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Re-Evaluating the Balance Between Zoning Regulations and Religious and Educational Uses

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I. Introduction

One of the primary objectives of zoning is the protection of the tranquility and family atmosphere of residential neighborhoods.¹ Religious and educational institutions are examples of uses which exist for the benefit of the public and which must, in most instances, exist in the residential areas which they serve.² The expanding concept of what is considered to be a religious

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1. The legitimacy of the promotion of the integrity of single-family residential districts was emphatically endorsed in the often quoted language of Justice Douglas in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974):

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make a sanctuary for people.

2. "Quite apart from tradition and aesthetics, no facility is more appropriately located in residential districts than a church from a viewpoint of its own effective functioning." 3A N. WILLIAMS, *AMERICAN LAND PLANNING LAW* § 77.01 (1985).

activity, coupled with the ever-increasing intensity and hours of utilization of school facilities, often produces impacts which interfere with the tranquility sought in residential neighborhoods.³ Nevertheless, the New York courts have uniformly held that residents must tolerate such minor inconvenience in order to accommodate the higher public benefit promoted by such institutions.⁴ A religious or educational use may be excluded only in those rare instances where it is demonstrated to be dangerous to the surrounding area or decisively contrary to the public health, safety, or welfare.⁵ Otherwise, the zoning power is generally confined to minimizing the undesirable impacts of the use.⁶

This Article will analyze what uses qualify for the preferred treatment accorded religious and educational uses and the degree to which otherwise legitimate concerns must yield to the limited immunity accorded these uses. In order to understand the often competing interests of the two potential protagonists, this Article will review the historical progression of decisions whereby municipal regulation of religious and educational uses was virtually eliminated. The initial emergence of a less deferential standard will be examined wherein a number of dissents have suggested that planning concerns and the desire to establish or expand religious and educational uses be balanced. Last, this Article will evaluate the recent revision of applicable standards whereby municipalities may require churches and schools to mitigate the undesirable consequences of their operations and, if such uses are dangerous to the public welfare, may exclude them from the municipality.

A. Background

Religious and educational institutions have historically enjoyed preferred status in New York and have been permitted to exist or to expand relatively unhindered in residential neighborhoods.⁷ The court of appeals has determined that "churches and

3. See N.Y. Times, July 27, 1986, § 8, at 7, col. 1.

4. See *infra* notes 148-150 and accompanying text.

5. *Cornell Univ. v. Bagnardi*, 68 N.Y.2d 583, 595, 503 N.E.2d 509, 515, 510 N.Y.S.2d 861, 867 (1986).

6. *Id.* at 596, 503 N.E.2d at 515-16, 510 N.Y.S.2d at 867.

7. See *id.* at 593, 503 N.E.2d at 513, 510 N.Y.S.2d at 865.

schools occupy a different status from mere commercial enterprises and, when the church enters the picture, different considerations apply.”⁸ This dominant status is based on a recognition that religious and educational institutions are, by their very nature, beneficial to the public welfare.⁹ Since zoning laws may be enacted only in furtherance of the public health, safety, morals, or general welfare,¹⁰ and such uses of property are presumed to be in furtherance of the general welfare of the community, the preferred status of churches¹¹ and schools “severely limits the permissible reach of zoning restrictions”¹² In addition, the constitutionally protected role in society of religious institutions further curtails the authority of local governments to enforce zoning regulations against churches. Accordingly, until *Cornell University v. Bagnardi*,¹³ the prevailing opinion was that “the general policy, as applied in this State, is that religious [and educational] institutions are virtually immune from zoning restrictions.”¹⁴ In *Bagnardi*, however, the court of appeals determined that the controlling consideration in reviewing a request of a school or church to locate in a residential area must be the overall impact of the use on the welfare of the community.¹⁵ Eschewing the perceived meaning of prior decisions, the court determined that “[t]here is simply no conclusive presumption that any religious or educational use automatically outweighs its ill effects.”¹⁶

8. *Diocese of Rochester v. Planning Bd.*, 1 N.Y.2d 508, 523, 136 N.E.2d 827, 834, 154 N.Y.S.2d 849, 859 (1956) (citation omitted).

9. “Thus church and school and accessory uses are, in themselves, clearly in furtherance of the public morals and general welfare.” *Id.* at 526, 136 N.E.2d at 836-37, 154 N.Y.S.2d at 862.

10. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

11. For the sake of convenience, the word “church” is frequently used herein to include within its meaning churches, synagogues, mosques, or any other edifice for the conducting of bona fide religious services of any nature.

12. *Rhema Christian Fellowship v. Common Council of Buffalo*, 114 Misc. 2d 710, 711, 452 N.Y.S.2d 292, 293 (Sup. Ct. Erie County 1982).

13. 68 N.Y.2d 583, 503 N.E.2d 509, 510 N.Y.S.2d 861 (1986).

14. *Bright Horizon House, Inc. v. Zoning Bd. of Appeals*, 121 Misc. 2d 703, 710, 469 N.Y.S.2d 851, 856 (Sup. Ct. Monroe County 1983).

15. *Bagnardi*, 68 N.Y.2d at 595, 503 N.E.2d at 515, 510 N.Y.S.2d at 867.

16. *Id.* See also *Jewish Reconstructionist Synagogue of the North Shore, Inc. v. Incorporated Village of Roslyn Harbor*, 38 N.Y.2d 283, 292, 342 N.E.2d 534, 542, 379 N.Y.S.2d 747, 756 (1975) (Breitel, C.J., concurring), *cert. denied*, 426 U.S. 950 (1976) (citations omitted).

While such institutions were initially welcomed by the neighbors they served, "the advent of the automobile, as well as the growth and diversification of religious and educational institutions, brought a host of new problems."¹⁷ Church activities are no longer confined to the traditional weekly service and other occasional religious observances. Religious institutions today are performing a variety of social, humanitarian, and educational functions. Consequently, the problems generated by churches have grown with the increased involvement of such institutions in the community.¹⁸ As a result, "[t]hey . . . bring congestion; they generate traffic and create parking problems; they can cause a deterioration of property values in a residential zone; in consequence of customary exemption from taxation they work an economic disadvantage to taxable properties."¹⁹

Similarly, the presence of educational institutions in residential areas frequently produces adverse effects on the neighborhood and may impair the residents' enjoyment of their homes.

Schools, like other places in which people are assembled in large numbers, produce effects such as noise, traffic congestion and attendant hazards to safety. Such conditions may be expected to have a tendency to disrupt the peace and quiet of a residential neighborhood and tend to cause a depreciation of property values.²⁰

Moreover, it has been observed that the level of activity in most schools reaches far higher intensity than is normal in connection with similar uses, such as churches, and that such activities continue for many more hours per week.²¹ In addition to the often obtrusive effects on the neighborhood of community schools, "[s]prawling universities brought increased traffic and other un-

17. *Bagnardi*, 68 N.Y.2d at 593, 503 N.E.2d at 513, 510 N.Y.S.2d at 865.

18. "To the extent that the churches are developing more programs of activities throughout the week, this problem (traffic generation and noise) is no longer restricted to the traditional Sunday morning, or Friday evening-Saturday morning." N. WILLIAMS, *supra* note 2, at § 77.01.

19. *Jewish Reconstructionist Synagogue*, 38 N.Y.2d at 295, 342 N.E.2d at 541, 379 N.Y.S.2d at 757 (Jones, J., dissenting), *cert. denied*, 426 U.S. 950 (1976).

20. *Brandeis School v. Village of Lawrence*, 18 Misc. 2d 550, 558, 184 N.Y.S.2d 687, 695 (Sup. Ct. Nassau County 1959).

21. N. WILLIAMS, *supra* note 2, at § 67.01.

expected inconveniences to their neighbors, while the benefits these universities conferred were becoming less relevant to the residents of the immediately surrounding areas."²²

As a result of such impacts, neighbors began to view such uses as intrusions on their domestic peace and tranquility. In response to unsubstantiated excuses proffered by boards rejecting the applications of such institutions, the courts were required to exert their authority to protect such socially beneficial uses from community fear and hostility.²³ While there is no question that applications for religious and educational uses frequently invoke legitimate planning and municipal concerns, the decisions demonstrate that judicial concern with subterfuge by reviewing agencies is not totally unwarranted.²⁴ The difficulty, of course, is a product of having to determine which concerns are legally permissible and which are merely excuses for impermissible exclusion of legitimate religious and educational uses.

Municipal attempts at exclusion of religious and educational uses may take any of several forms.²⁵ The first, an express provision specifying churches or schools as a prohibited use in a particular residential district or omitting churches or schools as a permitted use within a district,²⁶ was promptly rejected by the state's courts.²⁷ Accordingly, a zoning ordinance may not exclude places of worship or educational institutions from a municipality²⁸ and may not exclude them from any of its residential zones.²⁹ Similarly, a municipality may not control the *precise spot* at which a church or school is to be located and may not

22. *Bagnardi*, 68 N.Y.2d at 593, 503 N.E.2d at 513, 510 N.Y.S.2d at 865.

23. *See id.* at 593, 503 N.E.2d at 513-14, 510 N.Y.S.2d at 865-66.

24. *See infra* notes 167-174 and accompanying text.

25. *See* 2 A.H. RATHKOPF & D.A. RATHKOPF, *THE LAW OF ZONING AND PLANNING* § 20.01[1] (4th ed. 1987) [hereinafter RATHKOPF].

26. *Id.*

27. *Diocese of Rochester*, 1 N.Y.2d at 522, 136 N.E.2d at 834, 154 N.Y.S.2d at 858; *North Shore Unitarian Soc'y, Inc. v. Village of Plandome*, 200 Misc. 524, 525, 109 N.Y.S.2d 803, 804 (Sup. Ct. Nassau County 1951).

28. *North Shore Unitarian Soc'y*, 200 Misc. at 525, 109 N.Y.S.2d at 804.

29. *Diocese of Rochester*, 1 N.Y.2d at 522, 136 N.E.2d at 834, 154 N.Y.S.2d at 858. *See also Bagnardi*, 68 N.Y.2d at 594, 503 N.E.2d at 514, 510 N.Y.S.2d at 866 ("[As a result] of the inherently beneficial nature of churches and schools to the public, . . . total exclusion . . . from a residential [zone] serves no end that is reasonably related to the [promotion of] the morals, health, welfare or safety of the community."); *North Shore Unitarian Soc'y*, 200 Misc. at 525, 109 N.Y.S.2d at 804.

require such an applicant to demonstrate that a particular site is the most appropriate location for the use.³⁰

The second exclusionary device which has been employed is the authorization of the establishment of a church or school upon the granting of a special permit, predicated on standards or conditions with which they cannot practically comply.³¹ "The purpose of requiring a special permit for a church [or school] is derived from an understanding of the invalidity of total exclusion of [such uses] from residential districts coupled with a realization of the impact which a church [or school] may have upon other property in the district."³² The court of appeals has recognized that

[t]he requirement of a special permit application, which entails disclosure of site plans, parking facilities, and other features of the institution's proposed use, is beneficial in that it affords zoning boards an opportunity to weigh the proposed use in relation to neighboring land uses and to cushion any adverse effects by the imposition of conditions designed to mitigate them.³³

By requiring such a review, the permit may be conditioned upon the effect the use would have on traffic congestion, property values, municipal services, the general plan for the development of the community, and such other concerns that relate to the health, safety, and welfare of the community "to the same extent that they may be imposed on noneducational applicants."³⁴

While a zoning ordinance may subject a proposed religious or educational use to the requirement of a special permit, the reviewing agency may deny the special permit (or any other approval) only if the use will be inarguably contrary to the public health, safety, or welfare, or be dangerous to the surrounding area.³⁵ Considerations such as noise, traffic, inconvenience to

30. *Community Synagogue v. Bates*, 1 N.Y.2d 445, 458, 136 N.E.2d 488, 496, 154 N.Y.S.2d 15, 26 (1956).

31. See RATHKOPF, *supra* note 25, at § 20.01[1].

32. *Id.* at § 20.01[4].

33. *Bagnardi*, 68 N.Y.2d at 596, 503 N.E.2d at 516, 510 N.Y.S.2d at 868 (citation omitted).

34. *Id.* at 596, 503 N.E.2d at 515, 510 N.Y.S.2d at 867 (citations omitted).

35. *Id.* at 595, 503 N.E.2d at 515, 510 N.Y.S.2d at 867. *Cf. Westchester Reform Temple v. Brown*, 22 N.Y.2d 488, 494, 239 N.E.2d 891, 895, 293 N.Y.S.2d 297, 302 (1968) (In order to substantiate the denial of a permit for a religious institution, "it must be

neighbors, and the effect on property values which cannot be characterized as constituting a danger to the community, are insufficient to justify the denial of a permit for a religious or educational use.³⁶ These considerations, however, may be examined, insofar as practicable, in order to minimize the effects of the use on neighboring properties or traffic.³⁷ Because there exists the potential for utilizing legitimate considerations to deny a permit for an unpopular use or organization when no factual basis exists, when a permit is denied, courts will carefully examine the record and the reasons advanced for the presence or absence of factual support.³⁸ The record must contain expert testimony or "hard evidence"³⁹ to substantiate the denial of a permit. Speculation and fear are clearly insufficient to satisfy the stricter scrutiny applied to zoning restrictions on such socially beneficial uses.⁴⁰ While appropriate conditions may be imposed in order to mitigate adverse impacts of a church or school, the conditions will be considered to be invalid if they impose an excessively heavy financial burden on the organization,⁴¹ that is, if "by their cost, magnitude or volume, [they] operate indirectly to exclude such uses altogether."⁴² It is also impermissible to require an ap-

convincingly shown that the Temple's proposed expansion will have a direct and immediate adverse effect upon the health, safety or welfare of the community.").

36. *Diocese of Rochester*, 1 N.Y.2d at 523-25, 136 N.E.2d at 834-37, 154 N.Y.S.2d at 859-62.

37. *Bagnardi*, 68 N.Y.2d at 596, 503 N.E.2d at 515, 510 N.Y.S.2d at 867; *Westchester Reform Temple*, 22 N.Y.2d at 496, 239 N.E.2d at 896, 293 N.Y.S.2d at 303-04.

38. See *American Friends of the Soc'y of St. Pius, Inc. v. Schwab*, 68 A.D.2d 646, 649, 417 N.Y.S.2d 991, 993 (2d Dep't 1979). "[W]here the establishment of the church is dependent upon the action of a local administrative body, the court's obligation is to scrutinize carefully the reasons advanced for denial of the permit." RATHKOPF, *supra* note 25, at § 20.01[4].

39. *North Shore Hebrew Academy v. Wegman*, 105 A.D.2d 702, 705, 481 N.Y.S.2d 142, 145 (2d Dep't 1984).

40. See *North Shore Hebrew Academy*, 105 A.D.2d at 705-06, 481 N.Y.S.2d at 145 (use of a private religious school as a performing arts center allowed where town failed to provide substantial evidence establishing harm to the neighborhood); *Mikveh of South Shore Congregation, Inc. v. Granito*, 78 A.D.2d 855, 432 N.Y.S.2d 638, 639 (2d Dep't 1980).

41. *Westchester Reform Temple*, 22 N.Y.2d at 497, 239 N.E.2d at 897, 293 N.Y.S.2d at 304.

42. *Bagnardi*, 68 N.Y.2d at 596, 503 N.E.2d at 516, 510 N.Y.S.2d at 868 (citation omitted). Cf. *Westchester Reform Temple*, 22 N.Y.2d at 497, 239 N.E.2d at 897, 293 N.Y.S.2d at 304 (Conditions may be imposed on the granting of a special permit in order to mitigate against the undesirable impacts of the use on the community requiring a

plicant, as a condition of a special permit, to demonstrate the necessity of its desire to expand or the need to expand at its chosen location.⁴³

A third exclusionary technique which has been utilized to inhibit the establishment and expansion of religious and educational institutions is the requirement that they comply with the same parking, yard, lot coverage, height, and other bulk regulations provided for residences in the same district, the effect of which is to prevent or curtail the proposed use of the property.⁴⁴ The New York courts, however, have held that the inability to grant variances from parking and other bulk requirements which apply to such uses will render a zoning ordinance unconstitutional.⁴⁵ Rather than deny a requested variance, a zoning board of appeals is required to suggest measures to accommodate a proposed religious or educational use.⁴⁶ Significantly, it has recently been determined that a religious institution is excused from the requirement of demonstrating practical difficulty as a prerequisite to obtaining an area variance.⁴⁷ Moreover, a zoning ordinance is unreasonable and invalid if it effects an exclusion of an educational use by requiring the applicant to obtain a use variance and to prove "unnecessary hardship" as a condition of its use of property for an educational purpose.⁴⁸

In order to fully comprehend the parameters of municipal zoning authority over religious and educational uses, the dimensions of the "exemption" from such regulations, and the significance of the *Bagnardi* decision, the judicial response to zoning provisions regulating and restricting such publicly beneficial uses must be examined. In reviewing these decisions, it becomes

"modest increase in expenditures," but the imposition of conditions requiring "heavy financial burden" may be considered to be invalid.).

43. *Bagnardi*, 68 N.Y.2d at 597, 503 N.E.2d at 516, 510 N.Y.S.2d at 868.

44. See RATHKOPF, *supra* note 25, at § 20.01[1].

45. See *Jewish Reconstructionist Synagogue*, 38 N.Y.2d at 289, 342 N.E.2d at 539, 379 N.Y.S.2d at 754; *North Shore Hebrew Academy*, 105 A.D.2d at 706, 481 N.Y.S.2d at 146.

46. *Islamic Soc'y of Westchester and Rockland, Inc. v. Foley*, 96 A.D.2d 536, 537, 464 N.Y.S.2d 844, 845 (2d Dep't 1983).

47. *Sephardic Community of New Rochelle/Scarsdale v. Zoning Bd. of Appeals*, N.Y.L.J., Aug. 13, 1986, at 15, col. 5 (Sup. Ct. Westchester County 1986).

