Religious Land Use Jurisprudence: The Negative Ramifications for Religious Activities in Washington After *Open Door Baptist Church v. Clark County*

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I. INTRODUCTION

On March 16, 2000, the Washington Supreme Court entered the debate over whether a church has a constitutional right to be free from reasonable zoning regulations when it decided *Open Door Baptist Church v. Clark County*.[1] Open Door Baptist Church (hereinafter "Open Door") sued Clark County, Washington, alleging that Clark County's zoning laws violated the rights of Open Door's members under the First Amendment's Freedom of Exercise Clause,[2] the Washington Constitution's freedom of religion clause,[3] and the Religious Freedom Restoration Act of 1993.[4] The principal dispute in this case stemmed from a conditional use permit, which local zoning laws

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1. 140 Wash. 2d 143, 995 P.2d 33 (2000).

2. U.S. CONST. amend. I provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." The First Amendment is applied to state and local governments through the due process clause of the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296 (1940).

3. WASH. CONST. art. I, § 11 states:

> Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.

4. 42 U.S.C. § 2000bb-1 *et. seq.* (1993). The Religious Freedom Restoration Act (RFRA) prohibited government from substantially burdening a person's exercise of religion unless the government could demonstrate the burden was in furtherance of a compelling governmental interest, and was the least restrictive means of furthering that compelling governmental interest. 42 U.S.C. § 2000bb-1. RFRA was declared unconstitutional by the Supreme Court in City of Boerne v. Flores, 521 U.S. 507, 515–16 (1997).

required Open Door to obtain in order to operate as a church. Undeniably, this case serves as a prime example of the increasingly familiar conflict between a congregation's fundamental right to freely worship and the power of local government to zone.

Open Door has used the Clark County building located on the property at issue for church purposes since 1990.[5] Indeed, the building was originally devoted to church purposes, but was later used as an art school from 1978 until first occupied by Open Door.[6] The property was zoned by Clark County under a residential and rural land use designation.[7] On January 12, 1995, Clark County determined that Open Door's church site did not conform with the County's zoning code and issued a notice and order.[8] Open Door was ordered to "cease all business activities or apply for a conditional use permit within ten days from the date of the notice and order."[9] The church contended that requiring it to apply for a conditional use permit violated its constitutional right to the free exercise of religion.[10]

The Clark County hearing examiner stated that he did not have jurisdiction to consider state or federal constitutional issues, and concluded, based on applicable land use laws, that the property was being used as a church without the necessary conditional use permit, and was therefore a nonconforming use.[11] Accordingly, the hearing examiner affirmed the notice and order requirements and gave Open Door sixty days to file a technically complete application for a conditional use permit.[12] Open Door obtained review of the examiner's decision through a writ of certiorari to the Clark County Superior Court by alleging that enforcement of the zoning regulations violated its constitutional right to the free exercise of religion.[13] The court vacated the hearing examiner's order, reasoning that the legal standard that allowed the government to burden religious uses (as articulated by the

5. *Open Door Baptist Church*, 140 Wash. 2d at 145, 995 P.2d at 35.

6. *Id.* at 145, 995 P.2d at 35. The previous owner of the property testified in a March 1995 hearing about a meeting that she attended with a realtor and Rocky Shanks, Open Door's pastor. At this meeting the realtor informed Shanks that the building had not been approved as a church; the realtor also advised him that the church would have to obtain a conditional use permit from Clark County in order to secure approval of its use as a church. *Id.*

7. CLARK COUNTY, WASH., CODE § 18.304A (1998).

8. *Open Door Baptist Church*, 140 Wash. 2d at 145, 995 P.2d at 35. Incidentally, Open Door's pastor, Rocky Shanks, was served with a notice and order from Clark County that gave notice of the following violation: No Conditional Use Permit for church in Rural Estate Zoning District as per Clark County Code § 18.304. *Id.* at 145, 995 P.2d at 35.

9. *Id.* at 145–46, 995 P.2d at 35.

10. *Id.* at 146, 995 P.2d at 35.

11. *Id.*

12. *Id.* at 146, 995 P.2d at 35.

13. *Id.* at 146–47, 995 P.2d at 35.

Washington Supreme Court in *City of Sumner v. First Baptist Church*[14]) had not been met.[15] Addressing the conflict between the power of a governmental entity to zone and the right of a congregation to freely exercise religion, the *City of Sumner* court noted that its duty was to balance the interests of the parties in order to accommodate both religious freedom and local government's legitimate concerns over land use.[16] The court concluded that should Clark County take further enforcement against Open Door to require a conditional use permit, it would bear the burden of complying with the standard set forth in *City of Sumner*, meaning that the county would have to justify its zoning laws in the case at bar by (1) demonstrating a compelling state interest, and (2) proving that it has chosen the least restrictive alternative to accomplish that result.[17] Clark County appealed this ruling to Division Two of the Court of Appeals, which reversed the trial court, holding that the mere process of applying for a conditional use permit did not impose an unconstitutional burden on Open Door.[18] Accordingly, Open Door had little choice by way of this decision: it could comply with Clark County's zoning laws by applying for a conditional use permit, or it could close its doors.

There is a long-running, national dispute among churches, cities, and counties over local government's power to use zoning and other land use laws to regulate religious institutions.[19] In Washington, religious land use jurisprudence issues have "touched off a holy war."[20] Those fighting to keep large churches outside of rural areas concentrate their arguments on growth management concerns[21] and the main-

14. 97 Wash. 2d 1, 639 P.2d 1358 (1982). In *City of Sumner*, the court addressed the conflict between the state's power to enforce compliance with its zoning and building code regulations and the right of church members to freely exercise their religious beliefs by providing Christian education for their children. The court stated that "where, as here, two legitimate and substantial interests collide, one may ultimately have to give way to the other. In such a situation, the court's function is to balance the interests of the parties and, if an accommodation cannot be effected, determine which interest must yield." *Id.* at 8, 639 P.2d at 1362. The court further reasoned that "[w]hen the City, in the exercise of its police power, is confronted with rights protected by the First Amendment, it should not be uncompromising and rigid. Rather, it should approach the problem with flexibility. There should be some play in the joints of both the zoning ordinance and the building code." *Id.* at 9, 639 P.2d at 1362.

