ARTICLES

Zoning Churches: Washington State Constitutional Limitations on the Application of Land Use Regulations to Religious Buildings

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INTRODUCTION

The application of land use regulations to church[1] buildings has been the subject of significant debate and judicial activity.[2] While the issue has a significant political component, legal issues also affect the regulatory choices available to local governments. In certain circumstances, state or federal laws mandate regulatory systems that apply to churches.[3] At the same time, state and federal constitutional and statutory law also limit the applicability of zoning regulations to churches.[4] Local governments, and ultimately courts, are left to re-

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1. The term "church" is often used in case law and published literature to refer to a broader group of religious uses than the term suggests. "Church" is often used in a manner that also includes synagogues, temples, mosques and other similar land uses, and the term will be used similarly in this Article. *See, e.g.*, Laurie Reynolds, *Zoning the Church: The Police Power Versus the First Amendment*, 64 B.U. L. REV. 767, 767 n.3 (1985); Thomas S. Counts, Comment, *Justice Douglas' Sanctuary: May Churches Be Excluded from Suburban Residential Areas*, 45 OHIO ST. L.J. 1017, 1017 (1984). In professional land use planning literature, this category is often referred to as "religious organizations" and is assigned industry number 8661. *See* OFFICE OF MGMT. & BUDGET, STANDARD INDUSTRIAL CLASSIFICATION MANUAL 399 (1987).

2. *See infra* notes 18–34 and accompanying text.

3. *See infra* notes 94–95, 159–60 and accompanying text. *See also generally* Reynolds, *supra* note 1, at 767.

4. *See infra* notes 35, 39, 117 and accompanying text.

solve conflicts between policy-based, legal support for land use regulations on churches and countervailing limits on such regulations.[5]

A significant body of scholarship addresses the limits federal law places on the application of land use regulations to churches,[6] but the commentary regarding state law is rather limited.[7] Accordingly, this Article considers the limits of article I, section 11 of the Washington State Constitution with regard to local zoning. This Article concludes that as a matter of substantive law the free exercise clause of the Washington State Constitution is properly interpreted in a manner consistent with the parallel provision of the United Stated Constitution.[8] While the state constitution does apply to a broader class of regulatory activities than does the Federal Constitution,[9] the pertinent substantive requirements of the state constitution closely follow the parallel provisions of federal law.[10] Consistent with well-developed federal case law, the Washington State Constitution generally allows land use regulations to be applied to church buildings.[11]

This Article traces a path to various land use regulatory approaches that should survive scrutiny under the Washington State Constitution. Part I outlines the legal history of challenges to the application of zoning regulations to church buildings;[12] Part I also describes the contexts in which such disputes presently arise.[13] Part II introduces the Washington State Constitution's provision regarding the free exercise of religion and describes the limited body of case law that has applied this provision in the land use context.[14] Part III considers the role of federal case law in interpreting the free exercise clause of the Washington State Constitution.[15] Part IV discusses how,

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5. *See, e.g.*, Shelley Ross Saxer, *When Religion Becomes a Nuisance: Balancing Land Use and Religious Freedom When Activities of Religious Institutions Bring Outsiders into the Neighborhood*, 84 KY. L.J. 507, 507–09 (1996).

6. *Id.* at 525–45 (discussing free exercise limits on the application of zoning regulations to churches); Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929, 945–75 (2001) (discussing limits the Religious Land Use and Institutionalized Persons Act of 2000 places on zoning); Michael W. Macleod-Ball, Note, *The Future of Zoning Limitations upon Religious Uses of Land: Due Process or Equal Protection?*, 22 SUFFOLK U. L. REV. 1087, 1098–1120 (1988) (discussing due process and equal protection limits on the application of zoning regulations to churches).

7. *See infra* note 68 and accompanying text.

8. *See infra* notes 77–102 and accompanying text.

9. *See infra* note 37 and accompanying text.

10. *See infra* notes 64, 129–36 and accompanying text.

11. *See, e.g., infra* notes 58–68 and accompanying text.

12. *See infra* notes 19–28 and accompanying text.

13. *See infra* notes 29–32 and accompanying text.

14. *See infra* notes 36–68 and accompanying text.

15. *See infra* notes 69–137 and accompanying text.

if future cases are not resolved under existing case law, cases should be analyzed under the state constitution.[16] Finally, Part V briefly considers the limit the establishment clause would impose on any exceptions for churches from generally applicable zoning regulations, whether based on a legislative enactment or a more expansive interpretation of the free exercise clause.[17] Ultimately, this Article concludes that land use regulatory systems can be applied to churches in a manner that complies with the Washington State Constitution.

I. OVERVIEW OF ISSUES INVOLVING THE REGULATION OF CHURCHES

In the past decade, the application of land use regulations to church buildings has been the subject of significant debate and judicial activity. Recent issues have often involved the regulation of large church buildings, particularly in residential or rural areas.[18] Legal disputes surrounding the regulation of churches, however, are not new and are not limited to issues involving the development of large churches in low-intensity land use zones.

The history of legal disputes involving the government's role in regulating religious institutions extends well prior to the past decade.[19] Although zoning has a relatively short legal history,[20] issues involving churches have been the subjects of dispute for the entire history of modern zoning.[21] As early as 1922, state courts considered cases involving the application of land use regulations to church buildings.[22] For most of the twentieth century, free exercise challenges to zoning decisions were limited to state courts and in rare cases lower federal courts.[23] During this period, local governments were not particularly

16. *See infra* notes 137–76 and accompanying text.

17. *See infra* notes 177–97 and accompanying text.

18. *See, e.g.*, Jim Schwab, *Zoning and Big Box Religion*, ZONING NEWS, Nov. 1996, at 1–4; Eric Pryne, *Churches' Land Fight up for Vote; Sims Seeks to Limit Rural-Area Sprawl*, SEATTLE TIMES, Feb. 11, 2001, at B1.

19. *See, e.g.*, Robert W. Tuttle, *How Firm a Foundation? Protecting Religious Land Uses After Boerne*, 68 GEO. WASH. L. REV. 861, 862 n.12 (2000) (discussing the body of legal scholarship regarding religious land use).

20. Zoning developed in the early twentieth century, and the Supreme Court first considered the legality of municipal zoning in 1926. Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365 (1926); Evan M. Shapiro, Comment, *The Religious Land Use and Institutionalized Persons Act: An Analysis Under the Commerce Clause*, 76 WASH. L. REV. 1255, 1257–58 (2001).

21. *See* JAMES E. CURRY, PUBLIC REGULATION OF THE RELIGIOUS USE OF LAND: A DETAILED AND CRITICAL ANALYSIS OF A HUNDRED COURT CASES (1964) (surveying cases involving the application of land use regulations to churches).

22. State *ex rel.* Westminster Presbyterian Church of Omaha, Neb. v. Edgcomb, Eng'r, Etc., 189 N.W. 617 (Neb. 1922).

23. CURRY, *supra* note 21, at 330-33.

aggressive about regulating churches.[24] When land use regulations were challenged, courts were generally deferential to municipal zoning decisions.[25]

Over the past few decades, local governments have become increasingly committed to regulating churches much like they regulate other land uses.[26] This increase in zoning activity has been based, at least in part, on the expanding scale of church projects and the corresponding increases in the impacts those projects have on surrounding neighborhoods.[27] Several commentators have synthesized case law regarding the impacts of church projects.[28]

In addition to having a long history, legal disputes regarding the regulation of churches arise in a variety of contexts. While one recent debate over the regulation of church buildings has involved large churches in low-density areas, issues involving the application of land use regulations to religious uses have arisen in a wide variety of contexts, including the following situations:

1. Restrictions on the ability to site churches in commercial and/or industrial areas;[29]
2. Restrictions on the ability to site churches in residential areas;[30]
3. Limitations on the scale and intensity of church projects;[31] and
4. Regulation of ancillary programs such as food banks, homeless shelters, and drug counseling centers.[32]

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24. *See* Jewish Reconstructionist Synagogue of the North Shore, Inc. v. Inc. Village of Roslyn Harbor, 342 N.E.2d 534, 538 (N.Y. 1975) (noting that churches were traditionally viewed favorably in zoning systems).

25. *See* Counts, *supra* note 1, at 1021.

26. *See* Reynolds, *supra* note 1, at 768.

27. Schwab, *supra* note 18, at 1.

28. *E.g.*, Reynolds, *supra* note 1, at 767–68, 767 n.5, 768 n.13; Saxer, *supra* note 5, at 509 & n.12; Counts, *supra* note 1, at 1021–22; Macleod-Ball, *supra* note 6, at 1088 n.4.

29. *E.g.*, Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 466 (8th Cir. 1991); C.L.U.B. v. City of Chicago, 157 F. Supp. 2d 903, 906-07 (N.D. Ill. 2001); Lucinda Harper, *Storefront Churches: The Neighbors Upscale Stores Don't Love*, WALL ST. J., Mar. 15, 2000, at B1 (regarding a ban on storefront churches based on the concern that they impede economic development).

30. *See* Grosz v. City of Miami Beach, 721 F.2d 729, 732 (11th Cir. 1983) (considering a restriction on prayer meetings in a home because the area was not zoned for religious uses).

31. *See* Tuttle, *supra* note 19, at 861 & n.2 (considering regulation requiring a large minimum lot size for religious institutions); Pryne, *supra* note 18, at B1 (discussing proposal to limit the size of church buildings).

32. *E.g.*, Daytona Rescue Mission, Inc. v. City of Daytona Beach, 885 F. Supp. 1554 (M.D. Fl. 1995) (considering a challenge to a city's denial of a permit to allow a church to oper-

Regardless of the specific substantive provisions of the land use regulations at issue, the method of legal analysis should ordinarily be the same. The commonality among the various systems for regulating churches is similar to other zoning issues; it involves an attempt to mitigate the impacts of development and to ensure compatibility with surrounding areas.[33] Zoning decisions regarding churches are subject to legal challenge much like other land use decisions.[34] Moreover, zoning decisions that involve churches are subject to challenge under various constitutional and statutory provisions.

