 2001, the mosque had its first home in a former single-family residence. The community garnered national headlines when the structure was firebombed in 2003. I considered it as a case study candidate based on that event, expecting to tell a “clash of cultures” tale of Muslim Americans in the Bible Belt, complete with a tumultuous public review process. As it turns out, however, the fire bombing was the only controversy related to the mosque, and it took place several months after regular worship commenced. There had been no resistance to the mosque proposal—not a single member of the public even attended the hearings for the use approval required for the Muslim community to rehabilitate the house as a prayer hall. Similarly, when members forged ahead with plans to construct a purpose-built mosque and community center on the site two years later, not a single comment was received during the site plan review hearings. A number of factors contributed to the conflict-free review process for the Islamic Center of Savannah.

The Muslim community chose its site wisely; the significance of this decision cannot be overstated. The mosque is located in a transitional district which was evolving from its original use as a single-family home neighborhood to mixed-use; the few remaining single-family homes on large lots were already islands in a sea of apartment complexes and semi-detached townhouses, adult care facilities, university facilities, commercial uses and, most significantly, a number of large Christian congregations. Controversies over the compatibility of land uses, therefore, already had arisen and been resolved before the mosque proposal ever came into play. The site itself had been rezoned from a single-family designation to a multi-family designation, smoothing the way for a use approval for a house of worship.

The leaders of the Islamic Center of Savannah are reputable physicians respected across the city. As the mosque’s public face, they lent a significant degree of credibility to the proposal. Additionally, their wide-reaching social and business networks were essential to the success of their development review, affording them access to resources and expertise that aided their negotiation of Savannah’s complex zoning regime. Finally, the doctors and their consulting planner conducted a proactive, door-to-door outreach campaign in the neighborhood to gather and respond to property owners’ concerns in advance of public reviews. This approach allowed them to demonstrate their commitment to being good and conscientious neighbors.

When one considers the case study mosque developments and the grassroots opposition they faced as a composite, a number of lessons emerge to inform public hearing management and conflict reduction strategies. These are generalized in Part Four for use by elected officials, public planners and appointed review board members, following a discussion of the legal framework for municipal reviews of religious land use proposals.

¹⁷ Savannah’s first Muslim community is largely African American and worships near the city center. The city itself is almost evenly divided ethnically between Caucasian Americans and African Americans. According to the 2000 census, the last census taken prior to the mosque development, Pakistani, Indian and Arab Americans together constitute less than 5% of the city’s population.



*Dar al Islam
Abique, New Mexico.
Photo: Asad Tarsin*



Part Two: The Legal Framework for Reviewing Religious Land Use Proposals¹⁸

Any municipal official responding to an application for a mosque development must have a solid understanding of the legal framework that the Constitution and federal law provide for reviewing religious land use proposals. As a nation we have struggled to balance the constitutional right to unfettered religious practice with the need to regulate other activities, including land use and development. In recent years a flurry of legislative and judicial activity has resulted in shifting boundaries and varying standards for determining what is termed the government's "compelling interest" in regulating religious land developments, as well as the extent to which a government entity can limit free practice via the application of local land use laws. A full discussion of these decisions and actions is beyond the scope of this report. Instead, this section will focus on the culmination of the debate and the single most important law pertaining to religious land uses: the federal Religious Land Use and Institutionalized Persons Act of 2000,¹⁹ known as RLUIPA (generally pronounced ree-loopa).²⁰

When initially passed, RLUIPA was widely perceived to completely exempt religious land use proposals from local zoning and landmarking laws, and, in effect, mandate their approval. However, the initial assessment that RLUIPA was something of a free pass for religious entities was not entirely accurate, and was based largely on lack of clarity in the text of the bill. Put more accurately and simply, RLUIPA places religious and secular institutions on equal footing in land use reviews and requires the fair and unbiased consideration of religious land use proposals.

In constitutional terms, RLUIPA prohibits a local government from imposing or implementing a land use regulation, defined specifically in the act as zoning and landmarking, in any way that imposes a substantial burden on the free exercise of religion, unless the government can demonstrate that it has a compelling interest to justify the regulation and that it has used the least restrictive means to achieve the interest.²¹ The burden of proof for demonstrating

18 Unless otherwise indicated, information in this section is drawn from: Michael S. Giaimo and Lora A. Lucero, AICP, editors. *The RLUIPA Reader: Religious Land Uses, Zoning and the Courts*. Chicago: American Bar Association, 2009. Adam Kingsley and Thomas Smith. "The Zoning of Religious Institutions in the Wake of RLUIPA: A Guide for Planners," *Zoning Practice*. September 2008, pages 2-7. Marc Rohr. "And Congress said, 'Let there be a religious land use': A RLUIPA Primer." *Florida Bar Journal*. 12/1/2004. Alan C. Weinstein. "Recent Developments Concerning RLUIPA," *Current Trends and Practical Strategies in Land Use Law and Zoning*, Patricia E. Salkin, ed. Chapter 1, pages 1-18. Chicago: ABA Publishing, 2004.

19 Pub. L. No. 106-274, 114 Stat. 803-807, codified at 42 U.S.C. § 2000cc to 2000cc-5.

20 The name of the act indicates its two focus areas: limiting restrictions placed on religious entities by land use regulations, and on federal prisoners to practice their religion freely while incarcerated. Marci A. Hamilton describes RLUIPA as a "sausage" and a "quintessentially legislative product"—a bill which, after being stripped by compromise of many of its original elements, pertains in its final form to the two strangely paired issues of land use and federal prisoners. Giaimo and Lucero, *op. cit.*, page 31.

21 42 U.S.C. § 2000cc(A)(1)

compelling interest in land use cases has swung on a political and ideological pendulum at least since the 1950s. RLUIPA decidedly shifts the burden once again to the government and, specifically in land use cases, to state and local governments. Additionally, it restores a higher bar that a government body must reach to consider zoning more compelling than free religious practice, known as the “strict scrutiny” test.²² Since RLUIPA does not define substantial burden, it requires the courts to reach some consensus; they have not yet done so.²³ This lack of clarity is one of a number of problematic aspects of the law, along with two significant departures it makes from precedent.