15. *Open Door Baptist Church*, 140 Wash. 2d at 148, 995 P.2d at 35.

16. 97 Wash. 2d at 1, 639 P.2d at 1358.

17. *Open Door Baptist Church*, 140 Wash. 2d at 147, 995 P.2d at 36.

18. *Id.* at 148, 995 P.2d at 36.

19. Eric Pryne, *Churches' Land Fight Up For Vote: Sims Seeks To Limit Rural-Area Sprawl*, THE SEATTLE TIMES, Feb. 11, 2001, at B1, *available at* http://www.archives.seattletimes.nwsource.com/cgi-bin/texis.cgi/web/vortex/display?slug=comp11m&date=20010211&query=Churches+Land+Fight+Eric+Pryne.html.

20. *Id.*

21. *Id.*

tenance of public services, which include roads, water, utilities, sewage treatment, and fire and police protection.[22] Because the existence of mega-churches can lead to urban-level demands for these goods and services, many zoning law proponents believe counties wisely restrict the locations upon which these newer, large-size churches can be built.[23] Their theory is that zoning restrictions reduce sprawl in rural areas and avoid overburdening local government in its ability to provide public services.[24] As seen in *Open Door*, without such regulations, "one could choose to live in a neighborhood for its entirely residential nature, wake up one morning and find that all other houses on one's block had been replaced by church buildings, and be left without recourse."[25]

Conversely, the Catholic Archdiocese of Seattle is leading a crusade to get churches built, noting that church members in rural areas are clamoring for new parishes.[26] Alexander Brunett, an Archbishop in Western Washington, has stated that zoning ordinances are placing a burden on the churchgoer's right to worship freely: "a policy that stops people from going to church because the only church available is miles away and is so overcrowded that there is no parking and no place to sit . . . interfere[s] with our right to worship."[27] The Archbishop warned: "[I]f we are prevented from meeting the spiritual and educational needs of thousands of Catholics, there will be consequences."[28] Moreover, the conservation of resources is not the only pertinent issue here; consideration must also be given to the vast social good that churches create, like the clothes closets, food banks, and day-care operations.[29] Ron Hart, an ordained pastor for Walnut Grove Community Church and a former Vancouver, Washington city councilman, made clear that church leaders are not suggesting that churches should be exempt from complying with zoning laws by submitting plans or permits, but rather that "there ought to be somewhere we [churches

22. WASH. REV. CODE §§ 36.70.010, 36.70A.020, 36.70A.030, 36.70A.070; *cf. Open Door Baptist Church*, 140 Wash. 2d at 159, 995 P.2d at 42.

23. *County Can Limit Rural Church Size*, THE SEATTLE POST-INTELLIGENCER, Feb. 28, 2001, at B4, *available at* http://www.seattlepi.com/opinion/churched.shtml.

24. *Id.*

25. 140 Wash. 2d at 169, 995 P.2d at 47.

26. Pryne, *supra* note 19, at B1.

27. Alexander Brunett, *Editorial Wants to Restrict Right to Worship*, THE SEATTLE POST-INTELLIGENCER, March 8, 2001, at B6, *available at* http://www.seattlepi.com/opinion/archbishop.shtml.

28. Pryne, *supra* note 19, at B1.

29. Erin Middlewood, *Today's Churches Don't Fit Building Mold*, THE COLUMBIAN, June 25, 2001, at C1.

and congregations] can go to build without having to challenge the whole system."[30]

On its face, the Washington Supreme Court's decision in *Open Door* merely requires a church to go through the conditional use permit process when a zoning ordinance is deemed to pass constitutional muster; however, this decision actually has far greater ramifications because it signals a shift in the court's thinking with regard to the free exercise of religion. Because the court relied on Washington religious land use jurisprudence, this Note will concentrate on the court's analysis of that subject. This Note addresses the issue of whether a zoning ordinance that requires a church to apply for a conditional use permit, while also remitting a concomitant application fee, unconstitutionally infringes upon the church's religious freedom under article I, section 11 of the Washington Constitution. In holding that a zoning ordinance can, in fact, require churches to apply for these conditional use permits, the court demonstrated a significant shift in its religious land use jurisprudence. The court misapplied Washington's freedom of religion test, and in doing so, incorrectly tipped the scales in favor of zoning laws promulgated by local government.

Part II of this Note provides a history of religious land use jurisprudence in Washington. This part addresses growth management laws generally, and where these laws cross paths with constitutional guarantees of the free exercise of religion. Part III focuses on the Washington Supreme Court's *Open Door* decision, separately addressing both the majority opinion and the dissent. Part IV illustrates how the Washington Supreme Court misapplied Washington's religious freedom test in *Open Door* and significantly shifted religious land use jurisprudence. Part IV further discusses how this shift may include Washington's adoption of the lower federal standard and elaborates upon the negative ramifications this shift would have on churches throughout the state. Part V concludes this Note, discussing how the free exercise of religion has historically been afforded great protection in Washington, and how the Washington Supreme Court is seemingly moving in a different direction.

II. RELIGIOUS LAND USE JURISPRUDENCE

In order to fully understand both the controversy in *Open Door* and the implications of this case, one must first grasp some of the fundamentals of religious land use jurisprudence. Not surprisingly, the areas of land use and religious jurisprudence have very well-developed

30. *Id.*

law. Therefore, each of these bodies of law will be separately discussed in this section, followed by an analysis that details the implications of this merger between land use jurisprudence and the law of religion at both the state and federal levels.

A. Land Use and Growth Management

1. Washington State's Police Power

As a general principle, land use zoning is constitutionally valid under the United States and Washington constitutions.[31] "Land use planning seeks to rationally guide and coordinate the multitude of public and private land development decisions which determine the quality of a community."[32] While land use planning traditionally addresses physical developments (and is typically concerned with the location and extent of various forms of housing, commerce, industry and agriculture, woods, parks, open space, public buildings, and sewer, drainage, and water systems), it also considers various economic and social determinants.[33] The power to zone falls within the government's police power, which regulates citizens' activities in order to advance the public health, safety, and welfare.[34]

Local governments generally zone under the express legislative authority of a state zoning enabling act.[35] Among local governments, the delegated police power is distributed to municipal corporations – cities, villages, and towns – and frequently to counties.[36] Cities and counties that zone under Washington statutes must establish a planning committee or department.[37] Additionally, hearing examiners may be appointed and may consider applicants for special permits.[38] Under the adoption of a comprehensive land use plan, the administrative body has the power to enact ordinances that, in addition to physically planning a county or city, temper public problems such as overcrowding, traffic, noise, and incompatible land uses.[39]

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31. *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); State ex rel. Modern Lumber & Mill Work Co. v. MacDuff, 161 Wash. 600, 297 P. 733 (1931).