II. WASHINGTON LAW REGARDING ARTICLE I, SECTION 11 OF THE WASHINGTON STATE CONSTITUTION AND ITS LIMITS

In the State of Washington, the regulation of church buildings requires analysis under the Washington State Constitution. While the U.S. Constitution and federal statutes potentially affect the ability of local governments to regulate church buildings,[35] the Washington State Constitution is the source of more stringent limitations on the ability of government to regulate church buildings.[36] The state constitution contains its own free exercise clause, and at least in certain circumstances, Washington courts apply this provision more broadly than the Free Exercise Clause of the U.S. Constitution. State law differs from federal law in two significant regards. First, only a narrow category of land use regulations are even subject to challenge under the Free Exercise Clause of the U.S. Constitution, while the Washington State Constitution applies more broadly to land use regulations.[37] Second, certain nonpolice power regulations (notably involving historical preservation) can survive scrutiny under the Federal Constitution but not the state constitution.[38] Other than these two exceptions, however, the free exercise clause of the state constitution is generally

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ate a food bank and homeless shelter); Slevin v. Long Island Jewish Med. Ctr., 319 N.Y.S.2d 937 (N.Y. Sup. Ct. 1971) (considering whether zoning code allowed a church to operate a drug counseling center); *see also* Tuttle, *supra* note 19, at 861 & n.4.

33. Duckworth v. City of Bonney Lake, 91 Wash. 2d 19, 28, 586 P.2d 860, 866 (1978).

34. Carlson v. City of Bellevue, 73 Wash. 2d 41, 45, 435 P.2d 957, 959 (1968) (holding that zoning is subject to challenged if it is arbitrary and capricious); State *ex rel.* Westminster Presbyterian Church of Omaha, Neb. v. Edgcomb, Eng'r, Etc., 189 N.W. 617 (Neb. 1922) (holding that lot coverage ordinance was unreasonable).

35. U.S. CONST. amend. I; 42 U.S.C.A. § 2000cc (West Supp. 2001).

36. First Covenant Church v. City of Seattle, 120 Wash. 2d 203, 224, 840 P.2d 174, 186 (1992).

37. *See* Open Door Baptist Church v. Clark County, 140 Wash. 2d 143, 995 P.2d 33 (2000) (applying strict scrutiny to a regulation of general applicability).

38. *See infra* notes 53-57 and accompanying text.

interpreted in a manner consistent with the parallel provision of the Federal Constitution.

The Washington State Constitution provides, in pertinent part, as follows:

> Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.[39]

The body of case law regarding article I, section 11 is somewhat limited. While the Washington Supreme Court has considered this provision on numerous occasions, the body of law with regard to land use issues is rather sparse. The Washington Supreme Court first applied article I, section 11 to land use regulations in 1957.[40] *State ex rel. Wenatchee Congregation of Jehovah's Witnesses v. City of Wenatchee* involved a challenge to the city's decision to deny a permit that was necessary for construction of a church building.[41] The court found that the evidence in the record did not support the city's decision.[42] Although *Wenatchee Congregation* was resolved favorably for the church, the case actually supports that application of zoning regulations to churches; the supreme court commented favorably on zoning schemes that ban churches from residential zones.[43] In *Wenatchee Congregation*, the supreme court discussed the split among jurisdictions regarding whether churches could be excluded from residential zones. The court criticized those jurisdictions that prohibited these exclusions and labeled this anti-exclusion position "extreme."[44] The basis for the court's criticism was that an anti-exclusion rule "ignores the basic premise of modern day zoning legislation which emphasizes the best and most reasonable land utilization possible, considering the best interests of the entire community."[45]

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39. WASH. CONST. art. I, § 11.

40. *See* State *ex rel.* Wenatchee Congregation of Jehovah's Witnesses v. City of Wenatchee, 50 Wash. 2d 378, 312 P.2d 195 (1957); CURRY, *supra* note 21, at 377 (identifying *Wenatchee Congregation* as the only Washington case, as of 1964, regarding the application of land use regulations to religious uses).

41. *Wenatchee Congregation*, 50 Wash. 2d at 379, 312 P.2d at 195.

42. *Id.* at 385–86, 312 P.2d at 199.

43. *Id.* at 382, 312 P.2d at 197; *see also* CURRY, *supra* note 21, at 45.

44. *Wenatchee Congregation*, 50 Wash. 2d at 381–82, 312 P.2d at 197.

45. *Id.* at 382, 312 P.2d at 197.

The Washington Supreme Court did not again consider the application of article I, section 11 in the zoning context until 1982.[46] *City of Sumner v. First Baptist Church* involved a free exercise challenge to the city's enforcement of its building code.[47] The First Baptist Church had begun operating a school in the basement of its church building, but the facility did not comply with various building code requirements.[48] In a plurality opinion, the supreme court held that a sort of balancing was required when applying land use regulations to churches.[49] The court described how a government should approach the regulation of churches. The court held that when a church proposes a land use activity that may be technically inconsistent with established regulations, municipalities should "approach the problem with flexibility" and make "[a]n effort to accommodate the religious freedom of appellants while at the same time giving effect to the legitimate concerns of the [government] as expressed in the building code and zoning ordinance . . . ."[50] With regard to the City of Sumner's enforcement action, the court found that the record did not address whether the city had satisfied this obligation.[51] Accordingly, the court remanded the matter for further proceedings.[52]

More recent cases have addressed the applicability of article I, section 11 to historical preservation ordinances.[53] These cases involved regulations designed to protect historic buildings; the question for the court was whether application of these ordinances to old church buildings was unconstitutional.[54] These cases were significant because they involved existing church buildings, in which people had worshipped for many years.[55] The court found that these ordinances were designed to protect only aesthetic values and that aesthetics alone

46. *See* City of Sumner v. First Baptist Church, 97 Wash. 2d 1, 639 P.2d 1358 (1982).

47. *Id.* at 1, 639 P.2d at 1358.

48. *Id.* at 3–4, 639 P.2d at 1360.

49. *Id.* at 9–10, 639 P.2d at 1363.

50. *Id.*

51. *Id.*

52. *Id.* at 13–14, 639 P.2d at 1365.

53. Munns v. Martin, 131 Wash. 2d 192, 930 P.2d 318 (1997); First United Methodist Church v. Hearing Exam'r for the Seattle Landmarks Pres. Bd., 129 Wash. 2d 238, 916 P.2d 374 (1996); First Covenant Church v. City of Seattle, 120 Wash. 2d 203, 840 P.2d 174 (1992) [hereinafter *First Covenant II*]; First Covenant Church v. City of Seattle, 114 Wash. 2d 392, 787 P.2d 1352 (1990), *cert. granted and judgment vacated*, 499 U.S. 901 (1991).

54. *See, e.g.*, *First United Methodist Church*, 129 Wash. 2d at 241, 916 P.2d at 376 (noting that the church at issue was constructed in 1909).

55. *See, e.g.*, *id.* at 248, 916 P.2d at 379 (noting that the particular church building itself had significance to the congregation); *First Covenant II*, 120 Wash. 2d at 217, 840 P.2d at 182 (noting that the particular church building itself had significance to the congregation).

is not a compelling state interest.[56] As such, the regulations could not survive constitutional scrutiny.[57]

Other than the historical preservation cases, only one recent Washington case applies article I, section 11 in the land use context.[58] *Open Door Baptist Church v. Clark County* arose out of Clark County's enforcement action against the Open Door Baptist Church based on the church's refusal to obtain a conditional use permit.[59] The Clark County zoning code classified churches as a conditional use in the zone where the Open Door Baptist Church had located.[60] The supreme court held that requiring a church to comply with a conditional use permit process does not violate the Washington State Constitution.[61]

While *Open Door* is, on its face, a relatively simple case, the decision suggests that the Washington Supreme Court may be taking a narrower view of the free exercise clause than it had in some early cases, most notably those involving historical preservation.[62] In general, the decision is presented in a tone that is different from, and less favorable to, religion than earlier free exercise cases.[63] Moreover, *Open Door* relies significantly on federal case law, which takes a narrower view of the Federal Free Exercise Clause.[64] Finally, although *Open Door* only explicitly addresses a requirement that the church apply for a permit, the decision logically extends to the conclusion that the municipality can, in appropriate circumstances, condition and possibly even the permit.[65] If the municipality were not allowed to condition or deny the applied for permit, the review process would be meaningless.[66] Subjecting a church to a meaningless process would seem to lack any constitutional support.[67] By requiring the Open Door Baptist Church to submit to the process, the court necessarily suggests that the process could constitutionally result in the imposition of conditions or the denial of the permit.

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56. *See, e.g., First Covenant II*, 120 Wash. 2d at 222–23, 840 P.2d at 185.
57. *See, e.g., id.* at 228, 840 P.2d at 188.
58. Open Door Baptist Church v. Clark County, 140 Wash. 2d 143, 995 P.2d 33 (2000).
59. *Id.* at 145-46, 995 P.2d at 34–35.
60. *Id.* at 149, 995 P.2d at 37.
61. *Id.* at 171, 995 P.2d at 48.
62. 17 WILLIAM B. STOEBUCK, WASHINGTON PRACTICE § 4.10, at 15–16 (Supp. 2001).
63. *Id.* at § 4.10, at 16.
64. *Open Door*, 140 Wash. 2d at 161–71, 995 P.2d at 43–48 (relying extensively on federal case law to interpret state constitutional claim).
65. STOEBUCK, *supra* note 62, at § 4.10, at 16.
66. *Id.*
67. *Id.*

While *Open Door* and prior Washington case law establish that zoning regulations apply to church buildings, questions remain as to the limits, if any, the state constitution imposes on the application of such zoning regulations to churches. In addition to a limited body of case law, limited legal commentary addresses article I, section 11.[68] Accordingly, a more detailed analysis of article I, section 11 is warranted.