48. *Cornell Univ. v. Bagnardi*, 107 A.D.2d 398, 400, 486 N.Y.S.2d 964, 966 (3d Dep't 1985), *modified*, 68 N.Y.2d 583, 503 N.E.2d 509, 510 N.Y.S.2d 861 (1986). See *infra* notes 365-383 and accompanying text.

apparent that the initial judicial response and the thrust of most decisions demonstrate a suspicion of municipal motives and a concern with municipal efforts to inhibit or exclude the establishment of such uses.⁴⁹ Since many courts came to interpret the state of the law as requiring a "full exemption" from zoning regulations for all educational and church uses, later cases illustrate municipal frustration at being rendered "powerless in the face of a religious or educational institution's proposed expansion, no matter how offensive, overpowering or unsafe to a residential neighborhood the use might be."⁵⁰ While the courts continued to require zoning authorities to subordinate planning concerns in order to accommodate almost any use which could be construed as furthering an institution's religious or educational function, no matter how obtrusive, some jurists began to voice concern with such an absolutist policy.⁵¹ Such frustrations and concerns, in turn, resulted in a re-evaluation of the proper method of balancing the needs and rights of religious and educational institutions and the responsibilities of municipalities. As a result, *Bagnardi* determined that the presumption that educational and religious uses are always in furtherance of the public welfare may be rebutted by demonstrating that the proposed uses may actually have a "net negative impact" on the community.⁵²

II. Religion Cases

A. Federal Court Review of First Amendment Implications

The primary distinction between the treatment of educational and religious uses relates to the additional impediment on the exercise of local zoning authority as the result of the first amendment free exercise implications of governmental restrictions on religious institutions. Among the preeminent precepts of the United States and New York Constitutions is the guaran-

49. See *infra* notes 167-174 and accompanying text.

50. *Bagnardi*, 68 N.Y.2d at 594, 503 N.E.2d at 514, 510 N.Y.S.2d at 866.

51. See *Jewish Reconstructionist Synagogue*, 38 N.Y.2d at 292, 342 N.E.2d at 541, 379 N.Y.S.2d at 757 (Jones, J., dissenting); *id.* at 291, 342 N.E.2d at 540, 379 N.Y.S.2d at 756 (Breitel, C.J., concurring); *Schwab*, 68 A.D.2d at 651, 417 N.Y.S.2d at 994 (Suozzi, J., dissenting).

52. *Bagnardi*, 68 N.Y.2d at 589, 503 N.E.2d at 511, 510 N.Y.S.2d at 863.

teed protection of the free exercise of religion.⁵³ Although the United States Supreme Court has never addressed the issue, the federal courts are considerably more deferential to municipal exclusion of religious uses from residential areas and regulation of such uses, than are the New York courts.⁵⁴ It has been suggested that the federal courts have applied the free exercise analysis "in a manner that is so restrictive as to effectively exclude land use regulations from the scope of the free exercise clause."⁵⁵ These decisions have, in effect, concluded that the "burdens imposed upon religious practices by zoning . . . laws are not . . . the sort of religious burdens that merit constitutional protection."⁵⁶ In *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*,⁵⁷ for example, the sixth circuit determined that the free exercise clause did not bar a zoning law's exclusion of churches from residential neighborhoods.⁵⁸ Similarly, the eleventh circuit determined in *Grosz v. City of Miami Beach*⁵⁹ that the application of a zoning ordinance to prohibit the use of a single-family residence by its owners for organized religious services did not violate the first amendment.⁶⁰ Lastly, in *Congregation Beth Yitzchok of Rockland, Inc. v. Town of Ramapo*,⁶¹ a district court, denying injunctive relief, indicated that a religious school was subject to municipal requirements for site-plan approval, the securing of a certificate of occupancy, safety inspections, and compliance with the New York State Uniform Fire Prevention and Building Code.⁶²

In *Lakewood Congregation*,⁶³ a Jehovah's Witnesses congre-

53. U.S. CONST. amend. I; N.Y. CONST. art. I, § 3.

54. See *infra* notes 63-125 and accompanying text.

55. Note, *Land Use Regulation and the Free Exercise Clause*, 84 COLUM. L. REV. 1562, 1564 (1984).

56. *Id.*

57. 699 F.2d 303 (6th Cir. 1983), *cert. denied*, 464 U.S. 815 (1983).

58. *Id.* at 309.

59. 721 F.2d 729 (11th Cir. 1983), *reh'g denied*, 727 F.2d 1116 (11th Cir. 1984), *cert. denied*, 469 U.S. 827 (1984).

60. *Id.* at 741.

61. 593 F. Supp. 655 (S.D.N.Y. 1984).

62. N.Y. COMP. CODES R. & REGS. tit. 9, §§ 600.1-1400.14 (1983).

63. 699 F.2d 303 (6th Cir. 1983), *cert. denied*, 464 U.S. 815 (1983). For a criticism of the application of free exercise analysis in *Lakewood*, see Comment, *Zoning Ordinances Affecting Churches: A Proposal For Expanded Free Exercise Protection*, 132 U. PA. L. REV. 1131 (1984).

gation challenged a zoning ordinance's exclusion of churches from most residential districts in the city.⁶⁴ The court began its analysis of the applicable standard of review by observing that "[i]f the ordinance does infringe the Congregation's first amendment right, the city must justify the ordinance by a compelling governmental interest."⁶⁵ If, on the other hand, no first amendment infringement is imposed, the court is required to determine whether the congregation is denied the right to use its property without due process. Utilizing the due process standard first enunciated in *Village of Euclid v. Ambler Realty Co.*,⁶⁶ a zoning regulation will be sustained if it is reasonable and substantially related to concerns of public welfare.⁶⁷

The extent to which government imposes an economic burden on the exercise of religious freedom is the determinant of the infringement.⁶⁸ A regulation which merely makes one's religious observance more expensive does not infringe on an individual's freedom of exercise since "[i]nconvenient economic burdens on religious freedom do not rise to a constitutionally impermissible infringement of free exercise."⁶⁹ While religious beliefs are absolutely protected by the Constitution from government infringement, "[p]ractices flowing from religious beliefs merit protection [only] when they are shown to be integrally related to the underlying beliefs."⁷⁰

Applying such analysis to determine whether the zoning ordinance impermissibly infringed on the congregation's free exer-

64. 699 F.2d at 305 (zones in which church buildings were not permitted comprised ninety percent of city's total land area).

65. *Id.* (citing *Sherbert v. Verner*, 374 U.S. 398 (1963); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Wisconsin v. Yoder*, 406 U.S. 205 (1972)).

66. 272 U.S. 365 (1926).

67. *Id.* at 395.

68. "As a general rule, the greater the cost of practicing one's religion, the more probable that the statute creates an unconstitutional infringement." *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303, 305 (6th Cir. 1983).

69. *Id.* at 306 (citing *Braunfeld*, 366 U.S. at 607).

70. *Id.* "The centrality of the burdened religious observance to the believer's faith influences the determination of an infringement. Religious observances in the form of beliefs are absolutely protected from governmental infringement." *Id.* (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)). See also *Yoder*, 406 U.S. at 218; *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 653 (1981); *United States v. Lee*, 455 U.S. 252, 261 (1982).

cise of religion, the court was required to evaluate the nature of the religious observation and identify the nature of the burden placed on the religious observance.⁷¹ The court found that the “infringed” activity — the construction of a church building — had no religious or ritualistic significance for Jehovah’s Witnesses; it was “not a fundamental tenet of the Congregation’s religious beliefs.”⁷² The restrictions of the zoning law did not prohibit the members of the congregation from practicing their faith in homes, schools, or churches elsewhere in the city.⁷³ The court characterized the burdens imposed as merely constituting “an indirect financial burden and a subjective aesthetic burden.”⁷⁴ The ordinance did not, in the opinion of the court, pressure the congregation in any way to abandon its beliefs or observances.⁷⁵ Although the regulation permitted the construction of churches in only ten percent of the municipality, and lots in those areas might be beyond the economic means of the congregation or fail to satisfy the members’ aesthetic tastes, “the First Amendment does not require the City to make all land or even the cheapest or most beautiful land available to churches.”⁷⁶ Since the ordinance merely regulated secular activities and may have made the practice of religious beliefs somewhat more expensive, the court found no free exercise infringement.⁷⁷

Since the court found no religious infringement, the constitutionality of the regulation was evaluated by the due process standards of *Euclid*.⁷⁸ The ordinance easily satisfied the *Euclid*

71. *Lakewood Congregation*, 699 F.2d at 306.

72. *Id.* at 307. “At most the Congregation can claim that its freedom to worship is tangentially related to worshipping in its own structure.” *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 307-08. “It does not pressure the Congregation to abandon its religious beliefs through financial or criminal penalties.” *Id.* at 307.

78. In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the Supreme Court held zoning ordinances to be a legitimate exercise of a municipality’s police power if not “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare.” *Id.* at 395. Recognizing a presumption of validity of a zoning law, the Court also held that “[t]he inclusion of a reasonable margin to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity.” *Id.* at 388-89.

standard since the objectives of the law, controlling traffic congestion and off-street parking, were not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare."⁷⁹

In a decision involving a similar dispute, the eleventh circuit also rejected contentions that municipal objectives promoted by a zoning law did not outweigh the burden imposed upon the free exercise of religion. In *Grosz v. City of Miami Beach*,⁸⁰ the court upheld the application of a zoning law to bar the use of an accessory building for conducting religious services in a district zoned exclusively for single-family residential use.⁸¹ The city zoning law permitted churches, synagogues, and other religious institutions in every other zoning district, comprising fifty percent of the city's residential area.⁸² Although daily services rarely caused a substantial disturbance to the neighborhood, large services did annoy the neighbors.⁸³

Observing that the "doctrinal centerpiece" of free exercise analysis is the balancing of competing governmental and religious interests, the court opined that governmental action must first satisfy two threshold tests before such balancing is permitted.⁸⁴ The court found that the zoning regulation satisfied the first test, which required that the governmental action did not regulate religious beliefs, but involved only conduct.⁸⁵ The zoning law also satisfied the second threshold test, that a law have both a secular purpose⁸⁶ and a secular effect.⁸⁷

79. *Lakewood*, 699 F.2d at 308 (quoting *Euclid*, 272 U.S. at 395).

80. 721 F.2d 729 (11th Cir. 1983), *reh'g denied*, 727 F.2d 1116 (11th Cir. 1984), *cert. denied*, 469 U.S. 827 (1984).

81. The plaintiff, a rabbi and leader of an Orthodox Jewish sect, was required by his religious beliefs to conduct religious services twice a day with a congregation of at least ten adult males. While the congregation attending services generally consisted of ten to twenty family members, friends, and neighbors, the assemblage frequently numbered as many as fifty persons, some of whom were neither friends, family members, or neighbors. Members of the public were admitted to services and, on rare occasions, people were solicited to attend services. The building was stocked with religious articles and benches capable of accommodating over thirty persons. *Id.* at 731.

82. *Id.* at 732.

83. *Id.* at 731-32.

84. *Id.* at 733.

85. "The government may never regulate religious beliefs; but, the Constitution does not prohibit absolutely government regulation of religious conduct." *Id.*

86. "[A] law may not have a sectarian purpose — governmental action violates the

In determining the validity of the challenged governmental regulation, "the balance depends upon the cost to the government of altering its activity to allow the religious practice to continue unimpeded versus the cost to the religious interest imposed by the government activity."⁸⁸ In evaluating the first variable of the equation, courts must recognize that "the burden on the governmental interest depends upon the importance of the underlying policy interests and the degree of impairment of those interests if the regulation were changed to impose no burden on religious conduct."⁸⁹ The government must, in any event, satisfy the "least restrictive means test" — that is, if the government can accomplish its goal through a means which does not burden the free exercise of religion, it must utilize that nonburdening technique.⁹⁰ Additionally, in implementing the "government burden formula, . . . [the court] must consider the impact of a specific, religion-based exception upon government's policy objectives."⁹¹

On the other side of the scale, a court is required to weigh the burden imposed on religion by examining the importance of "[t]he burdened practice within the particular religion's doctrines" and the amount of interference caused by the government's regulation.⁹² In determining the importance of the religious practice, courts "often restrict themselves to determining whether the challenged conduct is rooted in religious belief or involves only secular, philosophical or personal choices."⁹³ Since

Constitution if it is based upon disagreement with religious tenets or practices, or if it is aimed at impeding religion." *Id.* (citing *Braunfeld*, 366 U.S. at 607).

87. "[A] law violates the free exercise clause if the 'essential effect' of the governmental action is to influence negatively the pursuit of religious activity or the expression of religious belief." *Grosz*, 721 F.2d at 733.

88. *Id.* at 734. In the opinion of the court, "[t]his principle marks the path of least impairment of constitutional values." *Id.*

89. *Id.*

90. *Id.* In the court's balancing analysis, if government can accomplish its policy through a non-burdening technique, the degree of impairment is zero. In such a case, "any sectarian interest, regardless of how lightly it weighs, wins the balancing." *Id.*

91. *Id.* See also *Braunfeld*, 366 U.S. at 606; *Sherbert*, 374 U.S. at 403; *Lee*, 455 U.S. at 259.

92. *Id.* at 735.

93. *Id.* (citing *Yoder*, 406 U.S. at 215-16; *EEOC v. Mississippi College*, 626 F.2d 477, 488 (5th Cir. 1980)). The court noted that although an examination of the importance of a religious belief "occasionally proves instructive," religious doctrine may merely be a

only conduct flowing from religious belief warrants constitutional protection, "no weight measures on the side of religion unless the government action ultimately affects a religious practice."⁹⁴ Regulations that burden religious conduct by focusing on the conduct itself, the *Grosz* court concluded, impose a heavy burden on religion regardless of whether the contested activity constitutes the imposition of a penalty or the denial of a benefit as a cost of practicing one's religion.⁹⁵

In reconciling governmental action with a free exercise challenge, "inroads on religious liberty" may be sustained upon a demonstration of a compelling state interest.⁹⁶ Before a trial court is required to examine the governmental interest advanced, however, the action must pass the threshold tests of conduct focus, secular purpose, and secular effect.⁹⁷ In balancing the respective interests, "[i]f avoiding the burden on government rises to the very upper ranges of government interest, a free exercise challenge will fail."⁹⁸ With the exception of instances involving governmental interests of the highest order, the federal courts must evaluate the interests on an ad hoc basis.⁹⁹

In evaluating the Miami Beach zoning ordinance, the *Grosz* court found that the threshold tests were easily satisfied. Since the zoning law affected prayer and religious services, it obviously involved conduct.¹⁰⁰ Secondly, the court determined that it clearly had both a secular purpose and effect¹⁰¹ since the city's objective in enforcing its zoning laws was the preservation of the residential quality of its zoning districts.¹⁰² The objectives of protecting inhabitants of residential neighborhoods from traffic, noise and litter, the avoidance of spot zoning, and the preserva-

reflection of an individual's religious interpretations. *Id.*

94. *Id.* at 736.

95. *Id.* at 737.

96. *Id.* The standard was described in *Yoder* as "interest of the highest order." *Id.* (citing *Yoder*, 406 U.S. at 215).

97. See *supra* notes 84-87 and accompanying text.

98. *Grosz*, 721 F.2d at 737.

99. *Id.* at 738.

100. *Id.*

101. The regulation was not motivated by disagreement with the religious beliefs or aimed at impeding religion. Moreover, given the traditional function of zoning laws in protecting the public welfare and the incidental nature of the burden imposed on religion, the effect of the regulation was deemed to be secular. *Id.*

102. *Id.*

tion of a coherent land use scheme are well-recognized as legitimate and significant governmental goals.¹⁰³ Evaluating the "total inconsistency" between the city's objectives and the crowds, noise, and disturbance generated by the religious services, the court found that the ordinance easily satisfied the least restrictive means test.¹⁰⁴ Moreover, the granting of a religious based exemption would be inappropriate since such an exception would defeat the purpose of the regulation.¹⁰⁵ The court concluded that "the important objectives underlying zoning and the degree of infringement of those objectives caused by allowing the religious conduct to continue place a heavy weight on the government's side of the balancing scale."¹⁰⁶

On the other side of the scale, in evaluating the burden on religion, the court was required first to determine whether the conduct of the religious institution constituted a religious practice.¹⁰⁷ The court considered that the solicitation of neighbors to attend services and the participation of congregations of larger than ten at services was not integral to the plaintiff's faith.¹⁰⁸ The burden imposed by the regulation, in the opinion of the court, "stands toward the lower end of the spectrum" in comparison to religious infringement scrutinized in previous free exercise cases.¹⁰⁹ The zoning regulation did not prohibit religious conduct per se — it merely prohibited acts in furtherance of

103. *Id.* The Supreme Court held in *Euclid* that the segregation of residential, business, and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section . . . it will increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections; decrease noise and other conditions which produce or intensify nervous disorders, preserve a more favorable environment in which to rear children . . .

272 U.S. at 394. See also *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1973).

104. *Grosz*, 721 F.2d at 738.

105. *Id.* at 739. "A religion based exception would clearly and substantially impair the City's policy objectives." *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* While unable to define precisely the burden imposed by the zoning law, in terms of convenience, dollars, or aesthetics, the court held that the burden did not rise to the level of criminal liability. For cases in which the burden rose to the level of criminal liability, see *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Gillette v. United States*, 401 U.S. 437 (1971).

that conduct in certain areas of the city. The plaintiff was not, however, confronted with the limited choice of ceasing his conduct or incurring criminal penalties,¹¹⁰ but possessed the alternative to conduct services in an appropriate zone.¹¹¹ The court concluded its analysis by finding that the relative weights of the burdens favored the city and that the city's interest outweighed the free exercise interest asserted.¹¹²

In *Congregation Beth Yitzchok of Rockland, Inc. v. Town of Ramapo*,¹¹³ the court's determination indicated that religious uses are required to comply with municipal inspections, permits, and codes which seek to protect the safety of the users of the facility. In *Congregation Beth Yitzchok*, the plaintiff sought a preliminary injunction to prohibit the municipality from enforcing certain of its regulations that were claimed to interfere with the plaintiff's operation of a religious school for the teaching of Jewish laws and customs to children between the ages of three and five.¹¹⁴ The plaintiff asserted that the enforcement of the town regulations had forced it to close its nursery school and that the application of those requirements against a religious school violated the free exercise clause.¹¹⁵ The town code required installation of an automatic alarm and fire detection system and site plan approval as a condition of the issuance of a certificate of occupancy.¹¹⁶ The premises were also subject to compliance with the New York State Uniform Fire Prevention and Building Code.¹¹⁷

110. *Grosz*, 721 F.2d at 739. See *supra* note 109.