First, RLUIPA requires local, state and federal bodies to treat religious institutions on equal terms with nonreligious institutions (such as private clubs or lodges²⁴); that is, religious assemblies may not be excluded where other secular assemblies are permitted, and they must be given the same zoning rights. Second, as written RLUIPA considers accessory functions (such as affiliated schools, food pantries, senior centers, cemeteries, etcetera) essential to the free exercise of religion and calls for them to be regulated in the same way that the primary worship spaces are regulated²⁵—that is, a local government may not place a substantial burden on the accessory use, either.²⁶ However, recent court cases have begun to establish that, so long as the bases for zoning decisions are rational and equitable, the regulation of accessory uses does not necessarily place a substantial burden on a religious group’s ability to practice freely.²⁷ The precedent of these cases is narrowing the focus of RLUIPA and giving municipalities greater ability to balance the needs of neighboring religious and secular land uses.

22 The “strict scrutiny test” is applied in any constitutional conflict, not just land use, and regardless of whether the law or action is that of the federal, state or local government.

23 See a discussion of the substantial burden question in chapter six of Giaimo and Lucero’s RLUIPA Reader, pages 89-94.

24 Kingsley and Smith point out that some courts have suggested that “nonreligious assembly or institution” may include commercial or entertainment uses. These authors do not interpret RLUIPA’s intentions that way and believe that planners must help shape courts’ understanding of the distinctions between true assembly and retail/commercial uses. *Op. cit.*, page 5.

25 Accessory uses have been considered essential to the free exercise of religion because RLUIPA defines a “protected exercise” very broadly: “any exercise of religion, whether or not compelled by, or central to, a system of religious belief” (42 U.S.C § 2000cc-5(7)(A)). The vagueness of this phrasing was initially interpreted to mean that all accessory uses should be considered the equivalent of actual worship. The courts have since modified this understanding.

26 The treatment of accessory uses under RLUIPA has proved particularly vexing for municipalities and the courts alike because until the courts began narrowing the focus of RLUIPA, the act seemed to mandate that municipalities approve accessory uses even if they had deleterious impacts on the properties that surround the religious use. Planners often felt that under the statute they could not adequately protect the rights and interests of surrounding property owners. See: Adam J. MacLeod. “A Non-Fatal Collision: Interpreting RLUIPA Where Religious Land Uses and Community Interests Meet.” Published on the website of the Social Science Research Network 1/7/2010. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1533015, accessed 9/26/2010.

27 See, among others; Greater Bible Way Temple of Jackson v City of Jackson, 478 Mich. 373 (2007); Trinity Evangelical Lutheran Church v. City of Peoria, Illinois, 07-cv-1029 (C.D. Ill. 3/31/2009); and New Life Worship Center v. Town of Smithfield Zoning Board of Review, 2010 R.I.Super. Lexis 101 (R.I. 7/10/10).

Part Three: Advance Preparation for Religious Land Use Proposals

The planning establishment has felt that RLUIPA limits its ability to regulate religious land uses and, by extension, balance the needs and rights of religious entities with those of surrounding property owners. However, outcomes in RLUIPA-related lawsuits increasingly support the idea that local governments actually do retain a significant amount of regulatory authority if the bases for decisions are supported by rational planning principles and neutral zoning codes.²⁸ Legal scholars and practicing attorneys have begun to outline best municipal practices for addressing religious land use proposals generally. This section presents a number of these valuable, practical recommendations; the reader is encouraged to review the cited sources for a more extensive discussion of considerations.²⁹ Then, parts four and five elaborate on that general advice with recommendations specific to mosque proposals.

Remember: the primary goal of RLUIPA is to ensure religious land uses equal and fair treatment, not privileged treatment. It is incumbent upon local governments, therefore, to ensure that deliberations surrounding religious land use applications are conducted on a rational, equitable basis and that they are anchored in accepted planning principles.

Plan Comprehensively; Zone Neutrally

As with land use generally, all good planning for the treatment of religious properties starts broadly and is considered comprehensively. Ideally, comprehensive plans provide locational options for religious developments, including accessory uses, now and into the future. Such planning offers flexibility to the municipality and religious institutions. For example, if after weighing a proposal's impacts, a municipality feels that the development is untenable on the applicant's first choice parcel, a denial will be problematic if alternative locations were not planned proactively. If the denial will leave the religious community with no viable development options, the courts will likely consider the decision a substantial burden on free practice. However, when reasonable and feasible development alternatives exist for faith groups in multiple municipal zones, the courts are less likely to find a substantial burden.³⁰ Planners and municipal attorneys should carefully examine their comprehensive plans to ensure

*RLUIPA ensures
equal and fair
treatment,
not privileged
treatment, for
religious land use.*

28 Weinstein, 2004. Op. cit, page 11; Kinglsey and Thomas, op. cit, page 3.

29 Recommendations in this section are drawn from Giaimo & Lucero, op. cit: Chapter 7, "How Local Government Can Nip RLUIPA Claims in the Bud," Dwight H. Merriam, FAICP. Chapter 8, "RLUIPA Challenges: An Ounce of Prevention is Worth a Pound of Cure," Alan Weinstein. Chapter 9: "RLUIPA and Planners: The Importance of Fairness in Planning for and Regulating Religious Land Uses," Graham S. Billingsley, AICP. Chapter 10: "The Top Ten Tips," Daniel P. Dalton, Vivian Kahn, FAICP and Bryan W. Wenter, AICP. Other important resources are Kinglsey & Smith, op. cit. and Weinstein, 2004, op. cit.