III. FEDERAL LAW GOVERNING THE ABILITY OF LOCAL GOVERNMENTS TO REGULATE CHURCHES

In the State of Washington, analysis of limitations on the ability of local governments to regulate church buildings necessarily begins with a consideration of federal constitutional provisions.[69] The Free Exercise Clause of the U.S. Constitution, of course, directly controls the ability of local governments to regulate churches. For the purposes of this Article's examination of state constitutional issues, an examination of federal law is necessary because federal law informs the interpretation of the state constitution.

A. Analysis of State Constitutional Provisions Starts with an Examination of Similar Federal Constitutional Provisions

The Washington Supreme Court has established that, in some contexts, provisions of the Washington State Constitution should be

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68. Limited secondary authority is devoted to the application of Article I, Section 11 to land use regulations. *See* STOEBUCK, *supra* note 62, § 4.10 (1995 & Supp. 2001); Russell S. Bonds, Comment, First Covenant Church v. City of Seattle: *The Washington Supreme Court Fortifies the Free Exercise Rights of Religious Landmarks Against Historic Preservation Restrictions*, 27 GA. L. REV. 589 (1993); Philip R. Meade, Note, *Constitutional Review of Building Codes and Zoning Ordinances Applied to Parochial Schools:* City of Sumner v. First Baptist Church, 7 U. PUGET SOUND L. REV. 607 (1984). Moreover, limited secondary authority is devoted to the application of Article I, Section 11 in any context. *See* Frank J. Conklin & James M. Vaché, *The Establishment Clause and the Free Exercise Clause of the Washington Constitution—A Proposal to the Supreme Court*, 8 U. PUGET SOUND L. REV. 411 (1985); Katie Hosford, Comment, *The Search for a Distinct Religious-Liberty Jurisprudence Under the Washington State Constitution*, 75 WASH. L. REV. 643 (2000); Robert F. Utter & Edward J. Larson, *Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution*, 15 HASTINGS CONST. L.Q. 451 (1988).

69. State v. Gunwall, 106 Wash. 2d 54, 64 & n.18, 720 P.2d 808, 814 & n.18 (1986) (noting that federal law did not offer the defendant constitutional protection before considering the defendant's claim under the state constitution); Linda White Atkins, Note, *Federalism, Uniformity, and the State Constitution*—State v. Gunwall, *106 Wn. 2d 54, 720 P.2d 808 (1986)*, 62 WASH. L. REV. 569, 582 (1987) (noting that Washington applies the interstitial model of state constitutional interpretation). *But see* Hugh D. Spitzer, *Which Constitution? Eleven Years of* Gunwall *in Washington State*, 21 SEATTLE U. L. REV. 1187, 1202-04 (1998) (discussing various cases in which Washington courts have analyzed the state constitution before considering parallel provisions on the federal constitution).

interpreted in the same manner as parallel provisions of the U.S. Constitution. The state supreme court has outlined several factors that must be considered when determining whether to interpret a provision of the state constitution in a manner consistent with established federal law or whether to apply the state constitutional provision more broadly than the U.S. Constitution.[70] With regard to the limits Article I places on zoning regulations, an analysis pursuant to *State v. Gunwall* reveals that the state constitution should generally be applied in a manner consistent with the Federal Free Exercise Clause.

1. A *Gunwall* Analysis Is Necessary with Regard to the Application of the Washington State Constitution to Zoning Regulations

An argument for an independent application of the Washington State Constitution must be based on a *Gunwall* analysis. The significance of *Gunwall* is not that it established the principle that the provisions of the state constitution *could* be interpreted more broadly than parallel provisions of the U.S. Constitution—that principle had previously been established.[71] Rather, *Gunwall* establishes the proposition that the state constitution can be applied more broadly than the U.S. Constitution *only if* such an interpretation is supported through analysis of the six factors set forth in *Gunwall*.[72]

Existing case law does not eliminate the need for a *Gunwall* analysis in other zoning contexts. A *Gunwall* analysis must be done for each particular situation where one attempts to interpret the state constitution more broadly than the U.S. Constitution.[73] Even if the court has previously engaged in a *Gunwall* analysis with regard to the application of a particular constitutional provision in one situation, the law is well settled that a separate *Gunwall* analysis must support a different application of the same constitutional provision.[74]

The Washington Supreme Court's decisions in the historical preservation context do not substitute for a *Gunwall* analysis in this situation. While the court has previously found that the state constitution's free exercise clause applies more broadly than that of the U.S. Constitution and precludes the application of historical preservation

70. *See Gunwall*, 106 Wash. 2d at 58, 720 P.2d at 811 (establishing six nonexclusive criteria that must be evaluated when considering whether, in a given situation, the state constitution should be applied more broadly than the U.S. Constitution).

71. *See, e.g.*, Darrin v. Gould, 85 Wash. 2d 859, 868, 540 P.2d 882, 888 (1975).

72. 106 Wash. 2d at 62—63, 720 P.2d at 813.

73. State v. Young, 123 Wash. 2d 173, 179, 867 P.2d 593, 596 (1994).

74. *See, e.g.*, State v. Brooks, 43 Wash. App. 560, 568, 718 P.2d 837, 841 (1986) (holding that, although Article I, Section 7 of the Washington State Constitution is sometimes construed as providing broader search and seizure protections than the Fourth Amendment, in other situations the two provisions will be construed as providing the same scope of protections).

ordinances to churches, this holding does not necessarily mean that state's free exercise clause is broader in every other context. In fact, some post-*Gunwall* courts have declined to apply the free exercise clause of the state constitution more broadly than the parallel provision of the U.S. Constitution.[75] Moreover, in its most recent case involving the free exercise clause, the state supreme court noted that a *Gunwall* analysis with regard to the effect of the state constitution's free exercise clause on application of land use development regulations had not been done.[76]

Accordingly, the court's application of the *Gunwall* criteria in the historical preservation cases does not substitute for a *Gunwall* analysis in other land use cases. A separate *Gunwall* analysis is necessary with regard to the free exercise limits on the application of general zoning regulations.

2. *Gunwall* Analysis

When analyzing whether a provision of the state constitution should be applied more broadly than the parallel provision of the U.S. Constitution, the Washington Supreme Court has called for analysis of the following six nonexclusive factors:

1. The textual language of the state constitution;
2. Significant differences in the texts of parallel provisions of the federal and state constitutions;
3. State constitutional and common-law history;
4. Pre-existing bodies of state law;
5. Differences in structure between the federal and state constitutions; and
6. Matters of particular state interest or local concern.[77]

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75. *See, e.g.*, Backlund v. Bd. of Comm'rs of King County Hosp. Dist. 2, 106 Wash. 2d 632, 639 n.3, 724 P.2d 981, 985 n.3 (1986) (finding unpersuasive the argument that the Free Exercise Clause of the state constitution should be applied more broadly than that of the U.S. Constitution), *appeal dismissed*, 481 U.S. 1034 (1987). Although the parties in *Backlund* had not briefed the *Gunwall* factors, the court, of course, was not precluded from ruling on the state constitutional issue. *See* Spitzer, *supra* note 69, at 1207 (discussing cases where the Washington Supreme Court has ruled independently on state constitutional issues despite the parties' failure to brief the *Gunwall* factors).

76. *See* Open Door Baptist Church v. Clark County, 140 Wash. 2d 143, 152, 995 P.2d 33, 38 (2000) (noting that the appellant had not engaged in the required *Gunwall* analysis and reaching the state constitutional claim only because the court of appeals had addressed that claim).

77. *Gunwall*, 106 Wash. 2d at 61–62, 720 P.2d at 812–13.

The burden of satisfying these criteria rests squarely on the party asserting the state constitutional claim;[78] the presumption is that the state constitution will be interpreted in a manner consistent with existing federal law.[79] Analysis of these factors demonstrates that, with regard to the application of zoning regulations, the state constitution should be applied in a manner consistent with the U.S. Constitution.

The first *Gunwall* factor involves consideration of the text of the state constitution; this factor also involves comparing the state provision to its counterpart in the U.S. Constitution.[80] While the free exercise clause of the Washington State Constitution is more detailed than the parallel provision of the U.S. Constitution, this does not necessarily require that state constitution be applied more broadly.[81] Although there are differences between the text of the free exercise clauses of the federal and state constitutions, the Washington Supreme Court has not applied the state free exercise clause independently in all contexts.[82]

The operative text of article I, section 11 demonstrates that it does not provide broader protection than the federal constitution with regard to general zoning regulations. First, article I, section 11 refers to "[a]bsolute freedom of conscience."[83] Of course, zoning regulations do not affect religious belief, and if they did, they would probably violate the Federal Constitution. Second, article I, section 11 refers to be-

78. *See* Margola Assocs. v. City of Seattle, 121 Wash. 2d 625, 642–43 n.6, 854 P.2d 23, 33 n.6 (1993).

79. Spitzer, *supra* note 69, at 1195; Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1026–27 (1997) (noting, albeit critically, that Washington courts usually presume that the federal constitutional interpretation is correct); Atkins, *supra* note 69, at 582–83. Some commentators have urged that *Gunwall* be modified to require a primary focus on the state constitution. *See, e.g.*, Williams, *supra*, at 1063–64; James W. Talbot, Comment, *Rethinking Civil Liberties Under the Washington State Constitution*, 66 WASH. L. REV. 1099, 1116–18 (1991).