111. *Grosz*, 721 F.2d at 739. The plaintiffs resided within four blocks of a zone which permitted organized, publicly attended religious services. The court reasoned that the plaintiffs could secure a site in an appropriate zone for holding services or could make their home in a zone which permitted such services. *Id.*

112. *Id.* at 741.

On the free exercise side of the balance weighs the burden that Appellees bear of conducting their services in compliance with applicable zoning restrictions or relocating in a suitably zoned district. Countering on the government's side is the substantial infringement of the City's zoning policy that would occur were the conduct allowed to continue.

Id.

113. 593 F. Supp. 655 (S.D.N.Y. 1984).

114. *Id.* at 657.

115. *Id.* at 658.

116. *Id.* at 661.

117. *Id.*

The court found that while the intended purpose of the contested ordinance was secular, the effect was burdensome to the plaintiff's religious observance.¹¹⁸ Although compliance with the law made the practice of the plaintiff's beliefs more difficult, the alleged burden was more attenuated than the imposition of criminal or monetary sanctions or the loss of a significant benefit or privilege. The court found that the purported burden was not inherently inconsistent with the plaintiff's religious beliefs.¹¹⁹

In applying the balancing analysis,¹²⁰ the court concluded that the public safety, health, and welfare were the objectives underlying the town's interest in enforcing the challenged ordinance provisions.¹²¹ The court determined that "[s]uch an interest is of a magnitude to justify even substantial inroads on the free exercise of religion and clearly outweighs the indirect and seemingly remediable burden on plaintiff's religious liberty."¹²² The court found that the burden on the congregation was far less substantial than in either *Grosz* or *Lakewood Congregation* and that the town's interest was far more compelling.¹²³ The regulations did not prohibit religious conduct per se, nor did it prohibit such conduct on plaintiff's premises. The town merely insisted "that plaintiff comply with certain regulations mandated

[The] plaintiff would be required to submit a set of professionally prepared construction drawings demonstrating compliance with various fire-safety-related structural features, including but not limited to a fire-resistant wall between the garage and the synagogue; a proper fire enclosure for the building's heating equipment; an approved means of egress from the synagogue and school area; and private emergency lighting, portable fire extinguishers, smoke and fire detectors and a fire alarm system . . .

Id. at 662 (citations omitted).

118. *Id.* at 658. "[I]f the . . . purpose of a law is to regulate religious beliefs, to impede the observance of all religions or a particular religion, or to discriminate invidiously between religions, that law cannot pass constitutional muster." *Id.* (citing *Braunfeld*, 366 U.S. at 607).

119. *Congregation Beth Yitzchok of Rockland, Inc. v. Town of Ramapo*, 593 F. Supp. 655, 659 (S.D.N.Y. 1984). The plaintiff did not assert that the requirement of a certificate of occupancy or the installation of fire safety equipment violated any tenet of its religion. *Id.*

120. *See supra* text accompanying note 88.

121. *Congregation Beth Yitzchok*, 593 F. Supp. at 663.

122. *Id.* "[W]hile the freedom to harbor religious beliefs is absolute, the freedom to engage in religious practices is not . . . [S]uch practices are subject to regulation for the protection of society." *Id.* (quoting *Holy Spirit Ass'n for Unification of World Christianity v. Rosenfeld*, 91 A.D.2d 190, 197, 458 N.Y.S.2d 920, 925 (2d Dep't 1983)).

123. *Congregation Beth Yitzchok*, 593 F. Supp. at 664.

by its use of the premises as a synagogue and nursery school."¹²⁴ In denying the preliminary injunction, the court found that even though the congregation had other avenues open to it in order to operate the school, it chose not to pursue them.¹²⁵

B. *New York Decisions*

In contrast to the interpretation of the federal courts, the New York courts have historically construed these principles to establish "the primacy in principle of religions over local zoning considerations."¹²⁶ Accordingly, "[r]eligious structures enjoy a constitutionally protected status which severely curtails the permissible extent of governmental regulation in the name of the police powers"¹²⁷ Although the freedom of religious belief is absolute, the freedom to engage in religious practices is not.¹²⁸ As a result, "religious practices are subject to regulation for the protection of society."¹²⁹ When an irreconcilable conflict exists, the community must accommodate the needs of a religious institution and tolerate the resultant inconvenience to the residents of the impacted area unless the religious use "may actually de-

124. *Id.*

125. *Id.*

I continue to be troubled by plaintiff's failure to pursue other available remedies to accomplish its objective of operating a religious nursery school [T]he availability of a means to keep its school in operation must weigh in the calculus of hardships considered in the context of a preliminary injunction motion.

Id.

126. *Slevin v. Long Island Jewish Medical Center*, 66 Misc. 2d 312, 315, 319 N.Y.S.2d 937, 943 (Sup. Ct. Nassau County 1971). The court of appeals has recognized "the peculiarly pre-eminent status of religious institutions under the First Amendment provision for free exercise of religion" *Jewish Reconstructionist Synagogue of the North Shore, Inc. v. Incorporated Village of Roslyn Harbor*, 38 N.Y.2d 283, 288, 342 N.E.2d 534, 538, 379 N.Y.S.2d 747, 753 (1975), *cert. denied*, 426 U.S. 950 (1976).

127. *Westchester Reform Temple v. Brown*, 22 N.Y.2d 488, 496, 239 N.E.2d 891, 896, 293 N.Y.S.2d 297, 303 (1968). *See also* *Community Synagogue v. Bates*, 1 N.Y.2d 445, 458, 136 N.E.2d 488, 496, 154 N.Y.S.2d 15, 26 (1956) ("The men and women who . . . came to Plymouth in order to worship God where they wished and in their own way must have thought they had terminated the interference of public authorities with free and unhandicapped exercise of religion.").

128. *See* *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963); *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940).

129. *Holy Spirit Ass'n for the Unification of World Christianity v. Rosenfeld*, 91 A.D.2d 190, 197, 458 N.Y.S.2d 920, 925 (2d Dep't 1983) (citations omitted).

tract from the public's health, safety, welfare or morals."¹³⁰

The New York courts have consistently taken an expansive view of what constitutes a religious use and have held that a religious use is more than just prayer and worship.¹³¹ Moreover, when expansion of religious facilities is needed to accommodate those who wish to take advantage of the services offered by religious institutions, the same preferential analysis is applied to the proposed expansion.¹³² The activities constituting religious or accessory uses which are entitled to preferential treatment have also been broadly construed. It has been suggested that "[t]he language of the courts in several cases indicates that it is difficult to find an activity which, if sponsored by the church, would not share the immunity."¹³³ Among the uses which have been construed to be primary or accessory religious uses are: a parochial school, meeting room, parking lot, and playground;¹³⁴ a drug center;¹³⁵ a day care center;¹³⁶ and a facility for the teaching of secular subjects.¹³⁷ Also held to constitute accessory uses are: a gymnasium;¹³⁸ facilities for meetings of Boy Scouts and Girl Scouts;¹³⁹ and an office from which the house of worship or school is administered.¹⁴⁰

The court of appeals first enunciated the paramount status

130. *Cornell Univ. v. Bagnardi*, 68 N.Y.2d 583, 595, 503 N.E.2d 509, 515, 510 N.Y.S.2d 861, 867 (1986). *Cf. Westchester Reform Temple*, 22 N.Y.2d at 494, 239 N.E.2d at 895, 293 N.Y.S.2d at 302 (A religious use may be banned only if it "will have a direct and immediate adverse effect on the health, safety or welfare of the community."); *Rosenfeld*, 91 A.D.2d at 191-92, 458 N.Y.S.2d at 926.

131. *See Bates*, 1 N.Y.2d at 453, 136 N.E.2d at 493, 154 N.Y.S.2d at 21.

132. *Westchester Reform Temple*, 22 N.Y.2d at 493, 239 N.E.2d at 894, 293 N.Y.S.2d at 301.

133. RATHKOPF, *supra* note 25, at § 20.03.

134. *Diocese of Rochester v. Planning Bd.*, 1 N.Y.2d 508, 526, 136 N.E.2d 827, 836-37, 154 N.Y.S.2d 849, 862 (1956).

135. *Slevin*, 66 Misc. 2d at 318, 319 N.Y.S.2d at 946.

136. *Unitarian Universalist Church of Cent. Nassau v. Shorten*, 63 Misc. 2d 978, 980, 314 N.Y.S.2d 66, 68-69 (Sup. Ct. Nassau County 1970).

137. *Westbury Hebrew Congregation, Inc. v. Downer*, 59 Misc. 2d 387, 388, 302 N.Y.S.2d 923, 925 (Sup. Ct. Nassau County 1969).

138. *Shaffer v. Temple Beth Emeth of Flatbush*, 198 A.D. 607, 609, 190 N.Y.S. 841, 843 (2d Dep't 1921).

139. *Garden City Jewish Center v. Village of Garden City*, 157 N.Y.S.2d 435, 438 (Sup. Ct. Nassau County 1956).

140. *Faith for Today, Inc. v. Murdock*, 11 A.D.2d 718, 719, 204 N.Y.S.2d 751, 753-54 (2d Dep't 1960), *aff'd*, 9 N.Y.2d 761, 174 N.E.2d 743, 215 N.Y.S.2d 70 (1961).

of religious uses in *Community Synagogue v. Bates*.¹⁴¹ In *Bates*, a congregation applied to the zoning board of appeals for a number of variances and for a special-use permit in order to convert a single-family dwelling into a place of worship and facilities for a Sunday School, men's club, women's social group, and youth activities. Invalidating the denial, the court of appeals announced the New York standard for construing what constitutes a religious use for purposes of favored treatment under zoning ordinances:

A church is more than merely an edifice affording people the opportunity to worship God. Strictly religious uses and activities are more than prayer and sacrifice and all churches recognize that the area of their responsibility is broader than leading the congregation in prayer. Churches have always developed social groups for adults and youth where the fellowship of the congregation is strengthened with the result that the parent church is strengthened. . . . To limit a church to being merely a house of prayer and sacrifice would, in a large degree, be depriving the church of the opportunity of enlarging, perpetuating and strengthening itself and the congregation.¹⁴²

The court noted, however, "that the religious aim of strengthening the congregation through fellowship may not be . . . perverted into a justification for establishing a place of entertainment, such as a country club"¹⁴³ The court also rejected the village's contention that it had the authority to deny an application for the location of a church at any particular site, noting that "if the municipality ha[d] the unfettered power to say that the 'precise spot' selected is not the right one, the municipality [would have] the power to say eventually which is the proper 'precise spot.'"¹⁴⁴ In effect, the court "forbade localities to bar religious uses on the ground that they had not met a bur-

141. 1 N.Y.2d 445, 136 N.E.2d 488, 154 N.Y.S.2d 15 (1956).

142. *Id.* at 453, 136 N.E.2d at 493, 154 N.Y.S.2d at 21-22.

When a member of the congregation cements friendships with other members of the congregation, the church benefits and becomes stronger. It is a religious activity for the church to provide a place for these social groups to meet, since the church by so doing is developing into a stronger and closer knit religious unit.

Id. at 453, 136 N.E.2d at 493, 154 N.Y.S.2d at 22.

143. *Id.*

144. *Id.* at 458, 136 N.E.2d at 496, 154 N.Y.S.2d at 26.

den of proof that other suitable locations could not be found.”¹⁴⁵

In a companion case, *Diocese of Rochester v. Planning Board*,¹⁴⁶ the court of appeals determined that “a zoning ordinance may not *wholly exclude* a church or synagogue from any residential district . . . [since such a restriction] bears no substantial relation to the public health, safety, morals, peace, or general welfare of the community.”¹⁴⁷ Churches (and schools), the court noted, occupy a different status from commercial enterprises and, as a result, different considerations must apply.¹⁴⁸ Accordingly, the court found that any purported adverse effect on property values resulting from the operation of a religious (or educational) use is an unauthorized consideration and that “mere pecuniary loss to a few persons should not bar” the establishment of such uses.¹⁴⁹ Also considered by the court to be irrelevant was any potential loss in tax revenues, as well as noise, traffic hazards, or other inconveniences which might result from the establishment of such religious or educational uses.¹⁵⁰ The court, therefore, found that the planning board’s denial of the Diocese’s application to erect a church, school, meeting room, and parking area based upon the foregoing irrelevant considerations, bore no substantial relation to the promotion of public health, safety, morals, or general welfare.¹⁵¹ As a harbinger of the court’s *Bagnardi* decision thirty years in the future, however, the court opined that municipalities may not be wholly powerless with respect to such uses: “That is not to say that ap-

145. *Jewish Reconstructionist Synagogue*, 38 N.Y.2d at 287, 342 N.E.2d at 537, 379 N.Y.S.2d at 752.

146. 1 N.Y.2d 508, 136 N.E.2d 827, 154 N.Y.S.2d 849 (1956).

147. *Id.* at 522, 136 N.E.2d at 834, 154 N.Y.S.2d at 858 (citing *North Shore Unitarian Soc’y v. Village of Plandome*, 200 Misc. 524, 525, 109 N.Y.S.2d 803, 804 (Sup. Ct. Nassau County 1951)). *Diocese of Rochester* is the seminal pronouncement of the “ex-empt” status of educational institutions.

148. *Diocese of Rochester*, 1 N.Y.2d at 523, 136 N.E.2d at 834, 154 N.Y.S.2d at 859.

149. *Id.* at 524, 136 N.E.2d at 835, 154 N.Y.S.2d at 861.

150. *Id.* at 524-25, 136 N.E.2d at 836, 154 N.Y.S.2d at 861-62. *Cf. Bagnardi*, 68 N.Y.2d at 595, 503 N.E.2d at 515, 510 N.Y.S.2d at 867.

[E]ducational and religious uses which would unarguably be contrary to the public’s health, safety or welfare need not be permitted at all. . . . Such uses are clearly not what the court had in mind when it stated that traffic and similar problems are outweighed by the benefits a church or school brings

68 N.Y.2d at 595, 503 N.E.2d at 515, 510 N.Y.S.2d at 867 (citations omitted).

151. *Diocese of Rochester*, 1 N.Y.2d at 526, 136 N.E.2d at 837, 154 N.Y.S.2d at 863.

propriate restrictions may never be imposed with respect to a church and school and accessory uses, nor is it to say that under no circumstances may they ever be excluded from designated areas."¹⁵²

In *Westchester Reform Temple v. Brown*,¹⁵³ the court of appeals determined that "when the educational and religious needs of the community have grown, so that existing structures are inadequate, the same reasoning which [it] applied to the initial construction or use of the facilities must pertain to a proposed expansion . . . of the facilities."¹⁵⁴ The court also held that a municipality may sustain the denial of the establishment or expansion of a religious use only if it is convincingly shown that the use "will have a direct and immediate adverse effect upon the health, safety or welfare of the community."¹⁵⁵ The court opined that while factors which may justify the exclusion of commercial uses from residential areas are an inadequate justification when religious uses are involved, those factors may be considered for the purpose of mitigating against or minimizing traffic hazards and the effect of the religious use on the surrounding area.¹⁵⁶ Conditions imposed to mitigate against undesirable effects of a religious use, however, may be considered to be invalid if they require more than a modest increase in ex-

152. *Id.*

153. 22 N.Y.2d 488, 239 N.E.2d 891, 293 N.Y.S.2d 297 (1968).

154. *Id.* at 493, 239 N.E.2d at 894, 293 N.Y.S.2d at 301.

155. *Id.* at 494, 239 N.E.2d at 895, 293 N.Y.S.2d at 302. *Cf. Bagnardi*, 68 N.Y.2d at 595, 503 N.E.2d at 515, 510 N.Y.S.2d at 867 ("[E]ducational and religious uses which would unarguably be contrary to the public's health, safety or welfare need not be permitted at all."). *See infra* notes 371-377 and accompanying text.

156. *Westchester Reform Temple*, 22 N.Y.2d at 496, 239 N.E.2d at 896, 293 N.Y.S.2d at 303-04.

We have not said that considerations of the surrounding area and potential traffic hazards are unrelated to public health, safety, or welfare when religious structures are involved. We have simply said that they are outweighed by the constitutional prohibition against the abridgement of the free exercise of religion by the public benefit and welfare which is itself an attribute of religious worship in a community.

Id. at 496, 239 N.E.2d at 896, 293 N.Y.S.2d at 304. *See also Bagnardi*, 68 N.Y.2d at 596, 503 N.E.2d at 515, 510 N.Y.S.2d at 867 (reasonable conditions relating to the health, safety and welfare may be imposed on religious and educational institutions to the same extent that they may be imposed on commercial enterprises). *See infra* notes 378-381 and accompanying text.

penditures by the religious institution.¹⁵⁷ The *Westchester Reform Temple* court, however, held that where an irreconcilable conflict exists between the right to erect a religious structure and the potential hazards of traffic or diminution in property value, the rights of religion must prevail.¹⁵⁸

In *Jewish Reconstructionist Synagogue of the North Shore, Inc. v. Incorporated Village of Roslyn Harbor*,¹⁵⁹ the court held unconstitutional an ordinance which required a special permit as a condition of conducting a religious use and required denial of that special permit application if the religious use would have any detrimental effect on public health, safety, or general welfare, or if the setback requirements could not be satisfied.¹⁶⁰ The ordinance required a 100-foot setback for religious uses in all instances, and the requirement could not be varied.¹⁶¹ The court of appeals posed the issue as whether the ordinance's provisions contained guidelines which permitted a compromise between the detrimental impacts on the area and the constitutional protections afforded religious institutions.¹⁶²

Since the ordinance subjected religious uses to an invariable setback requirement, it offended the requirement that efforts be made to accommodate religious uses, particularly since situations might exist in which no detriment to public safety or welfare would result from a setback of less than that required.¹⁶³ Additionally, the court found that there was insufficient evidence to justify application of such a requirement to the property.¹⁶⁴ While the record contained some indication of the existence of traffic or noise-related inconveniences, the court found that the record lacked "hard evidence" to that effect and that no effort was made to mitigate the inconveniences, "short of out-

157. *Westchester Reform Temple*, 22 N.Y.2d at 497, 239 N.E.2d at 897, 293 N.Y.S.2d at 304. Cf. *Bagnardi*, 68 N.Y.2d at 596, 503 N.E.2d at 516, 510 N.Y.S.2d at 868. See *infra* note 381 and accompanying text.