30 Kinglsey and Thomas, op. cit, page 7.

accommodation of religious properties and update those plans as needed. Obviously, such foresight will be more easily achieved in newer municipalities with available land than in older areas that are more completely built out.³¹

Next, planners and municipal attorneys should review zoning codes to determine if they contain differences in the treatment of religious assemblies and secular assemblies. Are secular assemblies such as theatres allowed as of right in commercial districts, while religious institutions are required to secure a use variance or conditional approval? This could be interpreted as unequal treatment.³² The courts have recognized the validity of creating a generic “assembly” category for zoning purposes and placing religious and secular assemblies under the same broad restrictions.³³ Municipalities should consider identifying zones in which assemblies—as a general category—will be allowed as of right, as well as those in which they are not permissible. Additionally, eliminating the traditional categories of “church,” “house of worship,” or “religious institution” not only equalizes treatment for religious and nonreligious uses, it equalizes treatment of different faith groups; codes no longer need to call out “church, synagogue, mosque or other.”

One successful method to deal with assemblies neutrally is to base their zoning on size, as calculated, for example, by square footage, floor area ratio, and number of parking spaces.³⁴ Smaller assemblies might be more appropriate to residential zones and larger assemblies to commercial or other nonresidential areas. The assembly’s size might be linked to roadway classification, such as arterial, collector, and local access, to ensure that its traffic load can be adequately carried near the site. Landscaping and buffering requirements might increase with assembly size, particularly in residential zones.³⁵ This type of approach affords municipalities flexibility to deal—neutrally—with assembly variations ranging from thirty member congregations with one Sunday service to sprawling mega churches with daily offerings of educational and social programs. It also increases a municipality’s ability to fairly protect residential neighborhoods from assembly uses which may be out of scale or otherwise incompatible with surrounding homes.³⁶

31 Weinstein, 2004 op.cit, page 12.

32 Merriam, op. cit page 117.

33 Vision Church, *United Methodist v. Village of Long Grove*, 468 F3d 975 (7th Cir. 2006).

34 Strong examples of well-considered and carefully written zoning codes for assemblies are those of the Village of Long Grove, Illinois (http://www.sterlingcodifiers.com/codebook/index.php?book_id=) and the City of Charlotte, North Carolina (<http://www.charmeck.org/Planning/ZoningOrdinance/ZoningOrdCityChapter12.pdf>).

35 Kinglsey and Thomas, op. cit, page 5.

36 An excellent discussion of RLUIPA’s impact on residential neighborhoods is found in chapter 4 of the RLUIPA Reader: Marci A. Hamilton’s “The Unintended



Preparing Planning Staff and Review Board Members

Municipal officials, planners, and appointed review board members should be trained in the basics of RLUIPA's scope and requirements. The municipality should provide "sensitivity training" so that staff and board members are aware of comments or actions that may be perceived as hostility and bias. Board members must bear in mind that their comments and queries will be a critical element of the public record, and should never communicate any sense of prejudice or aggression.³⁷ Anger management and conflict resolution should also be part of staff and board training.³⁸ As with any controversial land use proposal, review processes for religious properties can be fraught. One's religion is personal and cherished, and perceived attacks on it by any party can draw emotional responses. The same is true for private property ownership; for most Americans their home or business property is their most valuable asset, and they feel bound to protect it and their financial futures. The coming together of these two strong motivating factors will place review board members in the unenviable position of adjudicating applications under high stress, and they should be prepared to control escalating emotions, including their own. It is critically important that they can do so calmly and respectfully.

Dealing with Public Pressure

Review board members, and particularly the board chairs, must be prepared to deal with a potential onslaught of pressure from members of the public who have concerns about a mosque proposal. Appointed review board members occupy a challenging position, particularly in smaller towns, because applicants, opponents, and supporters may be people they know. Members of the public often do not hesitate to approach a review board member to lobby their position on an application, much as they would an elected official such as a mayor, city council member, or town supervisor. But elected officials and appointed review board members cannot be vulnerable to the same public pressures.

Elected officials are accountable to their electorate. Review board members are quasi-judicial officials who are accountable to the regulations they administer. Their decisions are legally binding. They must review proposals in public session and assess them on their merits using

One successful method to deal with assemblies neutrally is to base their zoning on size, calculated by square footage, floor area ratio, and number of parking spaces.

Consequences RLUIPA Has Visited on Residential Neighborhoods." Giaino & Lucero, op.cit.

³⁷ Kingsley and Smith, op. cit, page 7.

³⁸ Merriam, op. cit., page 122.

Any comments made by the planning staff or board members stewarding a contentious application during land use hearings will potentially become part of the case record.



established criteria. To protect board members from extra-session pressures and to ensure that other parties do not have undue or illegal influence on an application, members should be instructed by the municipal attorney not to discuss the application with any member of the public. This advice extends to intra-board conversations, as well. Land use applicants have a right to witness deliberations on their proposals in open session, and those deliberations should not be predetermined by extra-session conversations among adjudicators. In short, board members should not discuss land use applications with anyone outside of advertised public meetings and legal executive sessions.

Managing Contentious Public Hearings

Board members and particularly board chairs should additionally be trained in the management of public hearings to help ensure a civil and controlled proceeding. Following parliamentary procedure like Robert's Rules of Order establishes a structure for sessions that can be relied upon to respectfully manage application presentation, board debate, and public comment.³⁹ Additionally, many states have open meetings laws that mandate the process and order for public hearings.⁴⁰ A review board chair can lean on an established procedure as a neutralizing agent, especially in a tense and emotionally charged hearing environment.

Dwight Merriam and others recommend that planners' and board members' RLUIPA knowledge and hearing management skills be tested in a mock review for a hypothetical application, complete with angry opposition.⁴¹ Such role-play will emphasize the need for review board members to speak and deliberate without bias, and to tie their questions and statements back to the objective facts of the case. The municipal attorney should emphasize that any comments made by the planning staff stewarding the application or the board members adjudicating it will potentially become part of the case record and should, therefore, always be based on substantiated evidence and objective, rational considerations.

³⁹ <http://rulesonline.com/>

⁴⁰ The guide to New York State's Open Meetings Law ("Conducting Public Meetings and Public Hearings") offers one example: <http://www.dos.state.ny.us/lgss/pdfs/public.pdf> (accessed 10/3/2010).