80. *See Gunwall*, 106 Wash. 2d at 61, 720 P.2d at 812.

81. *See, e.g.*, Ford Motor Co. v. Barrett, 115 Wash. 2d 556, 568 & n.25, 800 P.2d 367, 374 & n.25 (1990) (noting that the Privileges and Immunities Clauses of the state and federal constitutions, despite having textual differences, have been considered to be substantively identical in many contexts). *But see Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 145 Wash. 2d 702, 727, 42 P.3d 394, 406 (2002) (holding, in another context, that textual differences between the federal and state constitutions supported applying Washington's privileges and immunities clause more broadly that its federal counterpart).

82. *Compare* First Covenant Church v. City of Seattle, 120 Wash. 2d 203, 224–25, 840 P.2d 174, 186–87 (1992) [hereinafter *First Covenant II*] (applying the state constitution independently with regard to a free exercise challenge to a historical preservation ordinance) *with* Backlund v. Bd. of Comm'rs of King County Hosp. Dist. 2, 106 Wash. 2d 632, 639 n.3, 724 P.2d 981, 985 n.3 (1986) (finding unpersuasive the argument that the Free Exercise Clause of the state constitution should be applied more broadly than that of the U.S. Constitution).

83. WASH. CONST. art I, § 11.

ing disturbed "*on account of* religion."[84] This language suggests that the Washington State Constitution precludes overt discrimination, which is also precluded under the federal constitution.

Zoning, which should be motivated by principles of land use planning rather than discrimination, regulates conduct and not beliefs. Accordingly, the text of the state constitution does not support an interpretation broader than the federal constitution. The first *Gunwall* factor supports the determination that the constitutional limit on zoning based on article I, section 11 should be interpreted in accordance with the First Amendment of the U.S. Constitution.

The second *Gunwall* factor involves consideration of any differences among provisions of the federal and state constitutions.[85] While the first two factors may overlap, the second factor, unlike the first, requires consideration of "other relevant provisions of the state constitution [that] may require that the state constitution be interpreted differently."[86] With regard to zoning, other state constitutional provisions are relevant to the *Gunwall* analysis. The state constitution explicitly authorizes local governments to establish zoning regulations.[87] (The fact that zoning is a constitutionally authorized police power contrasts with, for example, historic preservation, which does not fall within the police power.[88]) When engaging in a *Gunwall* analysis, article I, section 11 should be interpreted in conjunction with article XI, section 11 of the state constitution. The fact that one section of the state constitution authorizes municipal zoning suggests that another section of the constitution should not be interpreted to restrict such zoning. Accordingly, the second *Gunwall* factor supports the conclusion that the state constitution should be interpreted in a manner consistent with the U.S. Constitution.

The third *Gunwall* factor requires consideration of the state's constitutional and common-law history.[89] Under this factor, an evaluation of whether "[t]he history of the adoption of a particular state constitutional provision [reveals] an intention that will support

84. WASH. CONST. art I, § 11 (emphasis added).

85. *See Gunwall*, 106 Wash. 2d at 61, 720 P.2d at 812.

86. *See id.*

87. WASH. CONST. art XI, § 11 (authorizing municipalities to enact police power regulations); Jones v. Town of Woodway, 70 Wash. 2d 977, 985, 425 P.2d 904, 909 (1967) (holding that zoning is a proper exercise of the constitutional police power).

88. *See First Covenant II*, 120 Wash. 2d at 218, 840 P.2d at 182. In *First Covenant II*, the court distinguished *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), based on *Employment Division* being police power case while *First Covenant II* was not. *Id.*

89. *See Gunwall*, 106 Wash. 2d at 61, 720 P.2d at 812.

reading the provision independently of federal law."[90] No authority demonstrates that the framers of the state constitution intended article I, section 11 to apply more broadly than the U.S. Constitution.[91] While there is no dispute the state constitution contains somewhat different words than the Federal Constitution, there is no evidence from the history of the development of the state constitution as to what particular intent the framers had in choosing those words.[92] Accordingly, the third *Gunwall* factor does not support an independent application of the state constitution's free exercise clause.

The fourth *Gunwall* factor involves an evaluation of pre-existing state law, including statutory law.[93] Washington statutory law requires local governments to limit development in the rural area of the County; the Growth Management Act[94] contains no exception for church buildings.[95] Washington courts have also previously applied the state constitution in a manner consistent with the U.S. Constitution.[96] The only notable exception is the historical preservation cases. As discussed above with regard to the second *Gunwall* factor, the historical preservation cases are distinguishable because they are not police powers cases. Accordingly, preexisting Washington statutory and case law both support the application of the state constitution's free exercise clause in a manner that is consistent with the parallel provision of the U.S. Constitution.

The fifth *Gunwall* factor acknowledges the differences in structure between the federal and state constitutions.[97] It appears that analysis of this factor could support an independent state constitutional analysis in every situation. Of course, the Washington Supreme

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90. *See id.*

91. For example, the most exhaustive study of the development of the Washington State Constitution barely discusses Article I, Section 11 and contains no indication that the Free Exercise Clause of the state constitution was intended to apply more broadly than that of the federal constitution. *See* Wilfred J. Airey, A History of the Constitution and Government of Washington Territory (1945) (unpublished Ph.D. dissertation, University of Washington) (on file with the University of Washington Library); *accord* James Leonard Fitts, The Washington Constitutional Convention of 1889 (1951) (unpublished M.A. thesis, University of Washington) (on file with the University of Washington Library); THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 499–500 (Beverly Paulik Rosenow ed. 1962) (demonstrating that Article I, Section 11 was developed with little debate).

92. *See id.*

93. *See Gunwall* 106 Wash. 2d at 61–62, 720 P.2d at 812.

94. WASH. REV. CODE §§ 36.70A.010–.902

95. *See id.*

96. *See, e.g.*, Backlund v. Bd. of Comm'rs of King County Hosp. Dist. 2, 106 Wash. 2d 632, 639 n.3, 724 P.2d 981, 985 n.3 (1986) (finding unpersuasive the argument that the Free Exercise Clause of the state constitution should be applied more broadly than that of the U.S. Constitution).

97. *See Gunwall*, 106 Wash. 2d at 62, 720 P.2d at 812.

Court has regularly found that provisions of the state constitution apply no more broadly than the parallel provisions of the U.S. Constitution.[98] Accordingly, analysis of this factor provides no particular indication that the state constitution should be applied more broadly in this particular matter.

The sixth *Gunwall* factor involves a consideration of whether the issue at hand is of particularly state or local concern and not of national significance; such issues would support independent state constitutional analysis.[99] In *Gunwall*, the court cited issues regarding the siting and operation of state capitals as an example of the type of decisions that should be made by the states rather than by the federal government.[100] In contrast, the constitutional limit on the application of zoning regulations to churches is a matter of national significance.[101] As the authorities cited in this Article demonstrate, there is significant national interest, and seeming confusion, about the scope of religious freedom. This national debate can only be resolved through a national standard. Moreover, there is nothing peculiarly local about the Federal Free Exercise Clause. There is no reason not to have a uniform national standard, and in fact, there would seem to be some value to having one national body of law regarding the free exercise of religion. In *First Covenant Church v. City of Seattle*, the court acknowledged that the free exercise of religion is not a matter of specifically local concern.[102] In future cases, courts should follow that holding and find that factor six supports interpreting the state constitution in a manner consistent with Federal Constitution.

Analysis of the six *Gunwall* factors supports the determination that generally article I, section 11 should be applied in a manner consistent with the Free Exercise Clause of the U.S. Constitution. Accordingly, the state constitution's free exercise limits on the application of zoning regulations to churches should follow the well-established body of federal case law.

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98. *See, e.g.*, Richmond v. Thompson, 130 Wash. 2d 368, 383, 922 P.2d 1343, 1351 (1996) (holding that the state and federal constitutional provisions regarding the right to petition government should be interpreted in the same manner).

99. *See Gunwall*, 106 Wash. 2d at 62, 720 P.2d at 813.

100. *Id.* at 62 n.11, 720 P.2d at 813 n.11.

101. Albert Veldhuyzen, Note, *In Search of Objective Criteria for a National Standard of Review in Church Zoning:* Islamic Center of Mississippi, Inc. v. City of Starkville, 11 GEO. MASON U. L. REV. 147, 147–48 (1989).

102. First Covenant Church v. City of Seattle, 120 Wash. 2d 203, 225, 840 P.2d 174, 187 (1992).

B. Federal Law Is Clear

A body of federal case law addresses the ability of local governments to regulate church buildings. The U.S. Constitution is the underlying basis for this body of law; there appears to be no common law basis for this case law. Religious liberty is grounded in the Free Exercise Clause of the First Amendment.[103] The Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[104] The First Amendment is made applicable to state and local governments through the Fourteenth Amendment.[105] A body of federal case law addresses the application of the Free Exercise Clause to land use regulations. Before considering that body of law, however, it is necessary to briefly address recent developments regarding the application of the First Amendment.

1. Recent Developments Regarding the Free Exercise Clause

The United States Supreme Court historically applied a strict scrutiny analysis to regulations regarding religious uses. The Court has held that, fundamentally, "the free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires."[106] Through a series of cases, the Court developed a test for determining when a law "prohibit[s] the free exercise" of religion.[107]

Under *Sherbert v. Verner* and its progeny, governmental regulations that burdened religious activity, either directly or indirectly, could constitute a violation of the Free Exercise Clause only if a three-part test was satisfied.[108] The party who alleges that state action restrains its free exercise of religion must "show the coercive effect of the enactment as it operates against [it] in the practice of [its] religion."[109] If a party establishes such an infringement on its right to free exercise,

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103. The Free Exercise Clause is the constitutional provision most directly applicable to the regulation of churches and is the focus of the federal case law. Several other legal theories have also been asserted regarding the regulation of religious buildings. These theories include Equal Protection, Due Process, Freedom of Speech and Freedom of Assembly. *See* Macleod-Ball, *supra* note 6, at 1098–1112; *see also, e.g.*, C.L.U.B. v. City of Chicago, 157 F. Supp. 2d 903, 909–16 (N.D. Ill. 2001).