158. *Id.* at 497, 239 N.E.2d at 896, 293 N.Y.S.2d at 304. See also *Bagnardi*, 68 N.Y.2d at 596, 503 N.E.2d at 516, 510 N.Y.S.2d at 868.

159. 38 N.Y.2d 283, 342 N.E.2d 534, 379 N.Y.S.2d 747 (1975), *cert. denied*, 426 U.S. 950 (1976).

160. *Id.* at 289, 342 N.E.2d at 539, 379 N.Y.S.2d at 753-54.

161. *Id.* at 289, 342 N.E.2d at 539, 379 N.Y.S.2d at 754.

162. *Id.* at 288, 342 N.E.2d at 538, 379 N.Y.S.2d at 753.

163. *Id.* at 289, 342 N.E.2d at 539, 379 N.Y.S.2d at 754.

164. *Id.*

right denial of the variance."¹⁶⁵ The court also rejected the village's argument that since most of the congregation's members resided outside of the village, the synagogue should be required to demonstrate that there was no more suitable location for the synagogue.¹⁶⁶

While the decisions of the court of appeals have enunciated the broad limits of municipal authority to regulate religious uses, it has been left to the appellate division and lower courts to resolve disputes regarding the application of specific zoning restrictions to various religious uses and factual situations. For example, in *American Friends of the Society of St. Pius, Inc. v. Schwab*,¹⁶⁷ the second department announced the critical standard of review to be utilized in examining allegations of threats to the welfare of the community posed by a religious use.¹⁶⁸ The court rebuffed efforts of a village to deny an application for permission to use property as a church and residence for priests. Rejecting claims that the denial was appropriate due to allegations of increases in traffic, danger to area residents, lot coverage in excess of that allowed by the zoning ordinance, drainage and sewerage problems, and destruction of the character of the area,¹⁶⁹ the court determined that

[h]uman experience teaches us that public officials, when faced with pressure to bar church uses by those residing in a residential neighborhood, tend to avoid any appearance of an antireligious stance and temper their decision by carefully couching their grounds for refusal to permit such use in terms of traffic dangers, fire hazards and noise and disturbance, rather than on such crasser grounds as lessening of property values or loss of open space or entry of strangers into the neighborhood or undue crowding of the area. Under such circumstances it is necessary to most carefully scrutinize the reasons advanced for a denial to insure that they are real and not merely pretexts used to preclude

165. *Id.* at 289-90, 342 N.E.2d at 539, 379 N.Y.S.2d at 754.

166. *Id.* at 290, 342 N.E.2d at 540, 379 N.Y.S.2d at 755-56.

167. 68 A.D.2d 646, 417 N.Y.S.2d 991 (2d Dep't 1979).

168. The decision has been described as "perhaps the most far-reaching New York assessment of the free exercise considerations implicated when zoning unfavorably affects religious organizations . . ." Walker, *What Constitutes a Religious Use for Zoning Purposes*, 27 CATH. LAW, 129, 180 (1982).

169. *American Friends of the Soc'y of St. Pius v. Schwab*, 68 A.D.2d 646, 650, 417 N.Y.S.2d 991, 993 (2d Dep't 1979).

the exercise of constitutionally protected privileges.¹⁷⁰

As a result, the appellate division annulled the denial of the application and remitted the matter with directions to grant the application so that the establishment of the church would be facilitated while any detrimental effects would be mitigated.¹⁷¹

The second department sustained the denial of a special permit application made by Reverend Sun Myung Moon for the operation of a training and recruitment center in *Holy Spirit Association for the Unification of World Christianity v. Rosenfeld*.¹⁷² While the activities of the "Moonies" may have provoked a hostile reaction from the public, the record was devoid of evidence sufficient to demonstrate that their activities constituted a threat to the public health or welfare.¹⁷³ The law is clear that public intolerance, animosity, or unrest does not justify a prohibition of free assembly and association.¹⁷⁴ However, the church's misrepresentations to the zoning board of appeals, as well as violations of the zoning law while the application was pending, justified the denial of the special permit.¹⁷⁵ Thus the court held that "[n]othing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public."¹⁷⁶

The rights of religious organizations were expanded in *Islamic Society of Westchester and Rockland, Inc. v. Foley*,¹⁷⁷ in which the court invalidated the denial of an area variance required for the conversion of a single-family house into a Muslim house of worship and religious school.¹⁷⁸ The ordinance permitted religious institutions in the single-family district in which the property was located, but required that no building be

170. *Id.* at 649, 417 N.Y.S.2d at 993.

171. *Id.* at 651, 417 N.Y.S.2d at 994.

172. 91 A.D.2d 190, 458 N.Y.S.2d 920 (2d Dep't 1983). *See also* Anderson & Mayo, *Land Use Control, 1984 Survey of N.Y. Law*, 35 SYRACUSE L. REV. 485, 493-94 (1985).

173. *Rosenfeld*, 91 A.D.2d at 199, 458 N.Y.S.2d at 926.

174. *Id.* at 199, 458 N.Y.S.2d at 927.

175. *Id.* at 200, 458 N.Y.S.2d at 927.

176. *Id.* (quoting *Cantwell*, 310 U.S. at 306). "[I]f the church would not, or could not, comply with representations made while the application for a special use permit was pending, the zoning board could properly infer that it would not comply with conditions imposed on its proposed use." *Rosenfeld*, 91 A.D.2d at 201, 458 N.Y.S.2d at 928.

177. 96 A.D.2d 536, 464 N.Y.S.2d 844 (2d Dep't 1983).

178. *Id.*

nearer than 100 feet from any lot line or street. Portions of the existing dwelling were as close as 37.75 feet to the rear lot line of the property.¹⁷⁹ The zoning board of appeals denied the variance, finding that the petitioner had failed to demonstrate practical difficulties; that the variance was substantial; that the intended use of the property would generate excessive traffic on local roads and substantially impair the privacy, enjoyment, and use of the neighboring residential properties; and that petitioner could construct a new structure elsewhere on the property in conformance with the zoning regulations.¹⁸⁰

The second department noted that municipalities must apply the requirements of their zoning ordinances in a more flexible manner when religious institutions are involved.¹⁸¹ In rejecting the denial of the variance, the court held that there is "an affirmative duty on the part of a local zoning board to suggest measures to accommodate the planned religious use, without causing the religious institution to incur excessive additional costs, while mitigating the detrimental effects on the health, safety and welfare of the surrounding community."¹⁸² The greatest objection to the proposed variance involved plans to convert a garage near the property line into a congregational center. This conversion would necessarily center the most intensive use of the lot nearest to the highest concentration of residential dwellings.¹⁸³ Since the court concluded that there must be alternatives, so that the most intense use might be located farther from the lot lines, the application was remitted to the zoning board of appeals with directions to grant the variance, subject to such reasonable conditions as would permit the establishment of the religious use while mitigating the detrimental effects on the community.¹⁸⁴

The second department continued to recognize the elevated position of educational and religious organizations in *North Shore Hebrew Academy v. Wegman*.¹⁸⁵ Therein, the Village of

179. *Id.* at 537, 464 N.Y.S.2d at 845.

180. *Id.*

181. *Id.*

182. *Id.* (citations omitted).

183. *Id.* at 537, 464 N.Y.S.2d at 845-46.

184. *Id.* at 537, 464 N.Y.S.2d at 846.

185. 105 A.D.2d 702, 481 N.Y.S.2d 142 (2d Dep't 1984). See also Rice, *Zoning and*

Kings Point's zoning ordinance permitted public and private schools and houses of worship in residential districts upon the granting of a special permit from the board of trustees.¹⁸⁶ In addition to operating a Hebrew day school, the North Shore Hebrew Academy began to conduct classes in folk dancing and music on Sundays in violation of a previously issued special permit.¹⁸⁷ A subsequent application to amend the special permit to sanction such activities was denied, since "the board of trustees concluded that . . . [the] 'attendant noise and traffic is an unwarranted interference with the peaceful use and enjoyment of the properties in the neighborhood' and that the on-site parking facilities . . . were grossly inadequate for the [academy's] program."¹⁸⁸

The court concluded that the program was sufficiently related to the academy's overall educational and religious purposes to entitle it to the protections accorded religious and educational uses and that the board of trustees had unconstitutionally applied the village's zoning law in order to prohibit the expansion of those programs.¹⁸⁹ The village could not

prohibit the academy from conducting the Sunday . . . program[s] for the same reasons which would justify the exclusion or restriction of commercial activities, including the disruption of the tranquility customarily enjoyed by neighboring property owners on Sunday mornings by the noise and automobile traffic generated or expected to be generated by the academy's center for the performing arts.¹⁹⁰

In addition, the court determined that the board of trustees' "blanket prohibition of the Sunday classes in performing arts constitute[d] an impermissible interference in the academy's constitutionally protected educational and religious functions, which [was] not directly related to the zoning use of the real property"¹⁹¹

Land Use, 1985 Survey of N.Y. Law, 37 SYRACUSE L. REV. 747, 757-59 (1986).

186. *North Shore Hebrew Academy v. Wegman*, 105 A.D.2d 702, 703, 481 N.Y.S.2d 142, 144 (2d Dep't 1984).

187. *Id.* at 704, 481 N.Y.S.2d at 144.

188. *Id.*

189. *Id.* at 705, 481 N.Y.S.2d at 144.

190. *Id.* at 705, 481 N.Y.S.2d at 145 (citations omitted).

191. *Id.* (citations omitted). See *infra* notes 314-323 and accompanying text.

Furthermore, had the reasons advanced by the board of trustees been sufficient to survive the "stricter scrutiny" applied to zoning restrictions on religious institutions, the determination could not have been upheld since it was not supported by substantial evidence.¹⁹² The record was devoid of "hard evidence" that the noise and traffic resulting from the academy's activities "prior to the denial of the amended permit materially disrupted the tranquility of the surrounding neighborhood or that the on-site parking facilities were inadequate" ¹⁹³ The opponents were, in the opinion of the court, motivated by "their speculation and fears," ¹⁹⁴ a clearly insufficient basis for prohibiting the operation of a religious institution. In the absence of evidence that the operation would have a direct and immediate adverse effect upon the health, safety, or welfare of the community, the board of trustees lacked authority to deny the application.¹⁹⁵

The second department further held the ordinance's requirement that religious institutions located in residential areas provide a minimum number of on-site parking spaces to be unconstitutional on its face "to the extent that the board of trustees lack[ed] the power to vary this requirement." ¹⁹⁶ While the possible inadequacy of on-site parking was a justifiable concern to the neighboring property owners, "a municipality has an affirmative obligation to adopt less restrictive alternatives [than] completely barring such an institution from locating or expanding its facilities in a residential neighborhood." ¹⁹⁷ Accordingly, the court remitted the matter with directions to grant the requested amendment to the special permit after "establishing reasonable conditions to mitigate the adverse effects of the [academy's] program on the surrounding neighborhood" ¹⁹⁸

The lower courts have examined a variety of situations and uses which were claimed to be incorporated within the definition

192. *North Shore Hebrew Academy*, 105 A.D.2d at 705, 481 N.Y.S.2d at 145.

193. *Id.* at 705-06, 481 N.Y.S.2d at 145 (citations omitted).

194. *Id.* at 706, 481 N.Y.S.2d at 145.

195. *Id.* Cf. *Bagnardi*, 68 N.Y.2d at 589, 595, 503 N.E.2d at 511, 515, 510 N.Y.S.2d at 863, 867.

196. *North Shore Hebrew Academy*, 105 A.D.2d at 706, 481 N.Y.S.2d at 145-46 (citations omitted).

197. *Id.* at 706, 481 N.Y.S.2d at 146 (citations omitted).

198. *Id.* at 707, 481 N.Y.S.2d at 146 (citations omitted).

of "religious uses." Among the most comprehensive and expansive of such lower court decisions is *Slevin v. Long Island Jewish Medical Center*,¹⁹⁹ in which it was determined that a drug center for young people was a religious use of religious property.²⁰⁰ In *Slevin*, neighbors objected to a church's proposal to operate a drug center program in its rectory in a residentially zoned area in which churches or other buildings used exclusively for religious uses were authorized. The purpose of the program was to reach nonaddicted youngsters in the early stages of experimentation with "soft" drugs.²⁰¹

The court found that the drug center program was a "religious use of church property and a valid zoning extension of the religious institution"²⁰² since the church sought "to discharge a spiritual duty felt by clergymen and their congregants."²⁰³ The court rejected allegations that religious uses must be conducted by the church itself only for the benefit of its members.²⁰⁴ In rejecting that argument, the court reasoned that

[i]f a use of church property is a religious use, why should it matter that those of other religions or beliefs will benefit, or that the church engages or contracts or permits specialists or professional people on its premises to execute the religious use? The thought of limiting benefit struggles against the strong modern current of pan-ecumenicalism, and frustrates the desirable mutual interchange of use of religious institutions in our society today, ranging from bingo, to scout meetings, to lectures, to community action programs, to interfaith programs. The fact that the hospital supplies funds accords with the fact that religious funds are typically contributed.²⁰⁵

199. 66 Misc. 2d 312, 319 N.Y.S.2d 937 (Sup. Ct. Nassau County 1971).

200. *Id.* at 318, 319 N.Y.S.2d at 946.

201. *Id.* at 313, 319 N.Y.S.2d at 941. No residential facilities were to be provided, nor were drugs of any nature to be provided. The project was to be jointly financed, staffed, and supervised by a local hospital. The participants had daily contact with the church's minister. The court recognized that the definition of what constitutes a "religious use" is often a complex task, but accepted that "the term 'religious use' is defined, for zoning purposes, as 'broadly extended to conduct with a religious purpose.'" *Id.* at 316, 319 N.Y.S.2d at 943.

202. *Id.* at 318, 319 N.Y.S.2d at 946.

203. *Id.* at 317, 319 N.Y.S.2d at 945.

204. *Id.* at 318, 319 N.Y.S.2d at 946.

205. *Id.* at 318-19, 319 N.Y.S.2d at 946.

The court also determined that "if there is a genuine danger to the community, if an unreasonably unhealthful element is in fact introduced, the factor of religiosity alone cannot grant a legal immunity,"²⁰⁶ and the use may be denied if the court is "convinced that proposed uses will increase community hazards to the point of real personal danger."²⁰⁷ In the court's opinion, "[w]here the religious use may be so fraught with danger or peril to the community because of the particular use sought, the detriment to the community can outweigh the religious consideration."²⁰⁸ Since a factual determination of the impact was required, the court remanded the dispute for a determination of the issue of public danger.²⁰⁹

Significantly, in *Sephardic Community of New Rochelle/Scarsdale, Inc. v. Zoning Board of Appeals*,²¹⁰ it was succinctly determined that religious institutions are not required to demonstrate practical difficulties in order to be entitled to an area variance.²¹¹

Whether a particular land use constitutes a "church" has consistently troubled the courts. In *Bright Horizon House, Inc. v. Zoning Board of Appeals*,²¹² it was held that a Christian Science care facility did not constitute a religious use.²¹³ The court affirmed the finding that the facility did not qualify as a permitted use, either as a church, a public hospital, or a conventional health care facility.²¹⁴ Petitioners proposed to operate a facility to be staffed by accredited Christian Science nurses, and practitioners would not provide standard medical nursing or physician's care to the thirty-two fee-paying residents.²¹⁵ Patients of the facility would depend, instead, on Christian Science teaching, which eschews traditional medical care and relies on the power of faith to cure illness.²¹⁶

206. *Id.* at 319, 319 N.Y.S.2d at 947.

207. *Id.* at 320, 319 N.Y.S.2d at 947.

208. *Id.*

209. *Id.* at 321, 319 N.Y.S.2d at 948.

210. N.Y.L.J., Aug. 13, 1986, at 15, col. 3 (Sup. Ct. Westchester County 1986).

211. *Id.*

212. 121 Misc. 2d 703, 469 N.Y.S.2d 851 (Sup. Ct. Monroe County 1983).

213. *Id.* at 711, 469 N.Y.S.2d at 857.

214. *Id.* at 707-08, 469 N.Y.S.2d at 854-55.

215. *Id.* at 704-05, 469 N.Y.S.2d at 852-53.

216. *Id.* at 705, 469 N.Y.S.2d at 853.

Since "[t]he zoning ordinance [did] not define the term 'church',"²¹⁷ the court was required "to define the term in light of its ordinary and accepted meaning."²¹⁸ The court determined that the facts supported the conclusion of the zoning board of appeals that the facility did not constitute a church since its purpose was not public worship²¹⁹ and it lacked a common area or sanctuary for worship.²²⁰ The court opined that the proposed facility "does not take on a religious use simply because its residents pray and contemplate as part of the process of healing," since "[i]t is the proposed use of the land, not the religious nature of the organization, which must control."²²¹ "The constitutional protection afforded all religions and religious beliefs is not hindered by the law's refusal to mandate zoning approval of every institution solely because it is sponsored . . . by a religious organization in accordance with its beliefs."²²²

The court also rejected a challenge that the ordinance was unconstitutional as applied. The court noted that although "religious institutions are virtually immune from zoning restrictions,"²²³ that policy has emerged from instances in which the contested use was a church or synagogue or uses "accessory to the principal use of the structure as a place of worship."²²⁴ In the court's opinion, however, "a disproportionate accessory use would still be barred"²²⁵ and "uses ordinarily prohibited in a residential neighborhood . . . could not invoke the First Amendment simply because the use is associated with deeply held religious beliefs."²²⁶ "[A] narrower construction has been applied"²²⁷ if a use is neither ancillary nor accessory. It was also held that the proposed use was not a "religious use" and, accordingly, the constitutional attack on the application of the ordinance was

217. *Id.* at 706, 469 N.Y.S.2d at 854.