32. RICHARD L. SETTLE, WASHINGTON LAND USE AND ENVIRONMENTAL LAW AND PRACTICE 1 (1983).

33. *Id.*

34. *See* Penn Central Transp. Co. v. New York City, 438 U.S. 104, 125 (1978) (citing Nectow v. Cambridge, 277 U.S. 183, 188 (1928)).

35. *See id.*at 125–27.

36. JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND CONTROL LAW § 3.5 (1998).

37. WASH. REV. CODE §§ 36.63.020, 35A.63.110 (1999)

38. WASH. REV. CODE §§ 35.63.130, 35A.63.170, 36.70.970 (1999).

39. JUERGENSMEYER, *supra* note 36, § 2.8.

Although governmental zoning powers are broad and sweeping, these land use actions are nevertheless subject to constitutional limitations.[40] For example, land use regulations that deny due process of law are void on the ground of constitutional infirmity.[41] Another constitutional limitation on land use regulations is based on the guarantee of free exercise of religion.[42] Accordingly, a congregation has grounds to object to a zoning ordinance when the law significantly impinges upon the members' free exercise of religious beliefs.

2. Washington's Growth Management Act

In 1990, Washington enacted the Growth Management Act (GMA) as a legislative response to concerns over the state's rapid growth in population.[43] The Legislature enacted the GMA because it found that "uncoordinated and unplanned growth, together with a lack of common goals expressing the public's interest in the conservation and wise use of our lands, pose a threat to the environment, sustainable economic development, and the health, safety, and high quality of life enjoyed by the residents of the state."[44] The GMA articulates broad goals that are designed to guide local governments in the adoption of comprehensive plans and development regulations.[45] These goals include, but are not limited to, reducing urban sprawl and maintaining and enhancing natural resource industries.[46]

Under the GMA, local governments have broad authority and discretion in land use planning and enforcement.[47] Despite the broad delegation of power, the Act requires six mandatory elements that must be addressed in comprehensive land use planning: (1) land use; (2) housing; (3) capital facilities; (4) utilities; (5) rural; and (6) transportation.[48] Additionally, local governments must identify lands for

40. *E.g.*, *id.* at §§ 10.12–10.19.

41. *E.g.*, Norco Construction, Inc. v. King County, 97 Wash. 2d 680, 649 P.2d 103 (1982); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) (holding land use regulation that amounts to a taking requires just compensation); Ackerley Communications v. City of Seattle, 92 Wash. 2d 905, 602 P.2d 1177 (1979) (finding government cannot trammel upon guarantee of equal protection of law by treating one landowner less favorably than other landowners).

42. *See, e.g.*, City of Sumner v. First Baptist Church, 97 Wash. 2d 1, 5-8, 639 P.2d 1358, 1362-63 (1982).

43. HELLER, EHRMAN, WHITE & MCAULIFFE, 24 WASHINGTON PRACTICE, § 18.1, p. 172 (1997).

44. WASH. REV. CODE § 36.70A.010.

45. WASH. REV. CODE § 36.70A.020.

46. *Id.*

47. *See, e.g.*, WASH. REV. CODE §§ 36.70A.103, 120.

48. WASH. REV. CODE § 36.70A.070.

public purposes, open space corridors, and essential public facilities.[49] None of the GMA's criteria include churches.

3. Clark County's Land Use Regulations

Clark County has developed a comprehensive land use plan under the Growth Management Act. In accordance with the Act and its goals, Clark County created, among other uses, rural districts, providing land for residential living in rural areas.[50] Natural resources activities such as farming and forestry are also allowed and encouraged in rural districts.[51]

Some uses in the county are neither absolutely permitted nor prohibited, but are allowed only when certain conditions are met. The Clark County Code provides a broad range of conditional uses, and coincidentally, churches fall under this group.[52] Because a conditional use is not a regularly permitted use, it is thus permitted only upon the grant of a conditional use permit by a local administrative body.[53] The policy behind approving conditional use permits on a discretionary basis is based on the premise that although certain uses are desirable, many are not, and regulation is decided on an *ad hoc* basis.[54]

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49. WASH. REV. CODE §§ 36.70A.150, 36.70A.030(12), 36.70A.160, 36.70A.200.

50. CLARK COUNTY, WASH., CODE § 18.303A.010 (1998).

51. *Id.*

52. CLARK COUNTY, WASH., CODE § 18.303A.030. The following are conditional uses under § 18.303A.030 of the Clark County Code:

> A. Churches.
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> B. Cemeteries and mausoleums, crematoria, columbaria, and mortuaries within cemeteries. . . .
>
> C. Public or private schools, but not including business, dancing or technical schools.
>
> D. Golf courses.
>
> E. Kennels.
>
> F. Riding stables.
>
> G. Private recreational facilities, such as country clubs and golf courses, including such intensive commercial recreation uses a golf driving range, race track, amusement park or gun club.
>
> H. Veterinary clinics.
>
> I. Government facilities necessary to serve the area outside urban growth boundaries including fire stations, ambulance dispatch facilities and storage yards, warehouses, or similar uses.
>
> J. Private ambulance dispatch facility.
>
> K. Residential care homes.

CLARK COUNTY, WASH., CODE § 18.303A.030 (1998).

53. *See Open Door Baptist Church v. Clark County*, 140 Wash. 2d. 143, 146, 995 P.2d 33, 35 (2000).

54. *See id.* at 146, 995 P.2d at 35.