104. U.S. CONST. amend. I.

105. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

106. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 877 (1990).

107. *See* Sherbert v. Verner, 374 U.S. 398, 406–09 (1963).

108. Kenneth Marin, Employment Division v. Smith: *The Supreme Court Alters the State of Free Exercise Doctrine*, 40 AM. U. L. REV. 1431, 1438 & n.38 (1991).

109. School Dist. v. Schempp, 374 U.S. 203, 223 (1963).

courts will subject the infringement to strict scrutiny.[110] The government then must establish that the enactment is justified by a compelling state interest[111] and that the enactment is the least restrictive means for achieving that interest.[112]

Before 1990, the Free Exercise Clause was construed as limiting not only laws that explicitly burdened religious activity, but also laws indirectly affected religion.[113] For example, federal courts considered free exercise challenges to regulations regarding unemployment insurance and social security even though those regulations made no explicit reference to religion.[114]

Neutral, generally applicable laws are no longer subject to claims based on the Free Exercise Clause. In 1990, the United States Supreme Court significantly narrowed the scope of the Free Exercise Clause.[115] In *Employment Division, Department of Human Resources v. Smith*, the Court held that the Free Exercise Clause did not preclude the application of neutral laws of general applicability to churches, even if those laws had an indirect effect on the practice of religion.[116] Since 1990, courts have continued to recognize the narrower scope of the Free Exercise Clause.[117]

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110. Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141 (1987).

111. *Sherbert*, 374 U.S. at 406; *see also* Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).

112. Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981).

113. *See Sherbert*, 374 U.S. at 403–04.

114. *E.g.*, United States v. Lee, 455 U.S. 252 (1982) (considering challenge to requirement that an employer withhold social security taxes); *Yoder*, 406 U.S. 205 (1972) (considering challenge to compulsory school attendance); *Sherbert*, 374 U.S. at 398 (considering challenge to unemployment insurance regulations).

115. *See* Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990); *see also* Tuttle, *supra* note 19, at 862.

116. *Id.*

117. *See infra* notes 123–32 and accompanying text. Since 1990, Congress has attempted to restore the pre-*Employment Division* free exercise doctrine. In 1993, Congress adopted the Religious Freedom Restoration Act ["RFRA"]. 42 U.S.C. § 2000bb (1994). While RFRA applied broadly, many RFRA cases involved land use disputes. *See* Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L. REV. 575, 603–17 (1998) (describing federal and state decisions adjudicating RFRA claims). In 1997, the United States Supreme Court held that RFRA was unconstitutional as applied to state and local governments. City of Boerne v. Flores, 521 U.S. 507, 536 (1997). The Court found that Congress had exceeded its enforcement powers under the Fourteenth Amendment. *Boerne*, 521 U.S. at 532–36. In reaching this decision, the Court held that Congress's enforcement power under the Fourteenth Amendment is limited to enforcing the provisions of that amendment; the enforcement power does not extend to determining what constitutes a constitutional violation. *Boerne*, 521 U.S. at 519–20. In 1997, Congress considered the Religious Liberty Protection Act of 1999, but this Act failed to pass in the Senate. *See* 146 CONG. REC. S7778 (daily ed. July 27, 2000) (statement of Sen. Reid). In 2000, Congress again attempted to revive pre-*Employment Division* jurisprudence when it adopted the Religious Land Use and Institutionalized Persons Act ["RLUIPA"]. 42 U.S.C.A. § 2000cc (West Supp. 2001). RLUIPA faces constitutional challenges, much like *Boerne* did. *See, e.g.*, Gregory S. Walston, *Federalism and Federal Spending: Why the Religious Land Use and Institutionalized Persons Act of*

When a party brings a free exercise claim, *Employment Division* requires the court to consider whether the challenged law is neutral and of general applicability. Courts have not established a clear test for determining when a law satisfies the *Employment Division* test.[118] There is probably no dispute that a law that is both facially neutral and generally applicable would satisfy *Employment Division*. The United States Supreme Court has also held that a law can have an adverse impact on churches and still satisfy the *Employment Division* neutrality requirement.[119] The Court has explained that "a social harm may have been a legitimate concern of government for reasons quite apart from discrimination."[120]

2. Federal Case Law Regarding the Application of Zoning Regulations to Churches

Pursuant to *Employment Division*, courts have vigorously employed the "neutral and generally applicable" standard to limit free exercise challenges. After the Supreme Court issued *Employment Division*, some commentators argued that lower courts would interpret the case narrowly to avoid its far-reaching result.[121] In reality, courts have generally applied *Employment Division* as a sort of bright-line rule, substantially limiting claims under the Free Exercise Clause.[122]

Since *Employment Division*, courts have developed the scope of free exercise claims. In 1993, the Court spoke in detail to the issue of what constitutes a neutral and generally applicable regulation.[123] While there is a significant amount of overlap between these two con-

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2000 Is Unconstitutional, 23 U. HAW. L. REV. 479 (2001) (arguing that RLUIPA violates separation of powers principles); Shapiro, *supra* note 20, at 1255 (arguing that Congress improperly based RLUIPA on the Commerce Clause); Ada-Marie Walsh, Note, *Religious Land Use and Institutionalized Persons Act of 2000: Unconstitutional and Unnecessary*, 10 WM. & MARY BILL RTS. J. 189 (2001) (arguing that RLUIPA violates the Establishment Clause, the Commerce Clause and separation of powers principles).

118. Douglas Laycock, *Religious Freedom and International Human Rights in the United States Today*, 12 EMORY INT'L L. REV. 951, 967 (1998). The published opinion notes that Douglas Laycock was the attorney of record for the church in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

119. *Employment Div.*, 494 U.S. at 886 n.3.

120. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 535 (1993).

121. Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-*Smith *Jurisprudence*, 1993 BYU L. REV. 275, 279. *But see* Carol M. Kaplan, Note, *The Devil Is in the Details: Neutral, Generally Applicable Laws and Exceptions from* Smith, 75 N.Y.U. L. REV. 1045 (2000) (arguing that any exceptions to *Employment Division* should be applied narrowly or not at all).

122. *See* Carmella, *supra* note 121, at 279 & n.18.

123. *Church of the Lukumi Babalu Aye*, 508 U.S. at 533–43.

cepts,[124] in *Church of the Lukumi Babalu Aye*, the Court addressed the differences between the two elements.[125] The neutrality element focuses on the language and intent of the challenged regulation.[126] The general applicability element focuses on how the law is implemented.[127] Over the past decade, courts have applied and developed *Employment Division*'s "neutral and generally applicable" standard in numerous cases.[128]

This post-*Employment Division* body of law generally considers zoning regulations to be neutral and of general applicability, thus precluding strict scrutiny review. The zoning context presents a unique situation because zoning regulations necessarily refer to many different types of uses, including churches.[129] Courts have held that such regulations still constitute neutral laws of general applicability.[130] In contrast, courts have found land use regulations to lack neutrality and general applicability where the intent of the law is to discriminate against religion[131] or where the law treats various religions differently rather than uniformly.[132]

Even if a land use regulation was subject to strict scrutiny, that does not necessarily mean that those regulations would not survive judicial review.[133] Even under pre-*Employment Division* strict scrutiny,

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124. *Id.* at 557 (Scalia, J. concurring) (noting that the two elements "substantially overlap").

125. *Id.* at 533–43 (engaging in a detailed analysis of the neutrality element, then considering separately the requirement of general applicability).

126. *Id.* at 533–34.

127. *Id.* at 557–58 (Scalia, J., concurring).

128. *See* Carmella, *supra* note 121, at 279 n.18; Robin Cheryl Miller, Annotation, *What Laws are Neutral and of General Applicability Within Meaning of* Employment Div., Dept. of Human Resources of Oregon v. Smith, *494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876*, 167 A.L.R. FED. 663 (2001).

129. Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development; Part II: The Nonestablishment Principle*, 81 HARV. L. REV. 513, 538 (1968); Reynolds, *supra* note 1, at 767.

130. *E.g.*, Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 472 (8th Cir. 1991); Rector of the Vestry of St. Bartholomew's Church v. City of New York, 914 F.2d 348, 355 (2d Cir. 1990) (holding that the application of a landmark preservation regulation to a church building satisfied neutrality and general applicability requirements); Daytona Rescue Mission, Inc. v. City of Daytona Beach, 885 F. Supp. 1554, 1558 (M.D. Fl. 1995); Grace Cmty. Church v. Town of Bethel, Nos. 30 69 94, AC 11312, 1992 WL 174923, *3 (Conn. Super. Ct. July 16, 1992) (holding that the requirement of a special use permit for construction of a church in a residential zone constitutes a neutral law of general applicability), *aff'd*, 622 A.2d 591, 595–96 (Conn. App. 1993).

131. Mount Elliott Cemetery Ass'n v. City of Troy, 171 F.3d 398, 405 (6th Cir. 1999).

132. *See* Cam v. Marion County, Or., 987 F. Supp. 854, 861–62 (D. Or. 1997).