218. *Id.*

219. *Id.* at 707, 469 N.Y.S.2d at 854.

220. *Id.* at 708, 469 N.Y.S.2d at 855.

221. *Id.* at 708-09, 469 N.Y.S.2d at 855.

222. *Id.* at 709, 469 N.Y.S.2d at 855.

223. *Id.* at 710, 469 N.Y.S.2d at 856.

224. *Id.*

225. *Id.* (citing *Gallagher v. Zoning Bd. of Adjustment*, 32 Pa. D. & C.2d 669 (1963)).

226. *Bright Horizon House, Inc.*, 121 Misc. 2d at 710, 469 N.Y.S.2d at 856.

227. *Id.* at 710-11, 469 N.Y.S.2d at 856.

rejected.²²⁸

In *People v. Kalayjian*,²²⁹ a conviction for the use of a one-family residence other than as a single-family dwelling was affirmed in spite of defendant's claims that the premises constituted a parish house for religious purposes.²³⁰ The zoning ordinance allowed religious uses as a permitted use and defined such a religious use as "[c]hurches and other places of worship, including parish houses and buildings for religious instructions."²³¹ The house contained sixteen bedrooms and was occupied by twenty-five people comprising four separate families.²³² The occupants were members of the American Orthodox Catholic Church; one of the occupants was a monk and three were church deacons, although they were employed on a full-time basis elsewhere. Although all received religious instruction, no religious services were conducted on the premises. "The mere designation by a church of [a] private residence as a parish house is not controlling" upon the municipality or the courts for zoning purposes.²³³ A parish house is, in the opinion of the court, "an auxiliary building belonging to a church and used for its business, social or extension activities."²³⁴ Since the premises were neither owned nor used by a church, the court concluded that the premises could not be considered a parish house and was an illegal zoning use.²³⁵

While the federal courts have interpreted the first amendment as providing scant protection to religious organizations faced with zoning impediments, the New York courts have interpreted the same constitutional provision, as well as the limitation on the delegation of zoning authority, as severely limiting

228. *Id.* at 711-12, 469 N.Y.S.2d at 857.

229. 76 Misc. 2d 1097, 352 N.Y.S.2d 115 (Sup. Ct. App. T. 2d Dep't 1973).

230. *Id.* at 1099, 352 N.Y.S.2d at 117. *See also* *Independent Church of the Realization of God v. Board of Zoning Appeals*, 81 A.D.2d 585, 437 N.Y.S.2d 443 (2d Dep't 1981).

231. *People v. Kalayjian*, 76 Misc. 2d at 1097, 1099, 352 N.Y.S.2d at 117 (Sup. Ct. App. T. 2d Dep't 1973).

232. *Id.* at 1098, 352 N.Y.S.2d at 117.

233. *Id.* at 1099, 352 N.Y.S.2d at 118 (citing *Slevin*, 66 Misc. 2d 312, 319 N.Y.S.2d 937).

234. *Id.* *See* WEBSTER'S NEW INTERNATIONAL DICTIONARY (3d ed. 1971).

235. *Kalayjian*, 76 Misc. 2d at 1098-99, 352 N.Y.S.2d at 117. While not deciding the issue, the court questioned whether a parish house could constitute a main, rather than an accessory, use. *Id.*

the ability of zoning authorities to deal with the adverse effects of religious use of property. As can be discerned from the foregoing decisions, the New York courts have historically been exceedingly generous in categorizing uses as "religious" and have traditionally been very reluctant to sanction municipal impediments to the religious use of property. They have viewed with suspicion reasons proffered for the denial of religious permits and have required zoning authorities to accommodate various religious uses. Nevertheless, the *Bagnardi* decision has provided zoning authorities with the ability to balance the important and sometimes competing interests of religious institutions and the preservation of the community's residential neighborhoods.

III. Education Cases

Just as religious uses enjoy a qualified "exemption" from zoning regulations as the result of their unique contribution to the welfare and morals of the community, educational uses, by their very nature, equally contribute to the general welfare of the community.²³⁶ The courts have consistently held that "[e]ducational uses have a proper place in residential districts."²³⁷ Consequently, the historical "exemption" from zoning restrictions has, until recently, rendered almost all educational uses beyond the practical jurisdiction of municipal planning and zoning authorities. However, just as the decision of the court of appeals in *Bagnardi*²³⁸ has increased the ability of a municipality to examine the negative impacts of religious uses on neigh-

236. See *Diocese of Rochester v. Planning Bd.*, 1 N.Y.2d 508, 526, 136 N.E.2d 827, 836, 154 N.Y.S.2d 849, 862 (1956); *New York Inst. of Technology v. Le Boutillier*, 33 N.Y.2d 125, 130, 305 N.E.2d 754, 757, 350 N.Y.S.2d 623, 628 (1973); *Concordia Collegiate Inst. v. Miller*, 301 N.Y. 189, 195-96, 93 N.E.2d 632, 635-36 (1950). "Educational uses . . . are akin to churches in that they have a proper and traditional place in the residential districts of the community, and have such a strong tendency to promote the general welfare that they cannot be excluded by means of zoning restrictions" RATHKOPF, *supra* note 25, at § 20.02[1]. "Of all the major community facilities, schools, in general . . . have the strongest claim to access to all types of residential districts . . . for here the facility is a public one, and the service criterion is at its strongest." N. WILLIAMS, *supra* note 2, at § 76.01.

237. *New York Inst. of Technology v. Ruckgaber*, 65 Misc. 2d 241, 244, 317 N.Y.S.2d 89, 92 (Sup. Ct. Nassau County 1970).

238. *Cornell Univ. v. Bagnardi*, 68 N.Y.2d 583, 503 N.E.2d 509, 510 N.Y.S.2d 861 (1986). See *infra* notes 365-383 and accompanying text.

boring areas and on the community, to deny such uses under certain circumstances, and to require mitigation of adverse impacts, *Bagnardi* has similarly altered the paramount status enjoyed by most educational institutions. No longer are all educational uses automatically entitled to the traditional universal presumptive preeminence routinely enjoyed once over virtually all zoning regulations. *Bagnardi* demonstrates a desire to strike a balance between the significant contribution made to our society by churches and schools and the frequent inimical consequences of their presence in residential neighborhoods. Nevertheless, legitimate educational uses continue to be accorded a highly significant degree of immunity from zoning regulations.

In reviewing restrictions imposed on educational uses, the New York courts have applied the same standards and have expressed the same deference to such uses as in religious cases.²³⁹ Indeed, the critical language of the seminal decisions of *Diocese of Rochester* and *Bagnardi* specifically apply to both religious and educational uses. Many of the other significant decisions reviewing the status of religious or educational uses employ virtually identical reasoning in determining whether each form of socially significant use is subject to particular zoning restrictions.²⁴⁰ Any minor differences which might be perceived in the treatment of the two uses relate to the "peculiarly pre-eminent status of religious institutions under the First Amendment provision for free exercise of religion"²⁴¹

A. Public Schools

The primary conflict between zoning provisions and educational uses relates to the status and rights of private and paro-

239. "There is little difference in the attitude of the courts toward churches and that displayed toward schools." RATHKOPF, *supra* note 25, at § 20.02[1]. "While such [educational] uses usually do not evoke the vigorous judicial response which is typical in litigation involving religious use, the courts regard educational uses as worthy of special consideration." 1 R.M. ANDERSON, *NEW YORK ZONING LAW AND PRACTICE* § 11.07 (3d ed. 1984).

240. See *Westchester Reform Temple v. Brown*, 22 N.Y.2d 488, 239 N.E.2d 891, 293 N.Y.S.2d 297 (1968); *Le Boutillier*, 33 N.Y.2d 125, 305 N.E.2d 754, 350 N.Y.S.2d 623.

241. *Jewish Reconstructionist Synagogue v. Incorporated Village of Roslyn Harbor*, 38 N.Y.2d at 283, 288, 342 N.E.2d 534, 538, 379 N.Y.S.2d 746, 753 (1975). See also RATHKOPF, *supra* note 25, at § 20.02[1] n.1.

chial institutions since public schools, including B.O.C.E.S. facilities,²⁴² are immune from local zoning controls.²⁴³ Such a preclusion of local authority is mandated since local exercise of the police power and zoning authority is limited by the state constitution and applicable statutes²⁴⁴ and the State has not relinquished to localities its authority regarding the location and construction of school buildings.²⁴⁵

The Constitution of the State imposes the duty upon the Legislature to provide a system of free public education, and reserves to the Legislature full power in relation to the "maintenance, support or administration" of the system, notwithstanding the powers conferred by the Home Rule provisions of the Constitution (citations omitted). In compliance with the direction of the Constitution, the Education Law has been enacted, and it imposes upon school districts or the boards of education therein the duty to locate schools and empowers them to secure sites by condemnation, if necessary.²⁴⁶

As has also been noted:

242. See N.Y. EDUC. LAW §§ 1950, 1951 (McKinney Supp. 1987). B.O.C.E.S. furnishes certain educational services to its members including vocational education, education for the handicapped, summer schools, and various other shared services. It is "[a] policy-making board of citizens with a district superintendent of schools as executive officer." *F. DE LA FLEUR, SHARED SERVICES BOARD* 9 (1961). B.O.C.E.S. also refers, loosely, to "the geographical area covered by the activities of such a board, including common, union free and central school districts as well as some village superintendencies and smaller city districts which may participate directly in the services offered by such board." *Id.*

243. *Jewish Bd. of Family and Children's Services v. Zoning Bd. of Appeals*, 79 A.D.2d 657, 658, 433 N.Y.S.2d 840, 841 (2d Dep't 1980). See also *Board of Coop. Educ. Services v. Gaynor*, 60 Misc. 2d 316, 320, 303 N.Y.S.2d 183, 189 (Sup. Ct. Nassau County 1969), *aff'd*, 33 A.D.2d 701, 306 N.Y.S.2d 216 (2d Dep't 1969), *motion for leave to appeal denied*, 26 N.Y.2d 612 (1970); *Board of Educ. v. City of Buffalo*, 32 A.D.2d 98, 302 N.Y.S.2d 71 (4th Dep't 1969); *Durand v. Board of Coop. Educ. Services*, 70 Misc. 2d 429, 432, 334 N.Y.S.2d 670, 675 (Sup. Ct. Westchester County 1972), *aff'd*, 41 A.D.2d 803, 341 N.Y.S.2d 884 (2d Dep't 1973).

244. *Board of Educ. v. City of Buffalo*, 32 A.D.2d at 100, 302 N.Y.S.2d at 74.

245. *Town of Onondaga v. Central School Dist.*, 56 Misc. 2d 26, 27, 287 N.Y.S.2d 581, 584 (Sup. Ct. Onondaga County 1968). "The power of the city to regulate the erection of all buildings . . . cannot overcome or survive the broad and exclusive grant to the State of authority to regulate *all* school matters spelled out in the Constitution and, in turn, delegated by the Legislature to boards of education." *Board of Educ. v. City of Buffalo*, 32 A.D.2d at 101, 302 N.Y.S.2d at 75.

246. *Union Free School Dist. v. Village of Hewlett Bay Park*, 279 A.D. 618, 618-19, 107 N.Y.S.2d 858, 860 (2d Dep't 1951) (citations omitted).

Since the State has reserved unto itself the control over and the authority to regulate all school matters and, further, since the State has surrendered to school districts a portion of its (the State's) sovereign power and delegated to the districts some of these responsibilities imposed by the Constitution, including the selection of building sites and erection of buildings thereon . . . it follows that a school district should be and is immune from the attempted regulation of these rights and responsibilities by means of building codes or zoning ordinances.²⁴⁷

As a result, a municipality may not exclude public schools from its borders²⁴⁸ and may not subject educational uses to the provisions of its building codes.²⁴⁹ This preferred status is accorded to public schools regardless of whether the school district is the owner and occupant or merely the tenant of the property.²⁵⁰

The conflict between the legitimate goals of zoning laws and the exempt status of public schools is, perhaps, best illustrated by the instances in which surplus school buildings retained by a local school district are sought to be utilized for profit-making uses. Due to shrinking enrollments, school districts have become reluctant landlords who must maintain a vast number of empty school buildings.²⁵¹ In order to defray the costs necessary to maintain such buildings for future utilization,²⁵² it is not uncommon for a school district to lease surplus buildings located in

247. *Board of Educ. v. City of Buffalo*, 32 A.D.2d at 100, 302 N.Y.S.2d at 74. See also *County of Westchester v. Village of Mamaroneck*, 41 Misc. 2d 811, 246 N.Y.S.2d 770 (Sup. Ct. Westchester County 1964), *aff'd*, 22 A.D.2d 143, 255 N.Y.S.2d 290 (2d Dep't 1964), *aff'd*, 16 N.Y.2d 940, 212 N.E.2d 442, 264 N.Y.S.2d 925 (1965); N.Y. EDUC. LAW §§ 401, 407, 408 (McKinney 1969 & Supp. 1987). "In the very nature of things, local government units, including school districts, in the performance of their purely governmental duties and activities, should not be subjected to building code regulations or such other regulatory restrictions as zoning ordinances." *Board of Educ. v. City of Buffalo*, 32 A.D.2d at 101, 302 N.Y.S.2d at 74.

248. *Gaynor*, 33 A.D.2d at 701, 306 N.Y.S.2d at 218; *Union Free School Dist. v. Village of Hewlett Bay Park*, 198 Misc. 932, 934, 102 N.Y.S.2d 81, 83 (Sup. Ct. Nassau County 1950), *aff'd*, 279 A.D. 618, 107 N.Y.S.2d 858 (2d Dep't 1951).

249. *Board of Educ. v. City of Buffalo*, 32 A.D.2d at 100, 302 N.Y.S.2d at 74.

250. *Jewish Bd. of Family and Children's Services*, 79 A.D.2d at 658, 433 N.Y.S.2d at 841; *Gaynor*, 60 Misc. 2d at 320-21, 303 N.Y.S.2d at 189.

251. See *Village of Camillus v. West Side Gymnastics School*, 109 Misc. 2d 609, 612, 440 N.Y.S.2d 822, 824 (Sup. Ct. Onondaga County 1981).

252. "The closing of schools statewide presents a severe financial problem for the districts since the buildings must be maintained and fixed costs, such as bond payments, insurance, heat and light, continue." *Id.* at 609, 440 N.Y.S.2d at 822.

residential zones to enterprises for uses which are not permitted in a residential district. When confronted by zoning restrictions barring such proposed uses, school districts have, in a number of instances, asserted the exemption from local zoning laws to which they are entitled while carrying out state functions.

In *Village of Camillus v. West Side Gymnastics School*,²⁵³ for example, in order to defray fixed costs, the school district leased an elementary school building located in a residential district to two entities for use as office and training space and for a gymnastics school.²⁵⁴ The court determined that while a school district's proprietary activities are subject to local zoning, the maintenance of empty school buildings is an exempt governmental function.²⁵⁵ Accordingly, the court determined that in adopting section 403-a(1) of the Education Law,²⁵⁶ which authorizes the leasing of excess school property, the legislature exercised its constitutional authority to regulate education, thereby precluding the application of local zoning laws.²⁵⁷ As a result, in the opinion of the court, a school district is free to lease empty school buildings in residentially zoned areas to any user, regardless of the effect thereof on the residents of the area, and a municipality is precluded from applying its zoning regulations to such noneducational use.²⁵⁸

The appellate division, fourth department, however, has reached a contrary conclusion while affirming the granting of a use variance to a school district in order to permit an unused school building, located in a residential zone, to be leased for limited industrial use. The court in *Foster v. Saylor*,²⁵⁹ specifically determined that the lease of the property was subject to

253. 109 Misc. 2d 609, 440 N.Y.S.2d 822 (Sup. Ct. Onondaga County 1981).

254. *Id.* at 609-10, 440 N.Y.S.2d at 822-23.

255. *Id.* at 612-14, 440 N.Y.S.2d at 824-25. "Necessity creates the duty and it is the duty of the board to lease, if the board determines it is in the best interests of the District." *Id.* at 613, 440 N.Y.S.2d at 824.

256. N.Y. EDUC. LAW § 403-a(1) (McKinney 1972).

257. *West Side Gymnastics School*, 109 Misc. 2d at 614, 440 N.Y.S.2d at 825. The power to regulate school matters has been reserved to the State by article IX, section 1 of the State Constitution which authority, in turn, has been delegated to the Commissioner of Education and to the local boards of education with respect to the use of excess school buildings pursuant to section 403-a of the Education Law. *Id.*

258. *Id.*

259. 85 A.D.2d 876, 447 N.Y.S.2d 75 (4th Dep't 1981).

local zoning regulations.²⁶⁰ The cases relied upon by the court²⁶¹ indicated that, contrary to the *West Side Gymnastics School* decision, the court considered the school district's lease of the property to constitute a proprietary function.²⁶² As is discussed more fully below,²⁶³ it is more appropriate, at least from a planning perspective, to examine the use for which the property is to be devoted, rather than blindly to grant immunity solely upon the status of the owner. While the issue of pre-emption is essentially unresolved, it is unlikely that the legislature intended to authorize local school authorities to lease space in an unused school building to any commercial enterprise, no matter how obnoxious or inconsistent with the character of the area the use may be. The *West Side Gymnastics School* opinion noted that the exemption which it found to exist did not render a municipality completely powerless against such repugnant uses.²⁶⁴ The court also noted that a municipality may pursue a nuisance action.²⁶⁵ However, it is clearly illogical to remove a municipality's zoning jurisdiction in dealing with such commercial uses and rel-

260. *Id.* at 877, 447 N.Y.S.2d at 77.

261. *Little Joseph Realty, Inc. v. Town of Babylon*, 41 N.Y.2d 738, 363 N.E.2d 1163, 395 N.Y.S.2d 428 (1977) (asphalt manufacturing plant on property leased from municipality and operated by and for commercial benefit of private operator constitutes proprietary function of local government and is subject to local zoning regulations); *Nehrbas v. Village of Lloyd Harbor*, 2 N.Y.2d 190, 140 N.E.2d 241, 159 N.Y.S.2d 145 (1957) (municipality may use building located in residential zone for municipal purposes which uses would otherwise be prohibited by zoning law if use of property is in furtherance of performance of governmental function); *Board of Educ. v. City of Buffalo*, 32 A.D.2d 98, 302 N.Y.S.2d 71 (4th Dep't 1969) (local governmental units, including school districts, in the performance of purely governmental duties and activities not subject to local building codes and zoning ordinances).