⁴¹ Merriam, *op. cit.*, page 122.

Part Four: Stewarding a Mosque Development Proposal

Mosque applicants should not be asked to meet lower or higher standards in the approval process than any other kind of assembly. As planner Graham S. Billingsley writes, the key to avoiding a RLUIPA challenge is for municipalities to “be fair, be very fair.”⁴² When a mosque proposal is received, planners and attorneys should review the records of recent secular assembly applications and religious assembly applications to determine the rigor and requirements of their review. Planners should determine what permits were necessary for the application’s approval, as well as what documentation the applicants were asked to provide to support designs, plans and proposed uses. The findings of fact and conditions of approval or denial also should be read critically. That is to say, after making allowances for site and project-specific variations, the review process followed and conditions established for the mosque review should be similar to those recorded for other assembly proposals. The record of these applications should be explained to review board members to inform their deliberations.

If the mosque application is the first to benefit from an advance hearing, the practice should be adopted as policy.

Hold an Advance Meeting with Mosque Representatives

If the municipality does not have a policy of holding pre-hearing meetings with land use applicants, one should be established. Municipal officials should not hold advance meetings only with mosque representatives, as this could be considered unequal treatment. All land use applicants should have access to the same municipal services. If the mosque application is the first to benefit from an advance hearing, the practice should be adopted as policy. The municipal attorney should be present for advance meetings with the applicant, as should the chair(s) of the review board(s) that will adjudicate the application. The attorney’s role should be to explain the scope and requirements of RLUIPA for the benefit of the applicant and to ensure from the start that the treatment of the mosque proposal is fair and neutral. Finally, planning staff should document the advance meeting with the Muslim community in a letter or memo that details attendees, topics discussed, outcomes, and action items. The paragraphs that follow outline the kinds of topics that should be addressed in advance sessions.

Analyze Site Selection

Municipal officials should discuss the goals of the Muslim community’s development project, including the likely size of proposed structures and the primary and accessory uses to be

⁴² Billingsley, op. cit., page 143.

included. If a site has not yet been selected, planners might review all zones in which religious assemblies are permissible and what is required for their approval in each (such as use variances and conditional use permits). Any available parcels appropriate for the project's scale and uses might be discussed. If a site has been selected, the parties should troubleshoot potential areas of conflict associated with it. These might include the development context for the location—the degree of build-out in the neighborhood, existing traffic issues, community reaction to recent large-scale development proposals and recent religious land use proposals, and the degree to which the community's property owners are organized.

Understand the Design

Muslim community representatives may present concept drawings to planning staff. Planners, board chairs and the municipal attorney should review them and compare them to code requirements for height, setback, lot coverage, and whatever other design and site plan issues can be anticipated preliminarily. They should encourage the Muslim community to contain its design within the envelope of standing codes. If, for example, variances are needed to accommodate the height or lot coverage of the structure, this may reinforce public perceptions that the mosque “does not belong” in the neighborhood, and will likely increase tensions. In a number of significant ways, the design of mosques is different than the more familiar forms of churches and synagogues. To help municipal officials understand drawings and communicate clearly with Muslim community representatives, the character defining features are briefly described in this section.

Orientation to Mecca

Muslims pray facing Mecca, the location of the faith's holiest site. The direction of Mecca is indicated to worshippers by the mihrab (pronounced with a short i as in mint: mih-rob), a niche in the center of the primary wall known as the qibla (pronounced kib-bla). Muslims often orient the entire building which houses the prayer hall toward Mecca, resulting in a structure that is situated off-axis with the street grid. In some cases, such as in an historic district, a proposed structure that does not meet the line of the existing streetscape may be considered incompatible from a design perspective. In dense urban areas where surrounding structures make off-axis orientation difficult, Mecca orientation often is accommodated on the inside of the building. In those cases, the qibla wall may be constructed at a different angle than the



exterior walls and will be reflected as such on architectural drawings.

Interior Layout of a Mosque

The prayer hall within a mosque is generally a large open room with no seating and little other furniture. Muslims do not gather in pews to pray, but instead stand in rows to perform a ritual of prayer that includes sitting, kneeling, and prostrating with foreheads to the floor. Calculating occupancy for a mosque, therefore, is not the same as calculating occupancy for a church or synagogue. In those houses of worship, occupancy is usually determined by the number of seats in pews. In a mosque, it is best to use standard calculations for assembly spaces without seating, such as that recommended by the International Building Code.⁴³ This or a similar neutral formula should be included in a municipality's zoning code as a standard occupancy calculation for all assembly spaces without fixed seating. Parking calculations should then be based on that occupancy number.⁴⁴

Conversations about occupancy may be complicated by terminology. Many religious organizations use the term membership to describe their congregations. Muslims, on the other hand, do not generally consider themselves "members" of a mosque in the way that Christians consider themselves members of a church or Jews consider themselves members of a synagogue. In Muslim-majority societies, where mosques are common and conveniently situated, an individual may attend several different congregational mosques without considering himself or herself a "member" of any of them. Even though in the United States, where mosques are few and far between, and Muslims tend to affiliate more strongly with a single mosque, they still may not refer to themselves as "members." Sometimes this difference causes confusion in conversations between mosque representatives and planning officials as they try to determine building occupancy and the related parking calculation. Rather than focusing the discussion on membership, a better approach is to consider the number of people who regularly attend the Friday congregational prayers, since they generate the highest regular attendance.

Muslims often orient the building toward Mecca, resulting in a structure off-axis with the street grid.

⁴³ The 2009 International Building Code prescribes a floor area of five net square feet per occupant in assemblies without fixed seats. See Table 1004.1.1, "Maximum Floor Area Allowances per Occupant." Country Club Hills, Illinois: International Code Council, Inc., 2009. Page 220.