B. Religious Freedom Clause

Article I, section 11 of the Washington Constitution protects the free exercise of religion to all individuals.[55] The Washington Supreme Court has emphasized that the freedom of religion is vital,[56] and the courts have the duty to "ever guard and maintain our constitutional guarantees of religious liberty, and to see to it that these guarantees are not narrowed or restricted because of some supposed emergent situation . . . or because the consequences of the impingement upon the constitutional guarantees may appear insignificant."[57] Washington's highest court has stated that free religious exercise is the rule, and any burden on that exercise must be the exception.[58] Article I, section 11 is to be read broadly in order to achieve this aim.[59]

1. Strict Scrutiny of Religious Exercise

The Washington Supreme Court has traditionally applied the strict scrutiny test when analyzing religious exercise cases.[60] Under that test, the complaining party must first prove that a law has a coercive effect on the practice of religion.[61] If a coercive effect is proven, the burden shifts to the government to show that the law both serves a compelling state interest, and is the least restrictive means for achieving the governmental objective.[62] If no compelling state interest exists, or if a less restrictive means for achieving this interest can be found, the law is unconstitutional.[63]

To prove a coercive effect, the complaining party must satisfy a two-part test, which begins with a demonstration that the complainant harbors sincere religious beliefs.[64] To satisfy this requirement, the complainant must first show that its religious convictions are sincere and central to its beliefs.[65] A court will not inquire further into the truth or reasonableness of these beliefs.[66]

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55. Munns v. Martin, 131 Wash. 2d 192, 200, 930 P.2d 318, 321 (1997) (citing First Covenant Church v. City of Seattle, 120 Wash. 2d 203, 215, 840 P.2d 174 (1992) (hereinafter *"First Covenant II"*)).

56. Bolling v. Superior Court, 16 Wash. 2d 373, 381, 133 P.2d 803, 807 (1943).

57. *Id.* at 385–86, 133 P.2d 319.

58. *See, e.g.*, Malyon v. Pierce County, 131 Wash. 2d 779, 785–86, 935 P.2d 1272, 1274–75 (1997).

59. *First Covenant II*, 120 Wash. 2d 203, 224–25, 840 P.2d 174, 186 (1992).

60. *Munns*, 131 Wash. 2d at 199, 930 P.2d at 319.

61. *Id.* at 199, 930 P.2d at 319.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Munns*, 131 Wash. 2d at 199, 930 P.2d at 319.

66. Backlund v. Board of Comm'rs, 106 Wash. 2d 632, 639, 724 P.2d 981, 985 (1986).

The second part of the test requires an analysis of whether the challenged law amounts to a burden on the free exercise of religion.[67] If a law has such a burdening effect, then the enactment burdens the free exercise of religion.[68] The burden on the free exercise of religion may be direct as well as indirect.[69] Thus, even a facially neutral, even-handedly enforced statute may violate the First Amendment or article 1, section 11.[70] If a burden is not found, the coercive effect analysis ends, and the complainant's free exercise of religion challenge fails.[71]

However, should the complaining party prevail by showing that the aforementioned burden exists, the court must next decide whether this burden is sufficiently offset by a compelling state interest.[72] A compelling interest is one that justifies the prevention of a clear and present, grave and immediate danger to public health, peace, and welfare.[73] Washington courts rely upon the reasoning of the Supreme Court's decision in *Sherbert v. Verner*[74] to determine whether a compelling state interest outweighs the burden on the free exercise of religion.[75] Under *Sherbert's* compelling interest test, a law burdening religion can pass constitutional muster only if the government can show that the means chosen to enforce its interest are both necessary and the least restrictive means available to achieve its desired result.[76]

2. Religious Land Use Trilogy

In the past decade, the Washington Supreme Court decided a trilogy of religious land use jurisprudence cases that specifically concerned the imposition of municipal historic preservation ordinances upon churches.[77] In all three cases, the court found that municipal

67. *Munns*, 131 Wash. 2d at 200, 930 P.2d at 321.

68. Witters v. Comm'n for the Blind, 112 Wash. 2d 363, 371, 771 P.2d 1119, 1123 (1989).

69. *City of Sumner v. First Baptist Church*, 97 Wash. 2d 1, 6–7, 639 P.2d 1358, 1362 (1982) (holding facially neutral, even-handedly enforced statute that does not *directly* burden free exercise may, nonetheless, violate article 1, section 11 of the Washington Constitution if it *indirectly* burdens the exercise of religion) (emphasis added).

70. *Id.* at 6–7, 639 P.2d at 1362.

71. *See, e.g., id.*

72. *Munns*, 131 Wash. 2d at 200, 930 P.2d at 321.

73. *Id.* at 200, 930 P.2d at 321.

74. 374 U.S. 398 (1963).

75. *City of Sumner*, 97 Wash. 2d at 8, 639 P.2d at 1363. The *City of Sumner* court noted that under the rule of *Sherbert*, once the complaining party establishes that a governmental action has a coercive effect upon the practice of religion, the government must then identify whether the means chosen to enforce its interests were both necessary and the least restrictive means available to achieve the ends sought. *Id.* at 8, 639 P.2d at 1363.

76. *Id.* at 8, 639 P.2d at 1363.

77. *First Covenant II*, 120 Wash. 2d 203, 840 P.2d 174 (1992); First United Methodist Church v. Hearing Examiner, 129 Wash. 2d 238, 916 P.2d 374 (1996); *Munns*, 131 Wash. 2d at 192, 930 P.2d at 318.

historic preservation ordinances imposed an unconstitutional burden on a church congregation's free exercise of religion. These cases must be examined in order to gain a better understanding of the Washington Supreme Court's determination in *Open Door*, which yielded a contrary result.

In *First Covenant Church of Seattle v. City of Seattle*,[78] the Washington Supreme Court answered the question of whether the Seattle Landmarks Preservation Ordinance[79] violated the First Covenant members' right to freely exercise their religion. In 1985, the Seattle City Council adopted an ordinance that ultimately resulted in the designation of First Covenant's church building as a landmark.[80] First Covenant alleged that the zoning ordinance was void as applied to its church building because the Washington Constitution prohibited application of the ordinance to active churches.[81]

Applying *Sherbert*'s compelling interest test, the Washington Supreme Court held that the ordinance impermissibly burdened First Covenant's right to free exercise in two ways.[82] First, it burdened the free exercise "administratively" because it required First Covenant to seek the approval of a governmental body before the church altered the exterior of its house of worship.[83] Second, the ordinance burdened First Covenant financially because it reduced the value of the church's property by almost half.[84] The court held that all financial burdens on

78. 120 Wash. 2d at 203, 840 P.2d at 174. This case is typically referenced as *First Covenant II*, and was first reported in an opinion at 114 Wash. 2d 392, 787 P.2d 1352 (1990) (hereinafter "*First Covenant I*". Ultimately, the United States Supreme Court reversed a summary judgment in favor of the City of Seattle, and granted judgment in favor of First Covenant Church. 499 U.S. 901 (1991). The case was remanded to the Washington Supreme Court for reconsideration in light of *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990).