262. No issue as to exemption from zoning regulations exists in the instance when a school district is the vendor of a surplus school building located in a residential zone and the proposed use of the building is not a permissible use in a residential zone. The vendee is required to obtain a use variance and such variance may properly be denied, regardless of the financial proof of hardship, if the variant use would destroy the essential character of the locality. *Rostlee Associates, Ltd. v. Amelkin*, 121 A.D.2d 725, 726, 503 N.Y.S.2d 902, 903 (2d Dep't 1986) (medical office center). *Cf.* *Commco, Inc. v. Amelkin*, 109 A.D.2d 794, 486 N.Y.S.2d 305 (2d Dep't 1985), *motion for leave to appeal denied*, 65 N.Y.2d 606, 493 N.Y.S.2d 1028 (1985) (senior citizen residence).

263. *See infra* Part V, Conclusion.

264. *West Side Gymnastics School*, 109 Misc. 2d at 613, 440 N.Y.S.2d at 824.

265. "The law of nuisance and that of zoning both relate to the use of property but each protects a different interest so a use which fully complies with a zoning ordinance or is exempt from a zoning ordinance may still be enjoined as a nuisance." *Id.* at 613, 440 N.Y.S.2d at 824.

egate the municipality to a less certain, more cumbersome procedure which was never intended to supplant rational planning or traditional zoning implementation and enforcement. The community and the neighborhood should not be required to absorb the consequences solely because a school district desires "to lease property to the lessee offering the 'most benefit' to the district."²⁶⁶ When a school district seeks to maximize its profit derived from renting surplus school buildings to commercial concerns, local zoning regulations should control in order to protect the community's residential neighborhoods and the integrity of its zoning scheme. Requiring a school district to seek a use variance if it desires to utilize unneeded buildings for an impermissible zoning use would require it to demonstrate both an inability to sell or lease the structure for a permitted use and the fact that the proposed use would not alter the essential character of the neighborhood.²⁶⁷ By subjecting a school district to local zoning regulations in such instances and requiring the same demonstration which all applicants for a use variance must make, the interests of the school district and of the neighborhood may be evaluated and, if appropriate, accommodated, mitigated, or limited.

B. *Private and Parochial Schools*

Since no difference exists in the promotion of the general welfare of a community between public and private educational institutions, both must be treated equally and on the same basis.²⁶⁸ The court of appeals has noted that "the cases apparently

266. *Id.* at 613, 440 N.Y.S.2d at 825.

267. *Foster v. Saylor*, 85 A.D.2d at 876, 877-78, 447 N.Y.S.2d 75, 77 (4th Dep't 1981). As the *Foster* decision demonstrates, proof of a school district's economic and demographic plight, its inability to lease unutilized school property in conformity with the zoning law for an amount sufficient to meet its debt service on the property, its inability to sell the property for a permitted use, the fact that the hardship is due to the unique nature of the property, and the fact that the proposed variant use will not alter the essential character of the neighborhood, may entitle it to a use variance for unneeded school space. *Id.*

268. *Diocese of Rochester*, 1 N.Y.2d at 522, 136 N.E.2d at 834, 154 N.Y.S.2d at 859 ("An ordinance will also be stricken if it attempts to exclude private or parochial schools from any residential area where public schools are permitted."). See *Rockefeller v. Pyncheon*, 41 Misc. 2d 1, 3, 244 N.Y.S.2d 978, 981 (Sup. Ct. Nassau County 1963) (nursery school); *Brandeis School v. Village of Lawrence*, 18 Misc. 2d 550, 558-59, 184

draw no distinction between public and private education uses, a distinction which might offend constitutional guarantees of due process and equal protection."²⁶⁹ Since the public policy of promoting the education of the state's youth remains equally strong and is advanced to the same extent by private schools, the existence of a profit motive in conducting a private school does not result in any change in the applicable standards.²⁷⁰ Consequently, it has long been held that private schools, like religious institutions, may not be excluded as a permitted use from residentially zoned areas.²⁷¹ Similarly, it was held that a fifty-acre minimum lot area requirement which applied to parochial schools, but not to public schools, unconstitutionally discriminated against parochial schools.²⁷²

Unlike the decisions examining the conflict between purported religious uses and zoning regulations, where the most difficult task the courts have had to face is determining what uses constitute a bona fide religious use of property,²⁷³ whether a particular facility is devoted to an educational purpose is usually

N.Y.S.2d 687, 697 (Sup. Ct. Nassau County 1959) (private nonprofit elementary school); *Merrick Community Nursery School v. Young*, 11 Misc. 2d 576, 578, 171 N.Y.S.2d 522, 525 (Sup. Ct. Nassau County 1958) (private nursery school); *Hoelzer v. Village of New Hyde Park*, 4 Misc. 2d 96, 98, 150 N.Y.S.2d 765, 767 (Sup. Ct. Nassau County 1956) (amendment to village ordinance); *Property Owners Ass'n v. Board of Zoning Appeals*, 2 Misc. 2d 309, 311, 123 N.Y.S.2d 716, 719 (Sup. Ct. Nassau County 1953) (private college).

269. *Le Boutillier*, 33 N.Y.2d at 131-32, 305 N.E.2d at 758, 350 N.Y.S.2d at 629 (citations omitted).

270. *Village of Brookville v. Paulgene Realty Corp.*, 24 Misc. 2d 790, 794, 200 N.Y.S.2d 126, 133 (Sup. Ct. Nassau County 1960), *aff'd*, 14 A.D.2d 575, 218 N.Y.S.2d 264 (2d Dep't 1961), *aff'd*, 11 N.Y.2d 672, 180 N.E.2d 905, 225 N.Y.S.2d 750 (1962). "[T]he contribution which a private school makes to the public good in educating youngsters, is rendered nonetheless valid because it earns a profit." 24 Misc. 2d at 794, 200 N.Y.S.2d at 133.

271. *See Diocese of Rochester*, 1 N.Y.2d at 522, 136 N.E.2d at 834, 154 N.Y.S.2d at 858-59 (nursery school); *Brandeis School*, 18 Misc. 2d at 559, 184 N.Y.S.2d at 696 (private nonprofit elementary school); *Merrick Community Nursery School*, 11 Misc. 2d at 578, 171 N.Y.S.2d at 525 (private nursery school); *Hoelzer*, 4 Misc. 2d at 98, 150 N.Y.S.2d at 767 (amendment to village ordinance to include parochial schools in residential zone).

272. *Westbury Hebrew Congregation v. Downer*, 59 Misc. 2d 387, 388, 302 N.Y.S.2d 923, 925 (Sup. Ct. Nassau County 1969) (50-acre minimum zoning requirement); *Greater New York Corp. of Seventh Day Adventists v. Miller*, 54 Misc. 2d 268, 282 N.Y.S.2d 390 (Sup. Ct. Nassau County 1967) (parochial school and church special exception).

273. Once it is determined that a use qualifies as a church, synagogue, or accessory function, the court's inquiry, in the past, has been quite limited.

self-evident. It is for this reason that the factual details of relatively few educational decisions are worthy of extensive discussion. While it is clear that traditional private schools are entitled to privileged status, the conclusion may be somewhat obtuse when construing uses such as camps, day care centers, and some nontraditional uses claimed to be accessory to a valid educational function. While these uses may have some educational attributes or functions, an analysis of the facts in such unusual cases is required in order to determine whether the education of youngsters is legitimately the aim or merely a subterfuge to obtain the more favorable treatment accorded such uses.

The courts have, from time to time, endeavored to fashion a comprehensive definition of "school" for zoning purposes. The "prime requisites" of a school, for example, have been determined to consist of: a curriculum, adequate physical facilities to conduct its educational function, and a staff qualified to implement its educational objectives.²⁷⁴ An educational institution has also been defined as an organization which has an objective with educational value, performs some educational function and is organized exclusively for that purpose.²⁷⁵ While such conventional definitions are easily applicable to traditional educational institutions, they are clearly inadequate for construing more unorthodox uses claimed to serve an educational function. In such unusual circumstances, simple definitions fail and the institution's programs, facilities, and goals must be examined to unveil the paramount purpose of the sponsor. Elementary schools and high schools, for example, are clearly entitled to the benefit of such preferential treatment.²⁷⁶ Similarly, colleges and universi-

274. *Paulgene Realty Corp.*, 24 Misc. 2d at 792, 200 N.Y.S.2d at 131. See also *Rorie v. Woodmere Academy*, 52 N.Y.2d 200, 205, 418 N.E.2d 659, 661, 437 N.Y.S.2d 66, 68 (1981). Other definitions implicitly approved by a New York court include: "'a place where instruction is imparted to the young'"; "'any place or means of discipline, improvement, instruction, or training'"; "'the union of all elements in the organization, to furnish education in some branch of learning — the arts or sciences or literature.'" *Schweizer v. Board of Zoning Appeals*, 8 Misc. 2d 878, 879-80, 167 N.Y.S.2d 764, 766 (Sup. Ct. Nassau County 1957) (citations omitted).

275. *Imbergamo v. Barclay*, 77 Misc. 2d 188, 191, 352 N.Y.S.2d 337, 341 (Sup. Ct. Suffolk County 1973). Also considered to be significant by the court in concluding that an art league was a school, was the employment of a full-time staff of instructors for the purpose of conducting art classes. *Id.* at 192, 352 N.Y.S.2d at 341.

276. See *Brandeis School*, 18 Misc. 2d 550, 184 N.Y.S.2d 687.

ties promote the welfare of the community at large,²⁷⁷ although such institutions may primarily serve residents of other communities.²⁷⁸

With the growing trend of career and working mothers, nursery schools and day care centers have become an essential fixture in most communities. While it has been observed that "[it] is obvious that the same standard cannot be used to measure what constitutes a grade or secondary school as a pregrade school because of the capacity of the pupils at the different levels,"²⁷⁹ the courts have held that day care centers, preschool programs, and nursery schools satisfy the criteria as "educational" institutions.²⁸⁰ The state legislature has also recognized the desirability of the promotion of such "schools" and has unambiguously declared a strong legislative policy favoring the establishment of day care centers.²⁸¹

277. *Bagnardi*, 68 N.Y.2d at 596, 503 N.E.2d at 515, 510 N.Y.S.2d at 867 (special permit to expand operations); *Le Boutillier*, 33 N.Y.2d at 131, 305 N.E.2d at 758, 350 N.Y.S.2d at 629 (special use permit for college); *Long Island Univ. v. Tappan*, 202 Misc. 956, 113 N.Y.S.2d 795 (Sup. Ct. Nassau County 1952), *aff'd*, 281 A.D. 771, 118 N.Y.S.2d 767 (2d Dep't 1953), *aff'd*, 305 N.Y. 893, 114 N.E.2d 432, *reh'g denied*, 306 N.Y. 570, 115 N.E.2d 680 (1953) (annexation of property).

278. *Le Boutillier*, 33 N.Y.2d at 131, 305 N.E.2d at 758, 350 N.Y.S.2d at 629 (special use permit for college). See *Hofstra College v. Wilmerding*, 24 Misc. 2d 248, 258, 204 N.Y.S.2d 476, 487 (Sup. Ct. Nassau County 1960), *appeal dismissed*, 12 A.D.2d 631, 210 N.Y.S.2d 791 (2d Dep't 1960) (experimental college).

279. *People v. Collins*, 191 Misc. 553, 555, 83 N.Y.S.2d 124, 125 (Westchester County Ct. 1948).

280. See *Unitarian Universalist Church v. Shorten*, 63 Misc. 2d 978, 314 N.Y.S.2d 66 (Sup. Ct. Nassau County 1970) (day care center); *Bernstein v. Board of Appeals*, 60 Misc. 2d 470, 302 N.Y.S.2d 141 (Sup. Ct. Nassau County 1969) (nursery school); *Rockefeller v. Pyncheon*, 41 Misc. 2d 1, 244 N.Y.S.2d 978 (Sup. Ct. Nassau County 1963) (nursery school); *People v. Collins*, 191 Misc. 2d 553, 83 N.Y.S.2d 124 (Westchester County Ct. 1948) ("preschool"); *People v. Bacon*, 133 Misc. 2d 771, 508 N.Y.S.2d 138 (Dist. Ct. Nassau County 1986) (day care center). A day care center "differs from the traditional nursery school in that it generally accepts infants starting at a much earlier age, operates for longer hours . . . and tends to serve more of a custodial than an educational function." RATHKOPF, *supra* note 25, at § 20.02[7].

281. The state legislature has declared that "[t]he provision of [day care] facilities is hereby declared to be a public purpose which it is the policy of the state to encourage," N.Y. Soc. SERV. LAW § 410-d (McKinney 1983), and "[i]nsofar as the provisions of this act [Chapter 1013 of the Laws of 1969 enacting or amending N.Y. Soc. Serv. Law § 410-d, N.Y. Priv. Hous. Fin. Law § 41(7) (McKinney 1976), and the Youth Facilities Project Guarantee Fund Act] are inconsistent with the provisions of any other law, general, specific or local, the provisions of this act shall be controlling." Act of May 26, 1969, ch. 1013, 1969 N.Y. Laws 1585.

There is a serious shortage throughout the state of facilities suitable for use for the care of children especially those of pre-school age and primary school age whose parents are unable to provide such care for all or a substantial part of the day or post-school day. . . . Existing day care . . . facilities are overcrowded with long waiting lists. Many such facilities are so located that they are not accessible to families in need of such services. The absence of adequate day care . . . facilities is contrary to the interest of the people of the state, is detrimental to the health and welfare of the child and his parents and prevents the gainful employment of persons, who are otherwise qualified, because of the need to provide such care in their home.²⁸²

Although this strong policy statement is particularly relevant in concluding that encouraging the establishment of day care centers certainly promotes the welfare of the community and that such uses are, accordingly, entitled to some additional consideration in justice court prosecutions, one court has determined that such legislation has not pre-empted local zoning regulation in this area²⁸³ while another has arrived at a contrary conclusion.²⁸⁴ A 1986 amendment to the Social Services Law,²⁸⁵ however, eliminated any doubt as to the issue of pre-emption. As a result of such legislation, a zoning regulation may not prohibit the use of a "single family dwelling for group family day

282. N.Y. Soc. SERV. LAW § 410-d (McKinney 1983).

283. *People v. Halloran*, 130 Misc. 2d 569, 497 N.Y.S.2d 248 (Rockville Centre J. Ct. 1985). In *Halloran*, the court found that since the purpose of the legislation was to facilitate the encouragement of child care facilities, the legislature did not pre-empt the zoning ordinance from prohibiting day care businesses in a residential district. *Id.* at 571, 497 N.Y.S.2d at 249-50. The court also found that the requirements of the zoning law were not impermissibly inconsistent with the regulations of the Department of Social Services. *Id.* at 572-73, 497 N.Y.S.2d at 250-51.

284. *Bacon*, 133 Misc. 2d 771, 508 N.Y.S.2d 138. In *Bacon*, the court determined that "public policy and the laws of this State require finding that a family day care home is a permissible use of residentially zoned property." *Id.* at 776, 508 N.Y.S.2d at 141. The court determined that an ordinance which is interpreted to prohibit family day care in a residential zoning district is invalid since it would "conflict with and hinder State law and policy favoring home day care for children" and would not bear a reasonable or substantial relation to the public health, safety or welfare. 133 Misc. 2d at 777, 508 N.Y.S.2d at 141. Consequently, since the ordinance did not expressly prohibit day care centers as an accessory use of residential property, the court concluded that a day care center was a permissible accessory use. *Id.* at 777-78, 508 N.Y.S.2d at 142.

285. Act of Aug. 2, 1986, ch. 875, 1986 N.Y. LAWS 2155 (amending N.Y. Soc. SERV. LAW §§ 390, 390-a, 410, 412, 424-a (McKinney 1983)).

care" if the Department of Social Services has issued a permit for such use.²⁸⁶ A "group family day care home" is defined as

a home wherein day care services are provided to up to ten children of all ages, including not more than four children under two years of age or up to twelve children where all of such children are over two years of age. A group family day care home may provide day care services to two additional children if such additional children are of school age and such children only receive services before or after school hours.²⁸⁷

While the provisions of a zoning law may not bar the utilization of a residential home for such use, the legislation does not interfere with the ability of a municipality to condition the use of property as a "group family day care home" on obtaining a special permit and the imposition of reasonable conditions which seek to insure that the use of the premises does not unduly interfere with the residential character of neighboring property.

Moreover, an explicit pre-emption of local zoning authority does not exist with respect to day care centers which do not satisfy the statutory definition. While the general legislative policy of encouraging day care centers is certainly a laudable endeavor, limiting the establishment of facilities which do not satisfy the definition of "group family day care home" to appropriate areas is not inconsistent with the general intent to facilitate such beneficial uses. Rational planning should control in the location of such facilities in order to protect the neighborhood from potentially intrusive effects and to safeguard the children utilizing such centers. While the courts remained divided in this matter, it would appear that those enterprises may be prohibited in residential areas and, without question, may be conditioned upon obtaining a special permit.

In recognition of the potentially disturbing consequences of day care centers and nursery schools on residential neighborhoods, the courts have sanctioned a requirement that nursery

286. See N.Y. SOC. SERV. LAW § 390 (13)(d) (McKinney Supp. 1988). The amendment also precludes the prohibition of the use of the following premises for "group family day care" if the Department has issued a permit therefore and the use is otherwise permitted under the New York Uniform Fire Prevention and Building Code: any multiple dwelling classified as fireproof or a dwelling unit located on the ground floor of a multiple dwelling not classified as fireproof.