133. *See e.g.*, Christian Gospel Church, Inc. v. City & County of San Francisco, 896 F.2d 1221, 1224–25 (9th Cir. 1990) (holding that a municipality did not act unconstitutionally when it denied a conditional use permit for a church building proposed in a residential zone; the CUP

federal courts consistently found the zoning regulations constitutionally applied to churches. In fact, courts approved regulatory schemes involving outright bans on churches in residential zones.[134] The United States Supreme Court has spoken directly to this issue.[135] Referring to *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville*, the Court wrote that it had "recently dismissed *for want of substantiality* an appeal in which a church group contended that its First Amendment rights were violated by a municipal zoning ordinance preventing the building of churches in certain residential areas."[136]

The application of article I, section 11 should follow federal free exercise case law. Other than varying from *Employment Division* and subjecting neutral, generally applicable laws to free exercise challenges, Washington courts generally follow *Sherbert*-based federal case law. This case law is clear that churches are subject to zoning regulation.

IV. WASHINGTON CONSTITUTIONAL LAW

It is also necessary to consider how a claim could be analyzed under the free exercise clause of the Washington State Constitution. While the well-established body of federal case law should guide the application of article I, section 11 to zoning issues, it is possible that the state constitution could be applied independently of the U.S. Constitution. In some cases, such as those involving historical preservation, the Washington Supreme Court has already called for an independent analysis under the state constitution.[137] Additionally, some commentators suggest that state constitutions will play a more central role as the U.S. Constitution is applied more narrowly.[138]

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decision was based in part on the effect the church building would have had on the character of the neighborhood).

134. *See, e.g.*, Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville, 203 P.2d 823, 825–26 (Cal.), *appeal dismissed*, 338 U.S. 805 (1949); Macleod-Ball, *supra* note 6, at 1088–89, 1089 n.8 (noting that an increasingly large minority of jurisdictions have held that religious uses may be excluded form certain land use zones).

135. *See* Am. Communications Ass'n, C.I.O. v. Douds, 339 U.S. 382, 397–98 (1950).

136. *Id.* (emphasis added).

137. *See, e.g.*, First Covenant Church v. City of Seattle, 120 Wash. 2d 203, 226, 840 P.2d 174, 187 (1992).

138. *See* Carmella, *supra* note 121, at 284–85, 285 n.44; Spitzer, *supra* note 69, at 1190–91; Atkins, *supra* note 69, at 571 & n.19. Among other reasons, the reduced scope of the Free Exercise Clause under the *Employment Division* line of cases arguably encourages state courts to find protections for churches, which were previously based on the U.S. Constitution, in their own state constitutions. Carmella, *supra* note 121, at 279–80.

A. Washington's Strict Scrutiny Test

The Washington State Constitution contains its own provision regarding the free exercise of religion, and in at least certain circumstances Washington courts apply this provision more broadly than the Free Exercise Clause of the U.S. Constitution. In evaluating a claim based on the free exercise clause of the Washington State Constitution, state courts apply a version of strict scrutiny. *Open Door* holds that when a court is determining whether a governmental action affecting churches violates the Washington State Constitution, it must consider three elements: (1) whether the action has a coercive effect on the practice of religion, (2) whether the governmental action is justified by a compelling state interest, and (3) whether the government has acted in the least restrictive way necessary to satisfy its governmental obligations.[139] The Washington Supreme Court has held that a facially neutral, even-handedly enforced statute that does not directly burden free exercise might nonetheless violate the Washington State Constitution, if the statute imposes a sufficient indirect burden on the exercise of religion.[140]

1. Coercive Effect on the Practice of Religion

The threshold question in any challenge based on the free exercise clause is whether the challenged governmental action has a coercive effect on the practice of religion. In essence, this threshold question involves an inquiry into the scope of religious exercise that is subject to the strict scrutiny analysis. The burden lies with the claimant to prove that the governmental action improperly limits its ability to practice its religion; if the claimant fails to satisfy this burden, the challenge goes no further.[141]

In its most recent free exercise case, the Washington Supreme Court re-emphasized the significance of this threshold test. In *Open Door*, the court held that "we ought to require a very specific showing of hardship to justify exemption from land use restrictions . . . ."[142]

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139. 140 Wash. 2d at 154, 995 P.2d at 39.

140. *Id.* at 153, 995 P.2d 33, 39.

The test for evaluating claims under the free exercise clause of the Washington State Constitution is substantially similar to the test set forth in RLUIPA. *See* 42 U.S.C.A. § 2000cc(a)(1). The test articulated in *Open Door*, among other Washington cases, closely parallels pre-*Employment Division* federal jurisprudence; in fact, the test is based on the *Sherbert v. Verner* line of cases. *See Open Door*, 140 Wash. 2d at 154, 995 P.2d at 39. Given that Washington courts apply a *Sherbert*-based test, the enactment of RLUIPA, as well as the outcome of resulting constitutional challenges, may have little practical effect in Washington.

141. State v. Motherwell, 114 Wash. 2d 353, 361, 788 P.2d 1066, 1070 (1990).

142. *Open Door*, 140 Wash. 2d at 169, 995 P.2d at 47.

With regard to the "coercive effect" requirement, the Washington Supreme Court has set forth the legal test that the claimant must satisfy in order to advance its claim under the free exercise clause. The Washington Supreme Court has held that:

> A free exercise claimant must show "the coercive effect of the enactment as it operates against him in the practice of his religion." In this regard, "[t]he challenged state action *must somehow compel or pressure the individual to violate a tenet of his religious belief.*" Moreover, a claimant must show that his religious convictions are sincerely held.[143]

The "coercive effect" test requires substantially more than a showing that the challenged regulation is unfavorable to the church or even that the regulation imposes some burden on the church.[144] For example, in *State v. Motherwell*, the Washington Supreme Court held that "[b]oth this court and the [U.S.] Supreme Court have clearly stated that free exercise claimants do not meet their burden of proof merely by showing that the government's actions have impeded their ability to practice their religion."[145] Rather than simply establishing some impediment to its practice of religion, a free exercise claimant must show that the challenged action compelled the individual to violate a tenet of its religious belief.

Washington's "coercive effect" element is substantially similar to the "coercive effect" test outlined in the federal courts' strict scrutiny cases.[146] The United States Supreme Court has held that the "coercive effect" test could only be satisfied if the governmental act precluded the free exercise claimant from observing its religious tenets; a governmental act which simply had a substantial, negative impact on the operation of a church facility was not sufficient to preclude the claim-

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143. *Motherwell*, 114 Wash. 2d at 361, 788 P.2d at 1070 (emphasis added) (citations omitted).

144. Every regulation imposes some burden on parties who must comply with it, yet the proposition that every regulation applicable to a church satisfies the "coercive effect" test has been rejected. *See, e.g., Motherwell*, 114 Wash. 2d at 363–64, 788 P.2d at 1071–72 (relying on *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) and *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983)). In *Lyng*, the Court held that the "coercive effect" test is not necessarily satisfied simply based on a governmental act significantly impeding an individual's ability to practice its religion. 485 U.S. at 449–50.

145. 114 Wash. 2d at 363, 788 P.2d at 1071.

146. Even in areas where the state constitution applies more broadly than the U.S. Constitution, Washington courts have shown a willingness to continue to look to federal authority. *See generally Open Door*, 140 Wash. 2d at 164–68, 995 P.2d at 44–46 (relying extensively on federal free exercise case law in reviewing a church's claim that it was exempt from zoning regulations).

ant from observing a fundamental tenet of its religion, and thus the "coercive effect" test was not satisfied.[147]

Both state and federal courts have resolved many free exercise claims based on a determination that the challenged regulation did not substantially burden the practice of religion. For example, the Supreme Court has held that taxing the distribution of religious materials did not constitute a substantial burden on religious exercise.[148] The Tenth Circuit has held that precluding the construction of a church at a particular site did not constitute a substantial burden on the practice of religion.[149] Finally, the Washington Supreme Court has held that requiring a church to comply with a conditional use permit process did not constitute a substantial burden on religious exercise.[150]

While there are numerous imaginable theories a claimant could offer in an effort to satisfy the "coercive effect" test, one common theory warrants specific discussion. Free exercise claimants have regularly contended that the financial burden that results from the application of zoning regulations satisfies the "coercive effect" test.[151] Courts have repeatedly rejected this theory.[152] The Washington Supreme Court has held that a "gross financial burden" could satisfy the "coercive effect" requirement but a lesser financial burden would not satisfy the threshold requirement.[153] Although Washington courts have not established a precise rule for determining what constitutes a "gross financial burden," Washington courts have noted that governmental action that substantially devalues a church asset could satisfy this requirement.[154] Given that many contemporary zoning issues involve the development of new church sites, where government regulation would not devalue an existing church asset, the possibilities may be

147. Bob Jones Univ. v. United States, 461 U.S. 574, 603–04 (1983).

148. Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 392 (1990).

149. Messiah Baptist Church v. County of Jefferson, 859 F.2d 820, 824–25 (10th Cir. 1988) (holding that building a church on a particular site was not a religious tenet of the congregation).

150. *Open Door*, 140 Wash. 2d at 166, 995 P.2d at 46 (holding that the church had not satisfied its burden of establishing a coercive effect on its practice of religion).

151. *See, e.g.*, Hernandez v. Comm'r of Internal Revenue, 490 U.S. 680, 699 (1989); *Open Door*, 140 Wash. 2d at 160, 995 P.2d at 42.

152. *See, e.g.*, *Jimmy Swaggart Ministries*, 493 U.S. at 392 (1990) (holding that taxing the distribution of religious materials did not constitute a substantial burden); *Hernandez*, 490 U.S. at 699; Rector of the Vestry of St. Bartholomew's Church v. City of New York, 914 F.2d 348, 355 (2d Cir. 1990). *But see, e.g.*, First United Methodist Church v. Hearing Exam'r for the Seattle Landmarks Pres. Bd., 129 Wash. 2d 238, 249, 916 P.2d 374, 379–80 (1996) (holding that gross financial burdens could satisfy the "coercive effect" test).