79. SEATTLE, WASH. MUNICIPAL CODE § 25.12.020(B) (1977). Adopted to "designate, preserve, and protect, . . . improvements and objects which reflect significant elements of the City's cultural, aesthetic, social, economic, political, architectural, engineering, historic or other heritage. . . ." *Id.*

80. *First Covenant II*, 120 Wash. 2d at 208, 840 P.2d at 177.

81. *Id.* at 209, 840 P.2d at 178.

82. *Id.* at 219, 840 P.2d at 183.

83. *First Covenant II*, 120 Wash. 2d at 219, 840 P.2d at 183.

84. *Id.* at 219, 840 P.2d at 183. Although a religious activity may not be completely free from governmental regulation, clearly an excessively harsh financial burden on religious activity could unconstitutionally infringe upon free exercise. *Id.* (citing Hope Evangelical Lutheran Church v. Iowa Dep't of Rev. & Fin., 463 N.W.2d 76, 80–81 (Iowa 1990); Murdock v. Commonwealth, 321 U.S. 573 (1944) ("It is plain that a religious organization needs funds to remain a going concern." Those who can tax religious practice can make the exercise of religion impossible to maintain); Follett v. Town of McCormick, 321 U.S. 573 (1944) ("Freedom of religion is not merely reserved for those with a long purse"); *City of Sumner*, 97 Wash. 2d at 7, 639 P.2d at 1359 (enforcement of code violates First Amendment because "practical [financial] effect of enforcement would be to close down church-operated school")).

religious activity, if too gross, may unconstitutionally infringe on the free exercise of religion.[85] Finally, the court held that the City of Seattle failed to show that it had a compelling interest in enforcing its enactment of the ordinance,[86] despite the city's acknowledgment that landmark preservation laws enhance the quality of life of all citizens.[87]

In addition to applying the *Sherbert* test, the court described the important relationship between the theoretical doctrine and the church building, suggesting that the two are inextricably related.[88] It found that "when, as in this case, both are freighted with religious meaning that would be understood by those who view it, then the regulation of the church's exterior impermissibly infringes on the religious organization's right to free exercise and free speech."[89] The court concluded that the "church building itself is an expression of Christian belief and message."[90]

In *First United Methodist Church v. Hearing Examiner*, the Washington Supreme Court again addressed the question of whether enforcement of the Seattle Landmarks Preservation Ordinance[91] violated a church's right to free exercise of religion under the state and federal constitutions.[92] Because of the landmark designation of its house of worship, First United Methodist was essentially prohibited from making any alterations or significant changes to the church building without approval from the City of Seattle.[93] Applying the strict scrutiny test from *Sherbert*, the court held that the ordinance severely burdened the church's free exercise of religion because it impeded First United Methodist from "selling its property and using the proceeds to advance its religious mission."[94] Citing *First Covenant I*,[95] the court stated that the practical effect of the ordinance was to require a religious organization to seek secular approval of matters potentially affecting the church's practice of religion.[96] The church was required to submit plans to a secular governmental body, which inadvertently

85. *Id.* (citing *Hope Evangelical Lutheran Church*, 463 N.W.2d at 80–81).

86. *First Covenant II*, 120 Wash. 2d at 223, 840 P.2d at 185 (holding City's interest in preservation of aesthetic and historic structures was not compelling, and did not justify infringement of church members' right to free exercise of religion).

87. *See id.* at 223, 840 P.2d at 185.

88. *See id.* at 217, 840 P.2d at 182.

89. *Id.* at 217, 840 P.2d at 182 (internal quotations omitted).

90. *Id.*

91. SEATTLE, WASH., MUNICIPAL CODE § 25.12 (1990).

92. First United Methodist Church v. Hearing Examiner, 129 Wash. 2d 238, 916 P.2d 374 (1996).

93. *Id.* at 242, 916 P.2d at 376.

94. *Id.* at 252, 916 P.2d at 381.

95. 114 Wash. 2d at 392, 787 P.2d at 1352 (1990).

96. *First United Methodist Church*, 129 Wash. 2d at 246, 916 P.2d at 378.

created an unjustified governmental interference that ultimately infringed upon the church's right to freely exercise its religious practices.[97] The landmark designation was, therefore, unconstitutional.[98]

Finally, in *Munns v. Martin* the Washington Supreme Court addressed the question of whether a demolition permit ordinance promulgated by the City of Walla Walla[99] in hope of furthering historic preservation and aesthetic purposes violated article 1, section 11 of the Washington Constitution.[100] The demolition permit ordinance provided a "cooling off period" during which the religious organization could negotiate with governmental authorities or private entities before a historic or architecturally significant structure was targeted for demolition.[101] The Catholic Bishop of Spokane[102] wished to demolish St. Patrick's School in Walla Walla and replace it with a new pastoral center.[103] Under the ordinance, the bishop faced a possible fourteen-month delay in the advancement of the project.[104] The court stated that "this is not a *de minimis* delay,"[105] and found that the ordinance created an administrative burden on the Bishop's free exercise of religion.[106] Additionally, a delay would entail additional expense, and the ordinance would require the Bishop to attend a public hearing.[107] The City of Walla Walla failed to offset the burden placed on the church with a compelling state interest; thus, the ordinance was unconstitutional as applied to the Bishop.[108] "[T]he possible loss of significant architectural elements is the price we must accept to guarantee the paramount right of religious freedom."[109]

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97. *See id.* at 246–47, 916 P.2d at 378.

98. *Id.* at 252-53, 916 P.2d at 378.

99. WALLA WALLA, WASH., MUNICIPAL CODE § 20.146.040 (1997).

100. 131 Wash. 2d at 192, 930 P.2d at 318.

101. *Id.* at 195, 930 P.2d at 319.