⁴⁴ In the Voorhees case study, a tremendous amount of conflict surrounded the calculation of building occupancy and related parking needs. At the time, the Voorhees code required that religious land use applicants provide one parking space per three seats. The zoning review board was flummoxed over how to calculate parking without seats. In fairness to ZBA members, the occupancy of the mosque was something of a moving target throughout the multiple hearings, since the mosque leadership provided ambiguous numbers about congregation size. Still, this conflict was avoided entirely in Savannah and Scottsdale by the use of the previously mentioned International Building Code guideline for calculating occupancy in an assembly space without fixed seating.

Gender Segregation

Most but not all Muslim American communities practice varying degrees of gender-segregation for purposes of modesty and avoiding unnecessary distraction during prayer. The prayer hall may have separate entrances for men and women, as well separate spaces for prayer itself. Sometimes a single prayer hall is separated with some sort of fixed or movable divider, and sometimes there is a different room in which women and children pray. Mosque plans will also include gender-segregated spaces for ablution (ritual washing of face, hands, and feet before prayer, known as wudu—pronounced woo-doo), normally in or near restrooms to optimize water supply systems.

Dome and Minaret

Domes and minarets are important visual symbols of Islam and character-defining features of a mosque. They communicate the building's function to Muslims and non-Muslims alike. The minaret can be thought of as a bell tower. Just as Christian churches commonly ring bells from towers to call parishioners to services, in areas of the world where Muslims are in the majority, either a cantor makes the call to prayer or a recording of one is broadcast from the top of a minaret to indicate that the time for prayer has arrived. However, in areas where Muslims are a minority (including the United States) the call to prayer is rarely made audibly on the exterior of a mosque. The reason is simple—usually most of the people around the mosque are non-Muslims and do not need to hear the call. In the US the call to prayer is more commonly made inside the mosque and on personal devices such as clocks, watches and cell phones. However, minarets still are usually included in the design of new mosques as a symbol of religious identity.

Understand Use Components

Mosque proposals frequently include multiple accessory uses in addition to the actual prayer hall most people envision when they hear the term “mosque.” In the United States and other parts of the world where Muslims are minorities, prayer halls are normally accompanied by a number of spaces that serve the broader social and educational needs of the faith community. Municipalities commonly review such functional elements as social halls with banquet facilities, meetings rooms, living quarters for an imam (Islamic clergyman) and his family, classroom

space for religious instruction, K-12 schools, and funerary facilities used in the ritual preparation of bodies for burial. Specific aspects of mosque use that may be controversial in a land use review are addressed in this section.

Prayer Times

Muslims pray five times a day: at dawn, at noon, at mid-afternoon, at sunset, and in the evening.⁴⁵ Prayer times follow the sun, and as such shift slightly during the year; that is, in the northern hemisphere the sunset prayer takes place quite early in winter and quite late in summer. Islam does not require that these prayers are made in a mosque, only that they be performed in a clean place without distraction. And, given the frequency of prayers and the small number of mosques in the United States, it is in fact quite difficult for most Muslim Americans to get to a mosque during the day. As a result, most make the daily prayers at home, at work, or at school. The Islamic equivalent of the sabbath, when congregational prayer is required, is Friday at midday and is called the jum'ah (pronounced joom-ah) prayer. In terms of traffic patterns for particular mosque proposals, then, municipal officials and neighboring property owners can expect that few people will attend the mosque during the day and a small number will attend it during the evening prayer, after members' workdays have ended. Friday mid-day will be the time of peak attendance for the mosque.

High Holy Days

Islam has two high holy days: Eid al-Adha and Eid al-Fitr; the latter marks the end of the month of Ramadan, the lunar month during which Muslims fast from sunrise to sunset. The dates for these events shift slightly year to year as the lunar and Gregorian calendars are not in sync.⁴⁶ Mosques host special prayers and social events for these holidays, and the municipality can expect the facility to have high traffic and occupancy during them.⁴⁷ Additionally, some Muslims attend the mosque more frequently in the evening during the holy month of Ramadan, particularly through its last ten days. The lunar month of Muharram is also a period of higher mosque attendance for Shi'ite Muslim communities.

⁴⁵ The Arabic names for the prayer times are fajr (dawn), duhr (noon), 'asr (mid-afternoon), maghrib (sunset), and 'isha (evening).

⁴⁶ The Islamic calendar is lunar and shifts ten days earlier in each Gregorian calendar year. As such, Ramadan and the Eids take place earlier in each Gregorian year.

⁴⁷ From a planning perspective, one can think of the Eids like Christmas and Easter or Rosh Hashanah and Yom Kippur. That is, mosque members who might not attend congregational prayers regularly are more likely to come to the mosque for the celebration of the high holidays.

Unused parking lots can be rented for periodic use.



Traffic & Parking

Traffic and parking tend to be contentious issues in most development proposals, and particularly religious land use proposals; mosques are no different. Conflicts tend to be particularly intense in residential neighborhoods. The best response is for the municipality and the Muslim community to have carefully considered traffic and parking impacts as well as potential mitigating measures.

Municipal officials should reinforce the need for mosque representatives to provide data-based calculations for occupancy, parking needs and traffic impacts. Mosque representatives should be encouraged to commission a reputable, independent traffic engineer to conduct an analysis of the expected impacts worshippers' cars will have on the surrounding neighborhood. It may be additionally useful for mosque officials to prepare an overflow parking plan for high occupancy events. One successful strategy planners might recommend to Muslim communities is approaching the owners of nearby, underutilized parking lots and establishing periodic rental agreements. Not only will such agreements keep cars off surrounding streets, Muslim communities can also avoid investing money in constructing their own lots, which will themselves be underutilized. Additionally, the municipality can avoid having to approve another undesirable swath of impervious surface.

The Call to Prayer

Perhaps the least understood and most controversial element of review processes for mosque proposals is the call to prayer, or the adhan (pronounced ahd-haan).⁴⁸ Planners and attorneys should ascertain whether the Muslim community intends to pursue the broadcast of the call to prayer. If it does, the conflict in the land use review will likely be considerably higher. Particularly in residential zones, non-Muslims often consider a broadcast call to prayer a nuisance and a form of noise pollution.