153. *Open Door*, 140 Wash. 2d at 156–57, 995 P.2d at 41.

154. *Id.* at 156, 995 P.2d at 40; First Covenant Church v. City of Seattle, 120 Wash. 2d 203, 219, 840 P.2d 174, 183 (1992) [hereinafter *First Covenant II*] (finding coercive effect based on a fifty percent reduction in value of church property).

limited for basing a "coercive effect" argument on an alleged financial burden.[155]

The "coercive effect" test is a significant threshold requirement that free exercise claimants must satisfy in order to advance their claims. Courts regularly resolve claims based on a claimant's failure to satisfy this requirement. Evaluation of free exercise claims in the future should start with, and will often end with, this element.

2. Compelling Governmental Interest

The second element outlined in *Open Door* involves whether the challenged regulation furthers a compelling governmental interest.[156] As a general matter, the law is well settled that compelling governmental interests support protecting the integrity of various land use zones.[157] The Washington Supreme Court has specifically recognized that protecting rural areas is a compelling state interest.[158] The Growth Management Act also lends some support to the conclusion that zoning is a compelling governmental interest.[159] Through the Growth Management Act, the Washington State legislature adopted the following finding:

> The legislature finds that uncoordinated and unplanned growth, together with a lack of common goals expressing the public's interest in the conservation and the wise use of our lands, pose a

155. *See First Covenant II*, 120 Wash. 2d at 216, 840 P.2d at 181. In *First Covenant II*, the court distinguished a federal case, which had held that a regulation that impeded a church's ability to generate future revenue necessary to expand its programs did not constitute an unconstitutional coercive effect. *Id.* In contrast, the Washington court found that the coercive effect on the First Covenant Church was based on the substantial devaluation of an existing church asset. *Id.* The Washington Supreme Court's acceptance of the federal court's reasoning appears to suggest that regulations that do not affect a church's existing operations but rather affect its ability to expand (either through decreased revenues or increased costs) would not satisfy the "coercive effect" requirement.

156. *Open Door*, 140 Wash. 2d at 154, 995 P.2d at 39.

157. *See, e.g.*, Lewis v. City of Medina, 87 Wash. 2d 19, 21, 548 P.2d 1093, 1095 (1976).

158. State v. Lotze, 92 Wash. 2d 52, 59, 593 P.2d 811, 814 (recognizing compelling state interest and rejecting First Amendment challenge to restriction on billboards in undeveloped areas), *appeal dismissed*, 444 U.S. 921 (1979); *see also* Agins v. Tiburon, 447 U.S. 255, 261–62 (1980) (holding that the government has a legitimate interest in protecting undeveloped areas from "the ill effects of urbanization"); Buckles v. King County, 191 F.3d 1127, 1142 (9th Cir. 1999) (recognizing that the law is well settled that the government has a legitimate interest in protecting undeveloped areas). The applicability of *Lotze* was subsequently limited based on its failure to give adequate consideration to the fact that the challenged regulation was not content neutral, and instead it distinguished between commercial and noncommercial speech. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 513 n.18, (1981); Collier v. City of Tacoma, 121 Wash. 2d 737, 756, 854 P.2d 1046, 1055–56 (1993). With regard to free exercise, rather than free speech issues, however, this subsequent history should not be relevant to the *Lotze* holding regarding the importance of protecting rural areas.

159. *See* WASH. REV. CODE § 36.70A.010.

> threat to the environment, sustainable economic development, and the health, safety, and high quality of life enjoyed by residents of this state.[160]

As with the "coercive effect" element, Washington's development of the "compelling governmental interest" element closely parallels the strict scrutiny cases of the federal court. When considering whether a particular regulation furthers a "compelling governmental interest," the United States Supreme Court has suggested that courts consider whether the government similarly regulates non-religious activities that produce the same harms.[161] The Ninth Circuit has held that zoning is a compelling governmental interest.[162] Similarly, another federal court held that "[t]here appears to be no dispute that local governments have a compelling interest in protecting the health and safety of their communities through the enforcement of the local zoning regulations."[163]

3. Least Restrictive Means

The third element outlined in *Open Door* involves whether the government used the least restrictive means to accomplish its objective.[164] Washington case law does not specifically address the test for evaluating the "least restrictive means" element. Federal case law, however, provides some guidance as to the interpretation of this element. The Ninth Circuit has held that a zoning ordinance satisfies the requirement of being narrowly tailored to advance the governmental interest.[165] Courts in other circuits have mentioned several factors that could be considered in evaluating this element. One factor involves whether the challenged regulation specifically addresses the identified impact.[166] *Murphy v. Zoning Commission* involved a regulatory action that limited the number of people who could be present in a house for a prayer meeting. The government contended that the regulation was necessary to control traffic. The court found that the regulation did

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160. *Id.* Legislative declarations of fact are entitled to substantial deference and must be "deemed conclusive unless they are obviously false and a palpable attempt at dissimulation." City of Tacoma v. Luvene, 118 Wash. 2d 826, 851, 827 P.2d 1374, 1387 (1992) (citation omitted).

161. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546–47 (1993).

162. *See, e.g.*, Christian Gospel Church, Inc. v. City & County of San Francisco, 896 F.2d 1221, 1224 (9th Cir. 1990).

163. *See, e.g.*, Murphy v. Zoning Comm'n, 148 F. Supp. 2d 173, 190 (D. Conn. 2001).

164. Open Door Baptist Church v. Clark County, 140 Wash. 2d 143, 154, 995 P.2d 33, 39 (2000).

165. *Christian Gospel Church, Inc.*, 896 F.2d at 1224–25.

166. *See Murphy*, 148 F. Supp. 2d at 190–91.

not satisfy the "least restrictive means" test because it would have been less restrictive to regulate the traffic impact directly.[167]

As with analysis of the compelling governmental interest, another factor courts might consider involves whether the government similarly regulates non-religious activities that produce the same harms.[168] Finally, courts sometimes analyze the narrowly tailored element by inquiring into the consequence to government's objective of exempting the church from the subject regulations.[169]

B. Application of Washington's Strict Scrutiny

Although *Open Door* articulated a *Sherbert*-based, strict scrutiny test, *Open Door* ultimately preserves the applicability of zoning regulations to churches. If the Washington Supreme Court broadly applies a strict scrutiny test like the one outlined in *Open Door*, the application of zoning regulation to churches would clearly be subject to more expansive constitutional review than exists in the federal courts. As a result, neutral, generally applicable laws would be subject to constitutional scrutiny.[170] Even with strict scrutiny, however, a free exercise claimant would still have to satisfy the rigorous *Open Door* test. In *Open Door*, the court found that the church had not satisfied its burden of establishing a coercive effect on its practice of religion.[171] Although the claimant's failure to satisfy this threshold requirement was dispositive, the court also noted that the enforcement of the zoning code constituted a compelling governmental interest,[172] and that there was no less restrictive alternative than applying the zoning code.[173]

How the court will apply the *Open Door* elements to future cases depends, of course, on the facts of those particular cases. There is reason to believe, however, that free exercise claimants may have some difficulty advancing their claims. Even with strict scrutiny review, a free exercise claim must be evaluated pursuant to the *Open Door* elements described above. These elements are substantively similar to the requirements of RFRA.[174] In the three and one-half years between Congress's enactment of RFRA and the United States Supreme

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167. *See id.*

168. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993).

169. *See Christian Gospel Church, Inc.*, 896 F.2d at 1224–25.

170. First Covenant Church v. City of Seattle, 120 Wash. 2d 203, 226, 840 P.2d 174, 187 (1992).

171. 140 Wash. 2d at 166, 995 P.2d at 46.

172. *Id.* at 161, 995 P.2d 33, 43 (rejecting church's argument that zoning is not a compelling governmental interest).

173. *Id.* at 167, 995 P.2d at 46.

174. 42 U.S.C. § 2000bb-1 (1994).

Court's decision declaring the Act unconstitutional, federal and state courts considered the merits of a RFRA claim in 168 decisions.[175] RFRA claimants successfully obtained relief in only fifteen percent of cases decided on the merits.[176]

V. ESTABLISHMENT CLAUSE LIMIT ON THE ABILITY OF GOVERNMENT TO EXEMPT CHURCHES FROM GENERALLY APPLICABLE LAWS

While the federal and state constitutions limit the ability of local governments to regulate church buildings, these constitutions also limit the ability of government to grant special exceptions to churches.[177] The Establishment Clause provides a countervailing force against the Free Exercise Clause and is a significant check on any judicial expansion of the Free Exercise Clauses of federal and state constitutions. The Establishment Clause also limits the ability of legislative bodies to grant zoning exemptions to churches. As discussed above, the present judicial climate does not suggest an impending expansion of free exercise doctrine. If courts were inclined to interpret the Free Exercise Clause more broadly, or if legislative bodies attempted to affect such an expansion, the Establishment Clause would provide a check on such an effort. Accordingly, a brief discussion of the Establishment Clause is warranted for the purposes of this Article.

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175. Lupu, *supra* note 117, at 590-91.

176. *Id.* at 591.