102. "The Bishop owns the property, part of St. Patrick's Roman Catholic Church, as a corporation sole. RCW 24.12.010 provides, in pertinent part: 'Any person, being the bishop . . . of any church . . . may in conformity with the constitution, canons, rules, regulations or discipline of such church or denomination, become a corporation sole . . . with all the rights and powers prescribed in the case of corporations aggregate.'" *Id.*at 196, 930 P.2d at 319.

103. *Id.* at 195, 930 P.2d at 318. St. Patrick's School was built in 1928 and was used primarily as a school until 1974. Since then, the parish had used it for various purposes, including educational, social, and community. The new pastoral center would be "used for religious education, outreach programs, parish social activities related to church celebrations and Sacraments, parish retreat programs such as marriage encounter, renewal, *cursillos*, and activities of other Catholic organizations." *Id.* at 196, 930 P.2d at 319.

104. *Munns v. Martin*, 131 Wash. 2d 192, 210, 930 P.2d 318, 326 (1997).

105. *Id.* at 207, 930 P.2d at 325.

106. *Id.*

107. *Id.* at 208, 930 P.2d at 325.

108. *Id.* at 209–10, 930 P.2d at 326.

109. *Munns*, 131 Wash. 2d at 201, 930 P.2d at 322.

C. First Amendment Free Exercise Clause

Although constitutional rights provided by the First Amendment constitute a floor of protections below which no state can descend, states are free to build more expansive guarantees of freedom by way of their own constitutions.[110] Indeed, Washington may provide greater protection for religious rights based on its "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."[111] Although the Washington Constitution's article 1, section 11 freedom of religion clause provides greater protection than the First Amendment,[112] the Washington Supreme Court, in all religious freedom cases, looks to the reasoning of opinions construing the Free Exercise Clause of the First Amendment for persuasive guidance.[113]

The Washington judiciary looks to the Supreme Court's *Sherbert* test[114] for guidance in these cases, even though *Sherbert* is no longer the controlling federal standard.[115] Nevertheless, this authority stands as Washington's official standard for free exercise challenges:[116] when government action imposes even an *incidental* burden on the free exercise of religion, the government must demonstrate a compelling state interest in order to justify the infringement on the aggrieved party's constitutional guarantee.[117]

1. First Amendment Under *Sherbert*

In *Open Door*, the Washington Supreme Court reflected upon three federal appellate court decisions that were decided under the *Sherbert* regime.[118] The court stated that the cases "are instructive and demonstrate that the County's action here would pass muster"[119] under the compelling interest test. Although these three appellate court decisions were decided when *Sherbert* was the federal test, not one of

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110. *See, e.g., id.* at 200, 930 P.2d at 321 (citing *First Covenant II*, 120 Wash. 2d at 234, 840 P.2d at 191 (Utter, J., concurring) ("A truly independent state constitutional discourse cannot occur if we resort solely to federal jurisprudence in defining rights protected under our state constitution.")).

111. State v. Gunwall, 206 Wash. 2d 54, 59, 720 P.2d 808, 811 (1986) (citing Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980)).

112. *First Covenant II*, 120 Wash. 2d 203, 229-30, 840 P.2d 174, 189 (1992).

113. *Open Door Baptist Church v. Clark County*, 140 Wash. 2d 143, 161, 995 P.2d 33, 43 (2000).

114. *First Covenant II*, 120 Wash. 2d at 182, 840 P.2d at 215.

115. Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 885 (1990).

116. *First Covenant II*, 120 Wash. 2d at 182, 840 P.2d at 215.

117. *Sherbert*, 374 U.S. at 403 (emphasis added).

118. *Open Door Baptist Church*, 140 Wash. 2d at 164–65, 995 P.2d at 45.

119. *Id.* at 164, 995 P.2d at 44.

these opinions applied *Sherbert* with the same force as the Washington Supreme Court.

Disregarding *Sherbert*, the Sixth Circuit was the first federal appellate court that addressed the question of whether a municipal zoning ordinance that prohibited the construction of church buildings in virtually all of a city's residential districts violated the Free Exercise Clause of the First Amendment.[120] In *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, the Congregation wanted to relocate its church.[121] It purchased property in a zoning district designated exclusively for residential use, hoping that the City of Lakewood's Board of Zoning Appeals would exercise its authority to grant a zoning exception.[122] However, the Board of Zoning Appeals denied the Congregation's application for an exception.[123] Choosing not to apply *Sherbert*, the Sixth Circuit affirmed the Board of Zoning Appeals' decision.[124] Although the court recognized the burdens of the ordinance, which included the increased cost of purchasing land and the violation of the Congregation's aesthetic senses, it nevertheless upheld the decision made by the Board of Zoning Appeals under the following two-step analysis: (1) the nature of the religious observance at stake must be evaluated; and (2) the nature of the burden placed on the religious observer must be identified.[125] The Sixth Circuit held that the ordinance was constitutional because it merely frustrated, yet did not prohibit, the Congregation's desire to locate a more pleasant, more convenient and less expensive location.[126] Frustration of these benefits does not violate a constitutional protection.[127]

In *Messiah Baptist Church v. County of Jefferson*, the Tenth Circuit upheld the denial of a special use permit sought by a church organization wishing to construct a house of worship on church-owned property in an area zoned for agricultural use.[128] The Tenth Circuit stated that when entering the area of religious land use jurisprudence, courts must be "mindful of the often competing values of free exercise of religion and effective use by the state of its police powers."[129] In this case, even though the financial costs to the church were greater

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

121. *Id.* at 304.

122. *Id.* at 304.

123. *See id.* at 304–5.

124. *Id.* at 309.

125. *Id.* at 306.

126. *Id.*

127. *Id.* at 308.

128. 859 F.2d 820, 823 (10th Cir. 1988).