When uninformed about the meaning and intent of the call, some opponents can interpret it

⁴⁸ The phrases of the adhan are translated as follows:

(1) God is most great (four times); (2) I testify that there is no god but God (twice); (3) I testify that Muhammad is the Messenger of God (twice); (4) Hurry to prayer (twice); (5) Hurry to success [sometimes translated as 'salvation'] (twice); (6) only before the morning prayer: Prayer is better than sleep (twice); (7) God is most great (twice); (8) There is no god but God.

Translated by Frederick Mathewson Denny in his book *An Introduction to Islam* (second edition), which is an excellent resource for non-Muslims on the history and practice of Islam. Upper Saddle River, NJ: Macmillan Publishing Company/Prentice Hall, Inc., 1994. Page 120.

as proselytizing or an attempt to “dominate” and “intimidate” a neighborhood. This was the case in Voorhees, despite the fact that the mosque’s design had no minaret and the president repeatedly stated the community’s intention not to make an audible call to prayer. A cupola on the building’s roof, merely a design element to allow additional light into the prayer hall, was wrongly interpreted by opponents to be a minaret. Several speakers insisted that even if the Muslim community did not make the call to prayer immediately, they could not be trusted not to in the future.⁴⁹

If a Muslim community does desire to broadcast the call to prayer, legal precedent supports it being made at decibel levels equivalent to those of ringing church bells.⁵⁰ In an effort to prophylactically reduce conflict related to broadcasting the call to prayer, municipal officials might encourage the Muslim community to consider compromises such as only making the call to prayer before the Friday congregational prayer and on high holy days. Certainly, an extra degree of public education and outreach will be required around the issue.

Establish Process Clarity

So that all parties understand what will be required in the mosque’s public review process, planners and the attorney should explain the likely stages of the process and what will be required in terms of documentation. They should provide a checklist of materials that must be submitted and reviewed before each public hearing.

If the state in which the application is being made allows preliminary and final site plan approvals in a single hearing, officials should discourage the Muslim community from taking that path. Even though this choice may be perfectly lawful, it does tend to give neighboring property owners the impression that an application is being pushed through the approvals process. The Voorhees Muslim community sought a single, preliminary and final site plan approval to save money. However, any hoped-for cost efficiencies were lost to an extended review period and increased tensions. I believe that there was a psychological factor at play that gave an intimidating strength to the label “final” and caused the public to feel unable to

49 It is unclear how opponents thought the call would be made from the cupola—it is open to the floor below, it has no means of access for a cantor, it is not wired for speakers, and it has fixed windows.

50 Moore, *op. cit.*, page 132. In a famously controversial 2004 decision, the Hamtramck, Michigan city council modified its noise ordinance to accommodate the call to prayer at the same decibel level as church bells. See: <http://www.amren.com/news/news04/04/27/hamtramckmosque.html> (accessed 10/3/2010).



influence outcomes. Staging contentious proposals into preliminary and final steps will give the public the rightful sense that careful attention is being paid by the municipality and assure them that they have had a real opportunity to shape the end product and its impact on their properties and quality of life.

Encourage Neighborhood Outreach

Once likely areas of contention are identified and a plan established for addressing them, municipal officials should encourage Muslim applicants to undertake an outreach campaign to property owners and residents surrounding the development site. Planners should connect Muslim leaders to neighborhood associations or other known community organizers to discuss public education strategies and hold a community meeting regarding the proposal. Planners should attend the session as observers. The reaction they witness will help them gauge the degree of proposal resistance and identify contentious issues that are likely to be important in public hearings. However, as will be discussed later, members of the review board should not jeopardize their objectivity, or the perception of their objectivity, by attending such an event. In Scottsdale, developers of large-scale projects are required to meet with homeowners' associations before proceeding to public hearing. The planners I interviewed reported a marked reduction in levels of hearing conflict since the requirement was implemented.

Part Five: Adjudicating a Mosque Development Proposal

Fair and equal management of a public hearing process begins with the legal notices sent to the surrounding neighborhood, published in local newspapers, and posted at the development site. The purpose of the development application should be identified by the neutral term “assembly,” or, at minimum, as “house of worship” or “religious facility.”⁵¹ The former ensures notice equality with secular assemblies, while the latter ensures notice equality among religious land uses. Although this approach may not reduce conflict in the land use review—regardless, the public will know the proposal is for a mosque at some point—it does from the earliest stages establish the municipality’s neutral treatment of the application. This is important both in terms of public perception and for documentation purposes in the case of a RLUIPA challenge.

If a municipality normally holds public hearings during the day, officials should consider holding the sessions for mosque proposals in the evening when more citizens can attend. In all contentious applications, it is important that the public feel as if they have been afforded ample opportunity to participate in the process and influence outcomes. Also, if municipal officials sense that the public hearings for a mosque application will draw larger than normal crowds, they should relocate the meeting to a venue in which anyone who wants to participate can be in the room and able to see and hear proceedings. Public school auditoriums and theatres often provide good alternatives for meeting spaces.

Getting Off on the Right Foot

If possible, the municipal attorney should attend all public hearings for religious land use proposals, and particularly for a mosque proposal. Smaller municipalities that retain a consulting attorney may find the cost of such extensive counsel beyond their means. However, the attorney’s fees will surely be less than the enormous cost of defending the municipality against a RLUIPA claim. The attorney’s role might include clarifying the legal requirements of the review process as part of introductory statements for each hearing, as well as the rights of the applicant and the municipality under RLUIPA. These statements will refresh the memories of review board members, educate the public in attendance, and, most importantly, document in the public record from the beginning of the process that the municipality understands the requirements of RLUIPA. Throughout the meeting, the attorney can advise the board on the

Municipal officials should use neutral terms such as “assembly” or “house of worship” to refer to mosque applications.

51 This was the terminology used in the successful Savannah review process.

The prayer hall under construction in the Muslim American Community Association, Voorhees, New Jersey.



process and assist the chair in controlling public comment periods. If an attorney is not present, the board chair can fulfill these duties with support from planning staff.