287. N.Y. SOC. SERV. LAW § 390 (13)(a) (McKinney Supp. 1988).

schools obtain a special permit as a prerequisite to their operation while elementary schools and high schools are uses permitted by right.²⁸⁸ In reviewing such an application, it has been held that a board did not act unreasonably in denying a special permit for a substandard sized lot and determining that the use of the property for a nursery school would merely constitute an impermissible accessory use to a private dwelling.²⁸⁹

The court of appeals has interpreted the mandate of the New York State Constitution that the "legislature shall provide for the maintenance and support of a system of free common schools, wherein *all* the children of this state may be educated,"²⁹⁰ to include "the duty to establish 'schools for physically or mentally handicapped or delinquent children . . .'"²⁹¹ "The State has an obligation to raise these [handicapped] children to greater mental and emotional stature, and to make them, if possible, normal, useful, happy persons, equal to the other millions of children whom it trains every year."²⁹² As in the case of public

288. *Rockefeller*, 41 Misc. 2d at 3, 244 N.Y.S.2d at 981; *Merrick Community Nursery School*, 11 Misc. 2d at 576, 171 N.Y.S.2d at 522. It should be noted that these two decisions pre-date the previously discussed legislation, which has in one instance served as the basis for a finding that local zoning regulations are pre-empted with respect to day care centers, as defined in the Social Services Law and regulations.

289. *Rockefeller*, 41 Misc. 2d at 5, 244 N.Y.S.2d at 983. "[I]t is certainly within the 'appropriate restrictions' reserved to the board by the *Rochester* case to require such a school to be located on an improved plot dedicated exclusively to the function of education, rather than an accessory use to a private single-family residence." *Id.*

290. N.Y. CONST. art XI, § 1 (emphasis added).

291. *Wiltwyck School for Boys v. Hill*, 11 N.Y.2d 182, 191, 182 N.E.2d 268, 272, 227 N.Y.S.2d 655, 660 (1962) (quoting N.Y. EDUC. LAW §§ 2554(9), (18)).

292. *Brent v. Hoch*, 25 Misc. 2d 1062, 1066, 205 N.Y.S.2d 66, 71 (Sup. Ct. Suffolk County 1960), *aff'd*, 13 A.D.2d 505, 211 N.Y.S.2d 853 (2d Dep't 1961). *Cf. Brandt v. Zoning Bd. of Appeals*, 90 Misc. 2d 31, 393 N.Y.S.2d 264 (Sup. Ct. Westchester County 1977), *aff'd*, 61 A.D.2d 1012, 402 N.Y.S.2d 974 (2d Dep't 1978). In *Brandt*, the court held that a school for mentally retarded individuals did not qualify under the definition of "school" contained in a zoning ordinance which characterized a "private school" as a "kindergarten, primary or secondary school furnishing a comprehensive curriculum of academic instruction." 90 Misc. 2d at 33, 393 N.Y.S.2d at 265. Although it was intended to provide care, treatment, training, and education for severely to moderately mentally retarded persons between the ages of twenty-one and thirty-five, the court concluded that the aims and programs of the facility "certainly do not in any way, shape or form comply with the limited definition of private school contained in the zoning ordinance." *Id.* at 33, 393 N.Y.S.2d at 266. This decision is certainly contrary to the rationale and general philosophy of other decisions in this area. It would appear that a potential basis for this contrary holding is the presence, in the court's apparent view, of a predominance of psychiatric and medical diagnosis, treatment, and counselling in the program.

educational institutions, the bases for the special treatment accorded schools that educate such youth is two-fold: they are clearly furthering the welfare of the state and community by providing education for the state's youth, be they handicapped, delinquent, or otherwise, and secondly, they are performing an imperative state function.²⁹³ Similarly, the furnishing of care to mentally handicapped children and the providing of schooling while the children were in residence at the institution were considered by the court of appeals to be educational functions.²⁹⁴ As a result of this strong state policy favoring the education of such disadvantaged children, municipal attempts to distinguish such institutions from traditional public and private schools have largely been unsuccessful.²⁹⁵

The criterion as to what constitutes a school is, perhaps, best elucidated when a distinction is attempted between a summer "school" which qualifies as a true educational institution and a summer "camp" which does not.²⁹⁶ In reviewing the issue, the court of appeals has opined that "[t]he question . . . is . . . how far a private school summer program may deviate from its September to June curriculum before it functions not as a private school but as a day camp and, therefore, beyond what the

293. Such institutions are "actually performing functions belonging to the State and with which the State is vitally concerned — education of and related aid to delinquent, neglected and dependent children." *Wiltwyck School for Boys*, 11 N.Y.2d at 192, 182 N.E.2d at 272, 227 N.Y.S.2d at 660-61.

294. *Rogers v. Association for the Help of Retarded Children*, 308 N.Y. 126, 132, 123 N.E.2d 806, 809 (1954). A home for children suffering from cardiac problems with an accessory school which was a prior nonconforming use was converted into a school and home for mentally handicapped children. *Id.* at 130-31, 123 N.E.2d at 809. The court of appeals held that the school qualified as a continuation of the nonconforming use under an ordinance provision which permitted the continuation of a nonconforming use in spite of a change in ownership or tenancy, if the use is identical with the initial nonconforming use. *Id.* at 132-33, 123 N.E.2d at 809.

295.

[T]he notion of what constitutes a school must be extended to include an institution for the care and education of retarded or delinquent children. And it must be assumed that the power of a municipality to regulate or exclude such institutions is limited by the same factors of public welfare as are relevant in the case of educational uses generally.

1 R.M. ANDERSON, *supra* note 239, at § 11.16.

296. "The line between education and recreation is one narrow and difficult of definition." *Margo Operating Corp. v. Village of Great Neck*, 129 N.Y.S.2d 436, 438 (Sup. Ct. Nassau County 1954).

zoning ordinance allows.”²⁹⁷ A key factor in deciding the issue is “whether a substantial part of the summer program is devoted to subjects which are also part of the regular school curriculum.”²⁹⁸ The fact that some activities may also be found in the program of a day camp is not dispositive since

[w]hat is essential is that the educational component of the program, the staff and the plant be of sufficient size to warrant the conclusion that the program involves a good faith effort on the part of the private school to accomplish serious educational aims and is not simply a fun and games recreational program in disguise.²⁹⁹

Although the concept of an educational use does not include activities which are primarily recreational in nature,³⁰⁰ the presence of recreational and physical activities does not require the conclusion that a program is merely a camp since physical training may clearly constitute a portion of an educational program.³⁰¹ Particularly when the program is designed for physically or mentally handicapped children or adults, the physical activities may be an integral part of the education and training of those attending.³⁰² Ordinarily, however, if the primary activities offered by a camp are nonacademic activities and the teaching of academic subjects is unavailable or constitutes an insignificant portion of the activities, the conclusion is evident that the program is a summer camp and not a school.³⁰³

Among the more unusual uses that have been accorded preferential treatment is an art league which intended to conduct art classes and run art exhibits.³⁰⁴ A conference center and dormito-

297. *Rorie*, 52 N.Y.2d at 205, 418 N.E.2d at 661, 437 N.Y.S.2d at 68.

298. *Id.* See also *Paulgene Realty Corp.*, 24 Misc. 2d at 792, 200 N.Y.S.2d at 131.

299. *Rorie*, 52 N.Y.2d at 206, 418 N.E.2d at 662, 437 N.Y.S.2d at 69.

300. *Village of Asharoken v. Pitassy*, 119 A.D.2d 404, 412, 507 N.Y.S.2d 164, 170 (2d Dep’t 1986). See *Schoen v. Bowne*, 273 A.D. 1020, 79 N.Y.S.2d 292 (2d Dep’t 1948), *aff’d*, 298 N.Y. 611, 81 N.E.2d 350 (1948).

301. “Supervised physical training and instruction by competent personnel is nonetheless educational because it trains the body as well as the mind.” *Paulgene Realty Corp.*, 24 Misc. 2d at 792, 200 N.Y.S.2d at 131.

302. See *Summit School v. Neugent*, 82 A.D.2d 463, 470, 442 N.Y.S.2d 73, 79 (2d Dep’t 1981).

303. See *Fremed v. Bayswater Park, Inc.*, 11 Misc. 2d 1017, 176 N.Y.S.2d 729 (Sup. Ct. Queens County 1958).

304. See *Imbergano*, 77 Misc. 2d 188, 352 N.Y.S.2d 337.

ries for attendees from business and educational institutions might, depending on the facts, be considered an educational use.³⁰⁵ In reviewing a proposed use, it is irrelevant that the sponsoring organization is not approved by the State Board of Regents³⁰⁶ or registered pursuant to the requirements of the Education Law,³⁰⁷ since it is the function and objective of the organization and use that dictates its treatment. Moreover, an occasional profit-making bazaar or art sale does not transform such a use into a commercial venture.³⁰⁸

Since schools are afforded a privileged position in zoning review, so too, are the accessory uses without which schools could not continue their operations. Accordingly, it has been determined that the parking of school buses on the same lot as a school is a permitted accessory use,³⁰⁹ but the same accessory use of an adjoining parcel is not protected.³¹⁰ Similarly, having permitted a college to become established in a municipality, the municipality could not limit the number of seats in athletic stands.³¹¹

In order to deal with the inevitable adverse effects of educational institutions and to mitigate the negative impacts on the area, the courts have recognized the requirement of a special permit as an appropriate device to evaluate the potential impacts on the community of a private educational use and to perform the delicate balancing of these concerns with promoting

305. *Ruckgaber*, 65 Misc. 2d at 245, 317 N.Y.S.2d at 93.

306. *Imbergano*, 77 Misc. 2d at 191, 352 N.Y.S.2d at 341.

307. *Collins*, 191 Misc. at 552, 83 N.Y.S.2d at 124-25.

308. *Imbergano*, 77 Misc. 2d at 192, 352 N.Y.S.2d at 341-42.

309. *People v. Firestone*, 48 Misc. 2d 480, 482, 265 N.Y.S.2d 179, 181 (New Rochelle City Ct. 1965).

It is difficult to conceive of conducting an academic school which draws its students from a widespread area without the use of vehicles to transport them . . . It is true that the ordinance reveals a plan to protect residential areas from commercial use or enterprise, but the legislative intent underlying the statute is not contrary either to the use or to the parking of school buses and vehicles. They are employed solely for school purposes and they constitute an accessory use clearly within the purview of the ordinance.

Id.

310. *People v. Zelden*, 60 Misc. 2d 18, 300 N.Y.S.2d 933 (Dist. Ct. Nassau County 1969).

311. *Property Owners Ass'n*, 2 Misc. 2d 309, 123 N.Y.S.2d 716.

education of the public.³¹² In imposing conditions upon the establishment or expansion of an educational institution, as with any use, the conditions must be directly related and incidental to the proposed use of the property and not the manner of operation of the particular enterprise.³¹³ As a result, it is beyond the authority conferred on a municipality to impose, as a condition of a special permit for a private school, the details of the operation of the educational processes of the institution.³¹⁴ Conditions which relate to the age of students, limit instruction to certain grades, and limit the hours of operation of a school are invalid "because they apply to the details of the operation of the business and not to the zoning use of the [property]."³¹⁵

Summit School v. Neugent,³¹⁶ for example, illustrates the impermissibility of the imposition of conditions unrelated to the use of the land. In *Summit School*, the applicant applied for and received a special permit and variance to operate a private school for handicapped children with learning disabilities, subject to a number of conditions.³¹⁷ After a subsequent hearing, the zoning board of appeals found that the school had violated a number of the "conditions subsequent" and revoked the variance and special permit.³¹⁸ In the special proceeding in which the revocation of the permit was challenged, the court found

312. The majority of the more recent decisions deal with the authority or reasonableness of conditions attached to a special permit. Since "[m]unicipal zoning ordinances usually do not undertake to regulate schools . . . the decisions dealing with the power to regulate are few." R.M. ANDERSON, *supra* note 239, at § 11.09.

313. *Summit School*, 82 A.D.2d at 467, 442 N.Y.S.2d at 76-77.

314. *Id.* at 468, 442 N.Y.S.2d at 77.

315. *Bernstein*, 60 Misc. 2d at 476, 302 N.Y.S.2d at 148.

316. 82 A.D.2d 463, 442 N.Y.S.2d 73 (2d Dep't 1981).

317. *Id.* at 464, 442 N.Y.S.2d at 75. The conditions were agreed to by the applicant and were the subject of a written agreement entered into by the parties. In answer to the claim that the school had waived its right to object to the conditions, the court determined that, to the extent that the school might "be precluded by a prior waiver of a statutory or constitutional right to challenge the official action of the municipality in relation to zoning," such waiver of a statutory or constitutional right to challenge the action was ineffective to foreclose a challenge where the right concerned a matter of public policy. *Id.* at 468, 442 N.Y.S.2d at 77. The court determined that the school had "waived all objections to the 'conditions subsequent,' except those under which the municipality sought to assume control over some aspects of the educational process of the school, an effort for which [they are] neither professionally equipped nor legally authorized to undertake" and which is contrary to public policy. *Id.* at 468, 442 N.Y.S.2d at 77.

318. *Id.* at 465, 442 N.Y.S.2d at 76.

that a condition which limited attendance at the school to those with learning disabilities under the age of eighteen impermissibly contradicted the Education Law³¹⁹ which specifically provides for the education of handicapped children under the age of twenty-one.³²⁰ Such a condition further usurped the educational function of the local school district which is responsible for determining the nature and extent of a child's handicap and to educate the child appropriately.³²¹ The board's attempt to limit the handicapped condition of the children attending the school was invalid for the same reason.³²² A condition which limited the times of the day during which educational classes could be conducted and a provision that athletic and recreational activities be secondary and be conducted either indoors or sufficiently distant from the school boundaries were also found to be improper attempts to control the school's educational process.³²³

The court also invalidated a condition which prohibited summer camp or vacation activities at the school property and limited summer activities to a summer school session which was required to conform to the same general educational and recreational requirements as the regular school session:

If, in conjunction with the operation of the school, it is deemed by those charged with its management that it would enhance the training and education of the students by a combination of academic and camp activities by trained members of its faculty or others with similar educational qualifications, an effort by this condition to restrict such activities is wholly unauthorized and constitutes an interference with the teaching function.³²⁴

Also found to be an improper intrusion on the details of the operation of the school, not relating to the zoning use of the property, was the requirement that a certain proportion of staff to students be maintained.³²⁵

Similarly, among the impermissible provisions of zoning ordinances which sought to regulate schools were area require-

319. N.Y. EDUC. LAW §§ 4401(1), 4402(1)(a) (McKinney 1981).

320. *Summit School*, 82 A.D.2d at 469, 442 N.Y.S.2d at 78.

321. *Id.* at 469, 442 N.Y.S.2d at 78.

322. *Id.* at 471, 442 N.Y.S.2d at 79.

323. *Id.* at 468-69, 442 N.Y.S.2d at 77-78.

324. *Id.* at 470, 442 N.Y.S.2d at 79. *See supra* notes 296-303 and accompanying text.

325. *Summit School*, 82 A.D.2d at 470, 442 N.Y.S.2d at 78.

ments per student,³²⁶ the requirement of an annually renewable permit, and the requirement of a six-foot stockade fence where a school adjoins residential property.³²⁷ Such regulations exceeded the powers delegated to municipalities and were determined not to be reasonably related to advancing the stated goal of safety and fire prevention.³²⁸ Completely beyond the authority of local municipal control is any review or control of a school's curriculum.³²⁹ Also considered to be unreasonable per se is an off-street parking requirement for students without making a provision for the fact that the school's student population is not of driving age.³³⁰

IV. An Emerging Standard

Although the decisions of the New York courts before *Bagnardi* consistently elevated religious (and educational) uses over virtually every zoning consideration, it has been observed that "[d]espite First Amendment considerations, the judicial trend [in the country] now seems to favor the view that churches may be regulated like any other use of land in a residential zone."³³¹ The dissent in *Jewish Reconstructionist Synagogue of the North Shore, Inc. v. Incorporated Village of Roslyn Harbor*,³³² initially served as the basis for a school of thought which had advocated that a far less deferential standard was applicable

326. See *Paulgene Realty Corp.*, 24 Misc. 2d at 795, 200 N.Y.S.2d at 133 (30 square feet of classroom and 1,000 square feet of outdoor area per student); *Betty-June School v. Young*, 25 Misc. 2d 909, 913, 201 N.Y.S.2d 692, 697-98 (Sup. Ct. Nassau County 1960) (30 square feet of classroom and 200 square feet of outdoor area per student).

327. See *Betty-June School*, 25 Misc. 2d at 913-16, 201 N.Y.S.2d at 698-700; *Paulgene Realty Corp.*, 24 Misc. 2d at 797, 200 N.Y.S.2d at 136-37.

328. *Paulgene Realty Corp.*, 24 Misc. 2d at 797, 200 N.Y.S.2d at 136-37.

The number of square feet of space allotted to a student might properly be mandated as an educational matter as a health, safety or fire regulation . . . but what has that to do with zoning? . . . Considered from an educational view the State might very well prescribe the minimum space standards for students, but it has not seen fit to do so, but neither has it conferred control of educational functions on plaintiff village.

Id. at 795, 200 N.Y.S.2d at 133-34.

329. *Westbury Hebrew Congregation*, 59 Misc. 2d at 389, 302 N.Y.S.2d at 926.

330. *Paulgene Realty Corp.*, 24 Misc. 2d at 796, 200 N.Y.S.2d at 135.

331. 2 RATHKOPF, *supra* note 25, at § 20.01[2][a] n.9.

332. 38 N.Y.2d 283, 292, 342 N.E.2d 534, 541, 379 N.Y.S.2d 747, 757 (1975) (Jones, J., dissenting). Judge Jasen joined in this dissent.

in New York. The planning concerns and rationale expressed by the dissent in *Jewish Reconstructionist Synagogue* have, to a great degree, been accepted in *Bagnardi*. No longer does an insurmountable presumption exist that the desires of all religious and educational institutions to establish or expand a religious use always outweigh legitimate municipal planning and safety concerns.