129. *Id.*

because its permit was denied, the court determined that these costs did not rise to impermissible infringement of the church's religious freedom.[130] Although the Tenth Circuit applied the *Sherbert* test, it held that the financial consequences to the church did not rise to the infringement of religious freedom: "When the burden imposed by the government rests on conduct rooted only in secular philosophy or personal preferences . . . the scale *always* reads in favor of upholding government action."[131]

Finally, in *Christian Gospel Church, Inc. v. City and County of San Francisco*, the Ninth Circuit upheld the denial of a conditional use permit to establish a church in a residential neighborhood.[132] The court added a third prong to the test employed in *Lakewood*: the extent to which recognition of an exemption from the government action would impede the objectives sought by the state.[133] The Ninth Circuit thus balanced the identified burdens to the church and the compelling interests of the municipality.[134] Accordingly, the court held that the burdens of the denied action, which were mainly convenience and expense, were minimal compared to the benefits of the zoning system, which protected the inhabitants from traffic problems, noise and litter, illegal spot zoning, and inconsistencies with the land use zoning plan.[135]

Given the direction of these three federal courts of appeals cases, which were purportedly decided under the *Sherbert* regime, it bears emphasis that not one of them applied *Sherbert* with the same weight and force given to the free exercise of religion as demonstrated by the Washington Supreme Court.

2. First Amendment After *Sherbert*

Despite the fact that Washington has adopted *Sherbert's* compelling state interest test for analysis of religious land use cases, this test no longer controls First Amendment analysis.[136] In *Dept. of Human*

130. *Id.* at 825.

131. *Id.* (emphasis added).

132. 896 F.2d 1221, 1222 (9th Cir. 1990).

133. *Id.* at 1224.

134. *Id.* at 1225. The court articulated the appropriate test for analyzing a challenge to zoning laws under the First Amendment.

> This test involves examining the following three factors: (1) the magnitude of the statute's impact upon the exercise of the religious belief; (2) the existence of a compelling state interest justifying the imposed burden upon the exercise of the religious belief; and (3) the extent to which recognition of an exemption from the statute would impede the objectives sought to be advanced by the state.

Id. at 1224.

135. *Id.* at 1225–26.

136. *Smith*, 494 U.S. at 885.

Resources of Oregon v. Smith, the Supreme Court placed limitations upon the use of the *Sherbert* test in First Amendment cases.[137] Congress attempted to overrule *Smith* by passing the Religious Freedom Restoration Act of 1993 (RFRA), which restored the compelling state interest test.[138] Sensing Congress' intentions, the Supreme Court struck down the RFRA in *City of Boerne v. Flores* on the grounds that Congress had exceeded its power in passing the Act.[139] Thus, *Smith* remains good law, and its framework governs challenges under the Free Exercise Clause. The aforementioned legislative and judicial jousting is worthy of illustration.

In *Smith*, the Court lowered the federal standard for free exercise challenges set out in *Sherbert* and held that under the Free Exercise Clause, neutral laws of general applicability may be applied to religious practices even when not supported by a compelling state interest.[140] The Court in *Smith* addressed the issue of whether Oregon's prohibition of the religious use of peyote was permissible under the Free Exercise Clause.[141] This case began when two men were fired from their jobs because of their ingestion of peyote for sacramental purposes;[142] consequently, the men argued that the Court was obligated to evaluate the case under the balancing test set forth in *Sherbert*.[143] The Court refused, reasoning that Oregon's prohibition law was permissible, and that the State could deny unemployment benefits based on the religious ingestion of peyote.[144] It further reasoned that a better approach is to hold the compelling interest test inapplicable to challenges of valid, neutral laws of general applicability: "The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, cannot depend on measuring the effects of a governmental action on its religious objectors' spiritual development."[145] The Court reasoned that society cannot afford the luxury of deeming

137. 494 U.S. 872 (1990).
138. 42 U.S.C. § 2000bb-1 *et. seq.* (1993).
139. 521 U.S. 507, 511 (1997).
140. *Smith*, 494 U.S. at 872.
141. *Id.* at 876.
142. *Id.* at 874.
143. *Id.* at 882–83.
144. *Id.* at 890.
145. *Id.* at 885. The Court further stated that "[t]o make an individual's obligation to obey such law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is compelling . . . contradicts both constitutional tradition and common sense." (internal quotation and citation omitted). *Id.*

presumptively invalid every regulation that causes a burden on religion.[146]

Nevertheless, and in response to *Smith*, Congress enacted the RFRA.[147] This Act ultimately restored the compelling interest test set forth in *Sherbert*, which, when applied, tipped the scales in favor of proponents of free exercise challenges. Matching the Legislature *quid quo pro*, the Supreme Court struck down the RFRA on constitutional grounds in *City of Boerne v. Flores*.[148] In *City of Boerne*, the Archbishop of San Antonio applied for a building permit to enlarge a church in a nearby Texas city.[149] Local zoning authorities, relying upon a city ordinance concerning historic landmarks and districts, denied the application.[150] In finding the RFRA unconstitutional, the Court reemphasized that the compelling interest test no longer applies to free exercise challenges, and neutral laws burdening religion will be upheld.[151] It concluded the following:

> It is the reality of the modern regulatory state that numerous state laws, such as the zoning regulations at issue here, impose a substantial burden on a large class of individuals. When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs.[152]

D. Religion Versus Land Use

Washington law provides that in applying land use regulations to premises where religion is exercised, the governmental entity must balance the public's need for protection against the institution's free exercise of religion.[153] In other words, the court's function is to balance the interests of the parties and determine which interest must yield. With regard to religious uses, government entities must be flexible; they have a heavy burden to overcome in proving a compelling state interest.[154] Where, as here, two legitimate and substantial interests collide, one may ultimately have to give way to the other. In

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146. *Id.* at 889.
147. 42 U.S.C. § 2000bb-1 *et. seq.*
148. 521 U.S. at 511.
149. *Id.* at 512.
150. *Id.*
151. *Id.* at 515.
152. *City of Boerne*, 521 U.S. at 535.
153. City of Sumner v. First Baptist Church, 97 Wash. 2d 1, 8, 639 P.2d 1358, 1362 (1982).
154. *First Covenant II*, 120 Wash. 2d at 203, 840 P.2d at 174.

Open Door, the Washington Supreme Court mistakenly weighed against the free exercise of religion.

III. OPEN DOOR BAPTIST CHURCH V. CLARK COUNTY

The majority opinion in *Open Door* emphasized that this case specifically addressed the question of whether a church must alert citizens and their government—through the conditional use application process—of the church's intention to locate houses of worship in certain zoned areas where churches are not allowed as a matter of right, but are permissible under a conditional use status.[155] The court held that applying for a conditional use permit did not impose an impermissible burden on the church.[156] Although the court stated that religious free exercise "remains an area around which government must tread very lightly,"[157] the court weakened the strict scrutiny test as it applies to free exercise challenges in Washington, which will have a negative impact on religion in this state. In so doing, the Washington Supreme Court implied that the denial of a permit may be permissible,[158] thus setting the stage for subsequent religious land use jurisprudence cases.