Establish a Sound Public Record

“Nothing is more important in successfully defending against a RLUIPA claim than a complete, comprehensive, and compelling record of rational decision making based on the pursuit of legitimate government objectives.”⁵² To accomplish such a record, planners, municipal attorneys and review board members should ensure that application management and hearing conduct encompass the consideration of all evidence related to the development proposal and a rational process of fact-finding, including rigorous professional analyses (for example, studies of traffic and parking impacts, as well as property value impacts). The record should additionally document that the municipality proceeded with flexibility and a strong spirit of compromise, offering reasonable alternatives to the applicant. Examples are providing concrete suggestions to improve a problematic site plan proposal, or an effort to recommend other development sites if the proposed site is simply inappropriate for the use.⁵³ Finally, rulings should be based only on the documented impacts of the proposed development and not on complaints or unfounded fears of neighbors or review board members.⁵⁴ Similarly, they should not be based on aspects of the religion to be practiced in the building. Details of religious creed and/or ritual should not be addressed in any land use hearing unless they have some bearing on a design element that must be reviewed for public safety or another compelling governmental interest.

Managing Public Comment

The public comment portion of hearings likely will be the most contentious and challenging for review board members, and particularly the chair. Public comment is critical to democratic process in land use reviews and it must be as carefully protected as the rights of the applicant. But, it must be carefully managed to ensure that its conduct is respectful and lawful. Here again the assistance of the municipal attorney can be invaluable.

⁵² Merriam, *op. cit.*, page 122.

⁵³ Kingsley and Smith, *op. cit.*, page 7.

⁵⁴ *Ibid.*



Before public comment periods are opened, the attorney, board chair or planning staff should explain its contribution to the deliberation of the board. That is, public comment is an important venue to bring issues of concern to the board's attention, but it is only one factor that the board will consider. Public comment cannot lawfully outweigh factual evidence in the application.⁵⁵ The official should then detail the ground rules for public comment. Speakers should be required to provide their name and address before presenting. Each individual should be given a two or three minute speaking period and slightly longer if representing a group (five minutes is typical).⁵⁶ Speakers should be held firmly to those time limits.⁵⁷ Most critically, officials should be crystal clear that speakers may only address issues over which the review board has purview, and that violators of this rule will be warned once, then asked to leave the session if they continue.

Just as creed and ritual should not be topics of board deliberation, neither should they be allowable topics in public comment periods. Certainly, comments that suggest that the proposed mosque or an individual affiliated with the mosque has links to terrorism have no place in a land use hearing. Legally, allowing such discussion would jeopardize a municipality's position in a RLUIPA challenge. Functionally, it only serves to escalate tensions around the application, and distracts from the legitimate land use concerns that should be raised in review board sessions. By extension, members of the public who have those legitimate land use concerns are denied the opportunity to have them thoughtfully considered and addressed. Finally, allowing bigoted and racist commentary to infuse land use reviews victimizes the Muslim American community making the application and denies them the fair and unbiased proceeding which is their civil right. Municipal officials must have a plan for how they will address violators of these public comment ground rules. A police presence may either reduce tensions or increase them. Perhaps plain clothes officers could be on hand to remove individuals who will not comply after being warned and asked to leave, or who have threatened either board members or members of the Muslim community. It is better to be prepared for a range of possibilities while hoping that none occur.

*Comments about
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and the threat of
terrorism should not
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⁵⁵ Westchester Day School v. Village of Mamaroneck, 504F.3d 338 (2nd Cir. 2007).

⁵⁶ Some municipalities, like Scottsdale, allow individuals to cede their time to another individual so that he or she has an extended period of time. For example, an attorney representing a group of ten neighbors might be given all of their individual two minute slots for a total of twenty speaking minutes.

⁵⁷ So that board members are not distracted by monitoring time limits, some municipalities use timers that flash yellow when one minute remains and then red when the speaker's time is up.

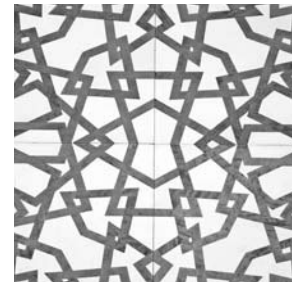
Factually Incorrect Statements Made by the Public and Review Board Members

The entrance of factually incorrect statements into the public record is one of the greatest challenges of public comment in any land use review. When incorrect statements are allowed to stand in the record, they gain a degree of legitimacy. Often, uncorrected factual errors compound as other speakers refer to them in their own statements, and, much like the child's game of telephone, after multiple iterations the truth is unrecognizable. This was a frequent problem in the Voorhees mosque review, when not even the municipal attorney corrected misstatements of fact. It is critical therefore, that when a member of the public, the applicant, or a board member makes a factually inaccurate statement, that the chair, municipal attorney or planning staff interrupt the session and correct what has been said. This is especially true when an inaccuracy has been perpetuated by a review board member. If the error is in the form of an intentional or unintentional statement of bias, the board member should admit to the prejudicial statement and apologize. This will "cleanse the record" from apparent institutional bias in the case of a RLUIPA challenge.⁵⁸

Redirecting Fears and Suspicions About Muslims

Simply banning biased, bigoted statements and speculation about terrorism from land use review hearings does not make the issues go away, and it does not end their influence on the public process. Often, fear is simply cloaked in the language of land use concerns. Informed opponents understand that blatant hatred and fear cannot block a mosque from being developed, and so they speak instead about traffic, lighting, noise, and other legitimate land use concerns. A segment of the opposition to the Voorhees mosque organized around such purposeful obfuscation, delaying the Muslim applicants' approvals for more than a year. This tactic can be difficult to recognize initially, but it becomes more apparent as the review process plays out. If the municipality and mosque leaders address legitimate land use problems, critics whose opposition is based on them should be assuaged. If parties keep returning to the table with new complaints, however, one must assume that they are driven by underlying, bias-based motivations.

⁵⁸ Merriam, *op. cit.*, page 121.