The *Jewish Reconstructionist Synagogue* dissent opined that "[i]n our view New York should approach the position taken by the growing number of States holding what has been termed the minority view."³³³ Noting that the constitutional guarantees of freedom of worship are not always absolutist and invariable,³³⁴ the two dissenting judges observed that the functional aspects of religious uses "are no different from those of other places of community assembly and activity."³³⁵ The dissent criticized past judicial preoccupation with the status and characteristics of the religious users rather than the functional aspects of the religious use.³³⁶ As was eventually accepted in *Bagnardi*, the dissent asserted that "[i]t cannot be successfully contended . . . that the application of sensitively, minimally designed regulation of religious and educational uses would materially adversely affect the full and free exercise of religious or educational freedom."³³⁷

Given the reasonable expectation that the use of the premises as a synagogue would increase traffic and create parking problems, the dissenters in *Jewish Reconstructionist Synagogue* found no constitutional considerations which precluded the application of what they perceived as the reasonable provisions of

333. *Id.* at 292, 342 N.E.2d at 541, 379 N.Y.S.2d at 757.

334. *Id.* at 293, 342 N.E.2d at 542, 379 N.Y.S.2d at 758.

335. *Id.* at 294, 342 N.E.2d at 542, 379 N.Y.S.2d at 758.

336. *Id.* at 294, 342 N.E.2d at 542, 379 N.Y.S.2d at 758-59.

[W]e do not agree that because of the merits of these [church] activities it can be said that an infringement of the constitutional rights of the owner results if it is not allowed use of the property for such purposes in the midst of a section of the city which has been restricted, . . . primarily to homes to be occupied by individual families.

Id. (quoting *Miami Beach Lutheran Church v. City of Miami Beach*, 82 So. 2d 880, 882 (Fla. 1955)).

337. *Id.* at 294, 342 N.E.2d at 542, 379 N.Y.S.2d at 759.

the zoning law to the property.³³⁸ The dissent noted that

[i]t is a newcomer which purchased the property . . . with full awareness of the regulatory provisions of the local zoning ordinance which had predated the synagogue's interest in the property by 20 years. Beyond that this synagogue comes not to serve the religious or other needs of the residents of Roslyn Harbor but of members of its own congregation from nearby municipalities.³³⁹

The dissent discerned a reasonable relationship between the zoning regulation and the public health, safety, and welfare of the community and found that "the application of such regulation would not infringe upon the legitimate interests of . . . [the] synagogue."³⁴⁰ The dissenters concluded that "[t]he time has come when our court should forthrightly face the legal, economic and social implications of continued slavish adherence to the outmoded doctrine that churches and synagogues are wholly immune from even reasonable zoning regulations."³⁴¹

The dissent was joined in part by the concurrence of two other judges.³⁴² The concurring opinion agreed with

so much of the dissent as characterizes the majority expression of the law as too absolutist in providing a preference and even to some extent an immunity from significant zoning regulation for premises devoted to religious uses Fundamentally, the law should move in the direction of requiring even religious institutions to accommodate to factors directly relevant to public health, safety, or welfare, inclusive of fire and similar emergency risks, and traffic conditions insofar as they involve public safety.³⁴³

It was "[t]he all but conclusive presumption that considerations of public health, safety, and welfare are always outweighed . . . by the policy favoring religious structures" that the concurring opinion found to be objectionable.³⁴⁴ The concurring judges, however, sought to annul the denial of the permit since the effect and purpose of the provisions of the municipality's zoning

338. *Id.* at 295, 342 N.E.2d at 543, 379 N.Y.S.2d at 759.

339. *Id.* at 294, 342 N.E.2d at 542-43, 379 N.Y.S.2d at 759.

340. *Id.* at 295, 342 N.E.2d at 543, 379 N.Y.S.2d at 759.

341. *Id.* at 295, 342 N.E.2d at 543, 379 N.Y.S.2d at 759-60.

342. *Id.* at 291-92, 342 N.E.2d at 540-41, 379 N.Y.S.2d at 756-57 (Breitel, J., concurring). Judge Wachtler joined in the concurrence.

343. *Id.* at 291-92, 342 N.E.2d at 540-41, 379 N.Y.S.2d at 756.

344. *Id.* at 292, 342 N.E.2d at 541, 379 N.Y.S.2d at 756.

ordinance were considered to be exclusionary without compensating values to sustain a public purpose. The overall impact of the ordinance was determined not to sufficiently accommodate the priority, "albeit limited, that should be accorded to religious institutions."³⁴⁵

Subsequently, in a dissenting opinion in *American Friends of the Society of St. Pius v. Schwab*,³⁴⁶ it was suggested that

a close scrutiny of the concurring and dissenting opinions in [*Jewish Reconstructionist Synagogue*] indicates that a majority of the Court of Appeals has moved toward the view that there are legitimate and serious considerations of public health, safety and welfare, i.e., fire and similar emergency risks, and traffic conditions insofar as they involve public safety, which outweigh any policy favoring religious structures.³⁴⁷

In *Society of St. Pius*, the church sought site plan approval to convert a house located in a residential zone into a rectory and chapel seating 250 people.³⁴⁸ The property was located on a cul-de-sac, approximately 2,200 feet from the nearest public highway and would only be accessible by traveling on private highways.³⁴⁹ The board found that a fire hazard would exist as the result of the inadequate parking facilities, ingress only on narrow private roads, the location at the end of a dead end street, and traffic generated prior to and following services.³⁵⁰ The majority decision annulled the denial of the permit and remitted the application for the imposition of conditions which would permit the establishment of the church while mitigating any adverse impacts.³⁵¹ The majority also held that "[u]ntil the appellants attempt to establish such reasonable conditions, it is premature to deal with the issue raised by the dissent, which is whether the petitioner's right to use its property for church purposes must be implemented even if it develops that it is impossi-

345. *Id.* at 292, 342 N.E.2d at 541, 379 N.Y.S.2d at 757.

346. 68 A.D.2d 646, 651, 417 N.Y.S.2d 991, 994 (2d Dep't 1979) (Suozzi, J., dissenting).

347. *Id.* at 652, 417 N.Y.S.2d at 995.

348. *Id.* at 654, 417 N.Y.S.2d at 996.

349. *Id.* at 655, 417 N.Y.S.2d at 996.

350. *Id.* at 655, 417 N.Y.S.2d at 997.

351. *Society of St. Pius*, 68 A.D.2d at 651, 417 N.Y.S.2d at 994.

ble to fashion reasonable conditions.”³⁵² The dissent, on the other hand, was of the opinion that *Westchester Reform Temple* was no longer controlling and that the dissenting and concurring opinions in *Jewish Reconstructionist Synagogue* constitute the prevailing rule today in the court of appeals.³⁵³

Having rebuffed years of municipal attempts at regulation of churches and schools and efforts to minimize undesirable effects of such uses, the court of appeals was provided the opportunity to re-examine the law as it affects such socially beneficial uses for the first time in more than ten years in *Cornell University v. Bagnardi*.³⁵⁴ The appellate division, third department, determined that a city of Ithaca zoning ordinance was invalid insofar as it excluded the proposed expansion of a Cornell University educational use into a residential area of the city by requiring a variance for such use and conditioning the issuance of the variance upon a showing of hardship.³⁵⁵ The one-family residential zone in which the property was located permitted public and parochial schools as uses by right, but required a special permit from the board of zoning appeals for private schools.³⁵⁶ The zoning ordinance defined a “school” as a public or private school below the college level.³⁵⁷ As a result, the city required the university to apply for a variance, the university was unable to establish “hardship,” and the application was denied.³⁵⁸ The court determined that the practical effect of the zoning ordinance was to exclude the educational use of the property and that the ordinance was thus unreasonable to the extent that it resulted in such an exclusion.³⁵⁹ Furthermore, the court held that “since educational use is [by its nature] harmonious with the public interest, conditioning such a use upon a showing of hardship does not bear a substantial relation to public health, safety, morals or general welfare.”³⁶⁰

352. *Id.*

353. *Id.* at 656, 417 N.Y.S.2d at 997 (Suoizzi, J., dissenting).

354. 68 N.Y.2d 583, 503 N.E.2d 509, 510 N.Y.S.2d 861 (1986).

355. 107 A.D.2d 398, 399, 486 N.Y.S.2d 964, 965 (3d Dep’t 1985).

356. *Id.* at 399, 486 N.Y.S.2d at 965.

357. *Id.*

358. *Id.* at 399, 486 N.Y.S.2d at 965.

359. *Id.* at 400, 486 N.Y.S.2d at 966.

360. *Id.* at 401, 486 N.Y.S.2d at 966.

Although, as the dissent noted, the city of Ithaca contains parts of two college campuses which occupy a substantial portion of the city's area, and the city was not practicing exclusionary or insular zoning,³⁶¹ the majority decision held that, absent proof of a reasonable and substantial basis for denial of the special permit, the city must permit expansion of the university into its previously residential areas, together with a proliferation of associated educational activities.³⁶² While the majority accorded scant weight to the city's attempts to limit the expansion of university uses into residential areas,³⁶³ the dissent reflected a belief that the city's master plan designation of the area as residential was a legitimate exercise of the police power "to conserve the value of buildings and enhance the value and appearance of land throughout the City."³⁶⁴

The court of appeals modified the decision of the third department, finding that while the protection provided to religious and educational uses by prior court of appeals decisions was necessary to protect such institutions from community hostility,³⁶⁵ those decisions were not intended to entitle all religious and educational institutions to a "full exemption" from zoning regulations "no matter how offensive, overpowering or unsafe to a residential neighborhood the use might be."³⁶⁶ The court noted that although they had rejected any conclusive presumption of an entitlement to an exemption from zoning ordinances in *Diocese of Rochester*,³⁶⁷ they had explicitly rejected any argument that "appropriate restrictions may never be imposed with respect to a church and school and accessory uses" or that "under no circumstances may [such uses] ever be excluded from designated areas."³⁶⁸ Additionally, the court stated that its determi-

361. *Id.* at 406, 486 N.Y.S.2d at 971 (Kane, J., dissenting).

362. *Bagnardi*, 107 A.D.2d at 402, 486 N.Y.S.2d at 968.

363. *Id.* at 401, 486 N.Y.S.2d at 967.

364. *Id.* at 404, 486 N.Y.S.2d at 969 (Kane, J., dissenting) (quoting ITHACA, N.Y., ZONING ORDINANCE § 30.2).

365. *Cornell Univ. v. Bagnardi*, 68 N.Y.2d 583, 593, 503 N.E.2d 509, 513, 510 N.Y.S.2d 861, 865 (1986).

366. *Id.* at 594, 503 N.E.2d at 514, 510 N.Y.S.2d at 866. "Such an interpretation . . . is mandated neither by the case law of our State nor common sense." *Id.*

367. 1 N.Y.2d 508, 136 N.E.2d 827, 154 N.Y.S.2d 849 (1956).

368. *Bagnardi*, 68 N.Y.2d at 594, 503 N.E.2d at 514, 510 N.Y.S.2d at 866 (quoting *Diocese of Rochester v. Planning Bd.*, 1 N.Y.2d 508, 526, 136 N.E.2d 827, 837, 154

nation in *New York Institute of Technology v. Le Boutillier*³⁶⁹ that

ordinarily the factors bearing on public health, safety and welfare such as traffic hazards, impairment of the use, enjoyment or value of properties in surrounding areas and deterioration of appearance of an area, would not be weighty enough to foreclose an educational use in a residential area; . . . [the court] did not intend to establish a rigid rule that educational or religious uses may never properly be found to conflict with these factors to such an extent as to endanger the public's health, safety, welfare or morals.³⁷⁰

Instead, the controlling consideration must be the overall impact of the use on the public welfare.³⁷¹ In spite of the presumed beneficial effect of churches and schools on the community, numerous instances exist in which such an institution may detract from the public health, safety, and welfare and, as a result, the court determined, an application for such a use may properly be denied.³⁷² The court of appeals proclaimed that "[t]here is simply no conclusive presumption that any religious or educational use automatically outweighs its ill effects."³⁷³ The routinely presumed beneficial effect of such institutions may be overcome with evidence of a significant impact on traffic congestion, property values, municipal services, or similar planning concerns.³⁷⁴ Consequently, an educational or religious use which would "unarguably" be contrary to the public welfare need not be permitted at all.³⁷⁵ Church and school uses which present such deleterious consequences on the welfare of the citizens of a community are clearly not what the court had in mind when, in *Westchester Reform Temple v. Brown*, it stated that traffic and similar problems are outweighed by the beneficial effects of a

N.Y.S.2d 849, 863 (1956)).

369. 33 N.Y.2d 125, 305 N.E.2d 754, 350 N.Y.S.2d 623 (1973).

370. *Bagnardi*, 68 N.Y.2d at 594-95, 503 N.E.2d at 514-15, 510 N.Y.S.2d at 866-67.

371. *Id.* at 595, 503 N.E.2d at 515, 510 N.Y.S.2d at 867.

372. *Id.*

373. *Id.* (citing *Jewish Reconstructionist Synagogue*, 38 N.Y.2d at 292, 342 N.E.2d at 541, 379 N.Y.S.2d at 756 (Breitel, C.J., concurring)).

374. *Bagnardi*, 68 N.Y.2d at 595, 503 N.E.2d at 515, 510 N.Y.S.2d at 867.

375. *Id.* The court posed as an example: "A community that resides in close proximity to a college should not be obliged to stand helpless in the face of proposed uses which are dangerous to the surrounding area." *Id.*

school or church.³⁷⁶ Quoting the concurring opinion of Chief Judge Breitel in *Jewish Reconstructionist Synagogue*, the court declared that "even religious [and educational] institutions [must] accommodate to factors directly relevant to public health, safety or welfare, inclusive of fire and similar emergency risks, and traffic conditions insofar as they involve public safety."³⁷⁷

A more balanced approach, however, is required for uses which, although not dangerous or clearly contrary to the public welfare, are nonetheless obnoxious to the residents of the neighborhood.³⁷⁸ Accordingly, a special permit may be required as a prerequisite to the establishment or expansion of a school or church, and reasonable conditions may be imposed in order to minimize the impairment of a residential neighborhood or the danger of traffic hazards to the same extent as they may be imposed on ordinary commercial enterprises.³⁷⁹ A special permit for such socially beneficial uses "may be conditioned on the effect the use would have on traffic congestion, property values, municipal services, the general plan for development of the community," and other relevant planning concerns.³⁸⁰ If such conditions are reasonably designed to counteract the adverse effects of such use, they will be sustained, "provided they do not by their cost, magnitude or volume, operate indirectly to exclude such uses altogether."³⁸¹

The court of appeals further found to be invalid a requirement that an application for a religious or educational use demonstrate a need for the proposed expansion or a need to expand at a particular location since such requirements are entirely unrelated to the welfare of the community.³⁸² In addition,

376. *Westchester Reform Temple v. Brown*, 22 N.Y.2d 488, 496-97, 239 N.E.2d 891, 896, 293 N.Y.S.2d 297, 304 (1968).

377. *Bagnardi*, 68 N.Y.2d at 595, 503 N.E.2d at 515, 510 N.Y.S.2d at 867 (quoting *Jewish Reconstructionist Synagogue*, 38 N.Y.2d at 291-92, 342 N.E.2d at 540-41, 379 N.Y.S.2d at 756 (Breitel, C.J., concurring)).

378. *Bagnardi*, 68 N.Y.2d at 595-96, 503 N.E.2d at 515, 510 N.Y.S.2d at 867.

379. *Id.* at 596, 503 N.E.2d at 515, 510 N.Y.S.2d at 867.

380. *Id.* at 596, 503 N.E.2d at 515-16, 510 N.Y.S.2d at 867-68.

381. *Id.* at 596, 503 N.E.2d at 516, 510 N.Y.S.2d at 868. *But cf. Westchester Reform Temple*, 22 N.Y.2d at 497, 239 N.E.2d at 897, 293 N.Y.S.2d at 304.

382. *Bagnardi*, 68 N.Y.2d at 596-97, 503 N.E.2d at 516, 510 N.Y.S.2d at 868. *Contra New York Inst. of Technology v. Le Boutillier*, 33 N.Y.2d 125, 305 N.E.2d 754, 350

a requirement that a church or school demonstrate that no ill effects will result from the proposal is invalid since it ignores that such uses "have inherent beneficial effects that must be weighed against their potential for harming the community."³⁸³

V. Conclusion

A less deferential standard is clearly applicable in balancing the needs of religious and educational institutions seeking to locate or expand in residential neighborhoods. While the preeminent status of truly religious and educational *uses* has not been significantly curtailed, it may be argued that all uses operated or sponsored by a religious or educational organization should not be entitled to the same level of immunity from zoning regulations. Some may question whether, for example, the drug center in *Slevin* is the type of use which must be accommodated in a residential area solely because a church is a sponsor of the program and it is operated in a church-owned building. Must a residential area tolerate whatever use a school district seeks to install in an unused school building, merely because the district desires to maximize its return? Should the establishment of a hospital or factory in a residential zone be mandated merely because it is owned and operated by a religious organization? Most likely, such uses are not required to be accommodated. Although the line has not been well established by current case law, it generally appears that only those uses which have been truly recognized as traditional, religious or educational uses and clearly accessory uses should be accorded such preferred status. It has been suggested that more emphasis should be placed on the nature of the use, rather than the organization sponsoring the use. The argument of those who assert such a limitation is not illogical. Since the residential neighbors of such uses are required to cope with any intrusive effects, the organization operating such nontraditional religious or educational uses should be required either to mitigate against undesirable impacts to the same extent as a commercial enterprise or be barred from resi-

N.Y.S.2d 623 (1973). *But see Bagnardi*, 68 N.Y.2d at 597, 503 N.E.2d at 516, 510 N.Y.S.2d at 868 (To the extent that *Le Boutillier* "may be construed otherwise, it should not be followed.").

383. *Bagnardi*, 68 N.Y.2d at 597, 503 N.E.2d at 516, 510 N.Y.S.2d at 868.

dential areas.

Even the status of traditional religious and educational uses has been challenged. The court of appeals in *Bagnardi* has required religious and educational uses to comply with appropriate regulations and conditions which would mitigate the negative impacts of such uses to the same extent as any other use which interferes with the quiet enjoyment of a residential neighborhood. In effect, the onus of preserving the tranquility of the neighborhood has been shifted to the institution. Nevertheless, the privileged position of such socially beneficial institutions in New York remains well established. Although *Bagnardi* represents a realization that such uses produce undesirable impacts which must be dealt with, the rule remains one, primarily, of accommodation.