Although Washington case law, much like federal statutory and case law, offers limited possibilities for churches to advance free exercise claims, it is possible that the Washington State Legislature may adopt more expansive free exercise protection. In the 2001, two bills were introduced in the state legislature that would have limited the applicability of local land use regulations to churches. S.B. 6013, 57th Legislature (Wash. 2001), *available at* http://www.leg.wa.gov/pub/billinfo/2001-02/Senate/6000-6024/6013.pdf (exempting churches from the Growth Management Act and various other statutes); H.B. 2097, 57th Legislature (Wash. 2001), *available at* http://www.leg.wa.gov/pub/billinfo/2001-02/House/2075-2099/2097_02142001.txt (providing that churches and private schools are not urban growth pursuant to the Growth Management Act); *see also* Eric Pryne, *Rural Land, Church Fray Given Hearing in Olympia*, SEATTLE TIMES, Feb. 18, 2001, at B1. Neither bill was adopted. *See* Washington State Legislature Bill Information, Summary Page for Senate Bill 6013 (Wash. 2001), *available at* http://www.leg.wa.gov/wsladm/bills.cfm; Washington State Legislature Bill Information, Summary Page for House Bill 2097 (Wash. 2001), *available at* http://www.leg.wa.gov/wsladm/billinfo/dspBillSummary.cfm?billnumber=2097#files. Although Washington has not adopted such legislation, other states have adopted similar statutes. *See generally* Alan E. Brownstein, *State RFRA Statutes and Freedom of Speech*, 32 U.C. DAVIS L. REV. 605 (1999). Such state efforts would be limited by the Establishment Clauses of the federal and state constitutions. *See infra* notes 177–97 and accompanying text.

177. U.S. CONST. amend. I (providing that "Congress shall make no law respecting an establishment of religion . . . ."); WASH. CONST. art. I, § 11 (regarding religious freedom), art. IX, § 4 (prohibiting public funding of religious schools).

A. United States Constitution

The U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion . . . ."[178] Several commentators have addressed the issue of whether the Establishment Clause precludes government from exempting churches from generally applicable laws,[179] but the specific application of the Establishment Clause to zoning exemptions remains an undeveloped issue.[180] Accordingly, further discussion of this issue is warranted.

While the United States Supreme Court has held that "[a]t some point, accommodation may devolve into an unlawful fostering of religion,"[181] the limits on any exemption for churches from land use regulations are not clearly defined. The United States Supreme Court has outlined a test to assist in determining what constitutes an unconstitutional "establishment of religion."[182] Under *Lemon v. Kurtzman*, for a legislative act to withstand an Establishment Clause challenge, (1) it must have a secular legislative purpose, (2) its principal or primary effect must neither advance nor inhibit religion, and (3) it must not foster excessive governmental entanglement with religion.[183]

Limited case law has considered whether the Establishment Clause precludes the exemption of church buildings from general zoning regulations. The Supreme Court has not spoken to this issue in a majority opinion.[184] The Sixth Circuit has suggested that exempting churches from restrictive zoning that applies to secular interests "runs afoul of the Establishment Clause."[185] In other circumstances, several courts have issued split decisions allowing churches to receive some exemptions under zoning regulations.[186]

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178. *Id.*

179. *E.g.*, Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 452–60 (1994).

180. Limited secondary authority addresses the applicability of the Establishment Clause to zoning regulations. *See* Reynolds, *supra* note 1, at 797–805; Recent Case, Ehlers-Renzi v. Connelly School of the Holy Child, Inc., *224 F.3d 283 (4th Cir. 2000)*, 114 HARV. L. REV. 932 (2001).

181. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 334–35 (1987).

182. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971).

183. *Id.* at 612–13.

184. *Cf.* City of Boerne v. Flores, 521 U.S. 507, 536–37 (1997) (Stevens, J. concurring) (opining that the Religious Freedom Restoration Act violated the Establishment Clause because it conferred a benefit on certain land uses based on their religious status).

185. Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio, 699 F.2d 303, 304 n.2 (6th Cir. 1983).

186. Ehlers-Renzi v. Connelly Sch. of the Holy Child, Inc., 224 F.3d 283 (4th Cir. 2000) (two-to-one decision) (holding that a zoning exemption favoring religious landowners does not violate the Establishment Clause), *overruling* 61 F. Supp. 2d 440 (D. Md. 1999), *cert. denied*, 531 U.S. 1192 (2001); Boyajian v. Gatzunis, 212 F.3d 1 (1st Cir. 2000) (two-to-one decision) (finding

The purpose of the Establishment Clause is to ensure that the public at large is not compelled to support the religious exercise of others. The Establishment Clause of the United States Constitution prohibits government from granting churches any benefit to the detriment of other citizens who are not affiliated with the church.[187] The Establishment Clause requires the government to be "firmly committed to a position of neutrality" with regard to churches.[188] An exemption of churches from zoning controls of general applicability risks departing from the neutrality and secular purpose required by the Establishment Clause.[189]

Exempting churches from generally applicable land use regulations potentially operates to the detriment of other members of the community.[190] For example, allowing churches to be developed without limitation in low-intensity land use zones would be detrimental to other residents of that zone. Such development would be inconsistent with, and otherwise explicitly excluded from, such areas. The law is clear that failing to protect the integrity of land use zones is detrimental to the public welfare.[191] In *Miller*, the Washington Supreme Court held that "[t]he public welfare must be considered from the standpoint of the objective of the zoning ordinance and of all the property within any particular use district."[192] Allowing any large, intensive use in an area where development is otherwise severely limited places a significant burden on the surrounding area.

B. Washington State Constitution

Any regulation exempting church buildings from general zoning regulations would also need to be evaluated under the establishment

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no Establishment Clause violation based on Massachusetts law prohibiting local authorities from excluding religious uses from any zoning district), *cert. denied*, 531 U.S. 1070 (2001); E. Bay Asian Local Dev. Corp. v. California, 13 P.3d 1122 (Cal. 2000) (four-to-three decision) (holding that exempting churches from historic preservation law did not violate the Establishment Clause), *cert. denied*, 532 U.S. 1008 (2001).

187. *See* Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 14–15 (1989).

188. School Dist. v. Schempp, 374 U.S. 203, 226 (1963); Engel v. Vitale, 370 U.S. 421, 443 (1962) (Douglas, J., concurring) (noting that "[t]he First Amendment leaves the [g]overnment in a position not of hostility to religion but of neutrality.").

189. *See Texas Monthly*, 489 U.S. at 13-15 (finding that an exception for religious organizations from a generally applicable tax law violated the Establishment Clause's requirement of government neutrality toward religion); Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (holding that the Establishment Clause requires governmental actions to have a secular purpose and neither to advance nor to inhibit religion).

190. Recent Case, *supra* note 180, at 935 & n.30.

191. Rhod-A-Zalea & 35th, Inc. v. Snohomish County, 136 Wash. 2d 1, 7–8, 959 P.2d 1024, 1027–28 (1998); State *ex rel.* Miller v. Cain, 40 Wash. 2d 216, 220–21, 242 P.2d 505, 508 (1952).

192. *Miller*, 40 Wash. 2d at 223, 242 P.2d at 509.

clause principles of the Washington State Constitution. Authority regarding the establishment clause of the state constitution is limited.[193] Several Washington cases apply the establishment clause to issues involving the expenditure of public funds.[194] There appears to be no published authority addressing the state establishment clause in other contexts.

The establishment clause of the Washington State Constitution is potentially an additional limit on exempting churches from zoning regulations. At least in certain circumstances, the state constitution's establishment clause is far stricter than that of the federal constitution.[195] The state constitution's establishment clause is based in the idea that people should be able to be free from the practice of religion.[196] As described above, exempting churches from general zoning regulations would operate to the detriment of the surrounding area.[197] Such a result would appear to implicate the establishment clause's guarantee that people should be able to be free from the practice of religion.

CONCLUSION

The application of land use regulations to the development of church buildings presents difficult legal issues. However, land use regulatory systems can be applied to churches in a manner that complies with the Washington State Constitution. The Washington Supreme Court's *Open Door*[198] decision signals a judicial shift toward rejecting free exercise challenges to land use regulations.[199] Pursuant to *Open Door*, municipalities can develop and apply regulatory systems that survive constitutional scrutiny.

While no single system guarantees a constitutional result, sensitivity to several considerations can enhance the defensibility of a land use zoning code. Although a zoning code can, and often necessarily must, specifically address churches,[200] it is useful when defending a free exercise challenge if zoning regulations are as general as possi-

193. *See* Utter & Larson, *supra* note 68, at 451 (addressing the history of the Washington State Constitution's establishment clause).

194. *See, e.g.*, Malyon v. Pierce County, 131 Wash. 2d 779, 935 P.2d 1272 (1997); Witters v. Comm'n for the Blind, 112 Wash. 2d 363, 771 P.2d 1119 (1989).

195. Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 489 (1986).

196. *See, e.g.*, WASH. CONST. art. I, § 11 (providing that "no one shall be molested or disturbed in person or property on account of religion").

197. *See supra* notes 190–92 and accompanying text.

198. Open Door Baptist Church v. Clark County, 140 Wash. 2d 143, 995 P.2d 33 (2000).

199. *See supra* notes 62–67 and accompanying text.

200. *See supra* note 129 and accompanying text.

ble.[201] Moreover, given the possibility of strict scrutiny review, municipalities should focus on specific land use impacts of churches when developing and applying their land use regulations.[202]

If municipalities are sensitive to the considerations suggested above, they should be able to avoid or successfully defend against free exercise claims. While Washington courts apply strict scrutiny to a broader range of cases than do the federal courts, the actual application of the test closely follows well-established federal law.[203] Under this case law, the fact that generally applicable land use regulations impact churches does not amount to a violation of the free exercise clause.[204] Rather, land use regulations are constitutionally infirm only if a complainant satisfies the strict scrutiny test outlined in *Open Door*.[205] Careful consideration of the *Open Door* test, however, demonstrates that the application of land use zoning regulations to church should survive constitutional scrutiny.[206]

201. *See, e.g.*, Macleod-Ball, *supra* note 6, at 1119 & n.228.
202. *See* Reynolds, *supra* note 1, at 799.
203. *See supra* notes 64, 129–36 and accompanying text.
204. *See supra* notes 115–17 and accompanying text.
205. *See supra* note 139 and accompanying text.
206. *See supra* notes 141–76 and accompanying text.