The chair of the Voorhees zoning board of appeals reported that he felt it was important that the public have an opportunity to air its anger about 9/11 and the war in Iraq, as well as fears about possible future attacks and the role some feared Muslim Americans would play in them. Municipalities and Muslim communities may want to consider ways to enable productive discussions that are entirely separate from the public land use review process. One option may be for the Muslim American community to address these emotions themselves as part of its public outreach effort. Another would be for a third party, such a different faith community or civic association, to host a discussion session. A neighboring Roman Catholic parish sponsored such an event in Scottsdale. Elected officials such as mayors, city council members, or town supervisors might also open a forum for mosque-related concerns. However, it is critical that the elected officials make entirely clear that the meeting is merely an information session and will have no bearing on the land use review for the mosque proposal. Certainly, members of the review board should not attend the session and risk opening themselves to accusations that their deliberations were swayed by statements made there. The advice of the municipal attorney should be sought before any such plans are made.

In some cases, bigots simply cloak their desire to exclude a community from the neighborhood in the language of land use concerns.

Decision Management

When the public hearings have been closed and the review board has deliberated, a decision must be phrased and memorialized in a resolution. Requirements for resolutions will vary from state to state, so the recommendations offered here are general. Municipal attorneys will be able to offer clearer guidance.

It is not uncommon for municipalities to consider board resolutions as so much housekeeping to be completed by staff at a later time and brought back to the board for final vote. However, in a contentious land use proposal, it is wise to craft resolutions in public session for the benefit of all parties to the application, as well as opponents and supporters. With an audience, the review board will need to pay careful attention to the thoroughness and accuracy of the resolution, and there can be no question that there was any post-hearing influence by any party on its final form. This kind of clear thinking can be a tall order after an extended, contentious public session. To ease the process, staff might provide a resolution template with suggested, broad language for findings of fact that the mover of the resolution can modify as he or she reads them into the record.



Findings of fact, also known as “whereas” statements, should document the key facts of the application, demonstrate the board’s rational, fact-based deliberation and relate the review process to accepted planning principles. If the review board determines that it is prudent to request a plan modification—that is, to approve the mosque application with conditions—the conditions should place no lesser or greater demand on the mosque than have been placed on other religious or secular assemblies in their conditional approvals. For both conditional approvals and denials, it is critical that the public record ties the decisions back to standing codes and demonstrates that the ruling does not place a substantial burden that limits the Muslim community’s religious practice. It should plainly identify the compelling governmental interest, such as public safety or nuisance abatement that is furthered by the action.⁵⁹ It should also make clear that the condition or denial was the least restrictive means available to meet that interest.⁶⁰ In short, the record should reflect no arbitrary or capricious conduct in the consideration of the subject land use proposal.

The High Price of RLUIPA Challenges

The matter of legal challenges under RLUIPA represents another of the act’s controversial aspects. If a municipality were to rule against a religious organization in a zoning application and the organization were to sue and win their case, RLUIPA includes a provision that requires municipalities to reimburse the religious organization’s legal fees, even if they were provided pro bono.⁶¹ There is a high disincentive, therefore, for municipalities to rule against a religious entity and risk lawsuit.⁶² Additionally, several legal defense funds concerned with religious liberties have provided powerful representation to RLUIPA plaintiffs. When coupled with reimbursement, the prospect of a strong opponent can also give local governments pause about ruling against a religious entity. Mediation, therefore, is likely to be a far better option for municipalities.

59 “Don’t be afraid to make a distinction between a religious practice and a nuisance (for example, massive holiday displays with amplified music, excessively bright lights, noncompliance with accessibility requirements).” Dalton, et al., op. cit, page 161.

60 Merriam, op. cit., page 124.

61 Weinstein, op. cit. Page 3.

62 The title of an article that appeared in Planning magazine in April 2003 gives a sense of the trepidation that the planning community has felt about RLUIPA: “Church v. State: Just Pray You’re Not Sued Under the RLUIPA Statute.” April 2003, pages 14-17. Michael S. Giaimo and Dwight Merriam, FAICP, authors.

In the context of mosque developments, it should be noted that only a small percentage of RLUIPA challenges to municipal decisions have been filed by Muslim American communities. As was demonstrated in the case study section of this report, even with RLUIPA's broad protections, Muslim communities frequently concede to restrictions ordered by local officials even when they are more strident than conditions imposed on other religious and secular assemblies and/or when these restrictions substantially burden their civil right to free practice. The increasingly hostile anti-Muslim sentiment since September 11th has resulted in an intensified pressure on Muslim communities to compromise with neighbors and public officials to a degree beyond what likely would be considered acceptable by mainstream faith communities. The result, I contend, is an unequal application of land use laws among faith groups. In effect, RLUIPA, and indeed the First Amendment, only protect those religious groups that feel they hold sufficient political capital to demand the enforcement of laws.

Interior courtyard in the Islamic Center of the Northeast Valley, Scottsdale, Arizona.



Conclusion

The aggressive protests against mosque development being led by national grassroots movements leave local planning authorities feeling buffeted by sociopolitical issues that are beyond their control. It is normally the case that the only parties paying any attention to land use hearings are the applicant and the few neighboring property owners with personal interest in the project. These days, when it comes to mosque development projects in the US, it seems the whole world is watching. Mundane conversations about floor area ratio and impervious surfaces are being replaced by heated disputes over national identity and national security. Having a focused purview on land use, local review boards might think themselves helpless to shape the course of the larger debate. In reality, municipal officials, planners, and review board members can make a crucial and productive contribution.

At the core of mosque development proposals are two quintessential American liberties: the rights to develop private property and to practice religion freely. The latter, of course, is a constitutionally protected civil right. Grassroots efforts to exclude mosques from particular neighborhoods, in effect, seek to deny a minority group access to these essential rights and degrade our national commitment to equal access and equal protection. The fair and equitable administration of land use laws, by contrast, reaffirms that commitment. That is to say, even while the purview of local planning officials is defined by municipal bounds, the example of their administrative conduct extends across the nation and to all Americans.



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