A. The Majority Opinion

The *Open Door* court stressed the necessity and validity of zoning as an exercise of police power: "if churches are not even subject to the application process, they will largely be exempt from zoning and other land use codes as a practical matter."[159] The court distinguished this case from the landmark preservation cases,[160] arguing that zoning is "more substantive" than landmark preservation.[161] Furthermore, the court reasoned that there was no dispute that the zoning ordinance at issue was facially neutral with respect to churches.[162] The permit requirement applied equally to churches, most schools, cemeteries, golf courses, kennels, riding stables, recreational facilities, veterinary clinics, government facilities, private ambulance dispatch facilities, and

155. 140 Wash. 2d at 149, 995 P.2d at 37.

156. *Id.* at 159–61, 995 P.2d at 42–43.

157. *Id.* at 171, 995 P.2d at 48.

158. *Cf. Open Door Baptist Church*, 140 Wash. 2d at 143, 995 P.2d at 33.

159. *Id.* at 146, 995 P.2d at 167.

160. Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303 (6th Cir. 1983). Messiah Baptist Church v. Jefferson County, 859 F.2d 820 (10th Cir. 1988); Christian Gospel Church, Inc. v. San Francisco, 896 F.2d 1221 (9th Cir. 1990).

161. *Open Door Baptist Church*, 140 Wash. 2d at 167, 995 P.2d at 46.

162. *Id.* at 149, 995 P.2d at 37.

residential care homes.[163] The court reasoned that while the permit requirement does not "elevate dog kennels to the same constitutional status as churches," it does treat churches as all other conditional uses are required to be treated by the Code.[164]

The court stated that it would assess Open Door's challenge in light of the Washington Constitution.[165] In conducting the analysis for a free exercise challenge, the court held that the first prerequisite of the strict scrutiny test, that the parties have a sincere religious belief, was undisputed and satisfactorily proven.[166] However, the court found that the second element of the test, which requires the challenged action to amount to a burden, was not satisfied.[167] The court concluded that under both article I, section 11 of the Washington Constitution and the First Amendment, Open Door did not meet its threshold requirement of establishing that Clark County's actions caused anything more than an incidental burden upon the free exercise of religion, which is not enough to satisfy the test.[168] Although the court did not conduct a compelling state interest analysis, it reasoned that even if Open Door had shown an unacceptable burden, the County persuasively argued that less restrictive alternatives did not exist beyond requiring Open Door to file applications and follow the administrative process.[169]

In finding that Open Door had not mounted a successful religious free exercise challenge, the court stated that the burden on Open Door was merely a "paperwork" burden, which surely did not rise to the level of religious persecution.[170] Furthermore, because Open Door "opened its doors" without properly seeking assurances from municipal authorities, it "set up this possibility through an undeniable zoning violation."[171] Agreeing with the reasoning adopted by the Tenth Circuit in *Messiah Baptist Church v. County of Jefferson*, the court declared "a church has no constitutional right to be free from reasonable zoning regulations."[172]

The *Open Door* court further reasoned that in religious land use jurisprudence cases, church organizations must make "a very specific showing of hardship to justify exemption from land use restric-

163. *Id.*; CLARK COUNTY, WASH., CODE § 18.303A.030 (1998).
164. *Open Door Baptist Church*, 140 Wash. 2d at 167, 995 P.2d at 46.
165. *Id.* at 152, 995 P.2d at 38.
166. *Id.*
167. *Id.* at 166, 995 P.2d at 46.
168. *Id.*
169. *Id.* at 167, 995 P.2d at 46.
170. *Id.* at 167–68, 995 P.2d at 46.
171. *Id.* at 168, 995 P.2d at 46.
172. *Id.* at 165, 995 P.2d at 45 (citing 859 F.2d at 826).

tions."[173] The absence of such a showing would be a detriment to all residents of the affected communities since "a church would be free to construct a church building of apparently unlimited size in a residential neighborhood without having to go through a process in which neighbors receive notification and an opportunity to be heard."[174] In addition, the court stated that it does not have the power to amend zoning ordinances: "[it] cannot and should not invade the legislative arena or intrude upon municipal zoning determinations, absent a clear showing of arbitrary, unreasonable, irrational or unlawful zoning action or inaction."[175]

Finally, the Washington Supreme Court in *Open Door* deferred to the Court of Appeals below by acknowledging that religious free exercise is among the protections enshrined by the Washington Constitution.[176] The high court reasoned that the previous *Open Door* decision, which was fashioned by the Court of Appeals, struck a reasonable balance on the delicate scale between the rights of the County and those of Open Door.[177] Although Open Door ultimately had to apply for the conditional use permit, the County was required to ensure that the application fee did not burden Open Door's worship.[178]

B. The Dissent

The dissent in *Open Door* proclaimed that the majority opinion set a precedent that was dangerous to religious liberty.[179] Article I, section 11 of the Washington Constitution provides for 'absolute freedom' of religious liberty. Zoning laws are subject to this constitutional guarantee, which is subject only to narrow and expressly enumerated exceptions.[180] In accordance with the Washington Constitution, "protection of free religious exercise is the rule, and any burden on that exercise must be the exception."[181]

The dissent further reasoned that the administrative burden placed on Open Door to apply for a conditional use permit was significant, and the burden should therefore have been on the govern-

173. *Open Door Baptist Church*, 140 Wash. 2d at 169, 995 P.2d at 45.
174. *Id.* at 168–69, 995 P.2d at 48.
175. *Id.* at 161, 995 P.2d at 43.
176. *Id.* at 170, 995 P.2d at 47.
177. *Open Door Baptist Church*, 143 Wash. 2d at 170, 995 P.2d at 48.
178. *Id.* at 170, 995 P.2d at 48.
179. *Id.* at 173, 995 P.2d at 49.
180. *See id.* at 173–74, 995 P.2d at 48–49.
181. *Id.* at 174, 995 P.2d at 48–49 (quoting *Malyon*, 131 Wash. 2d at 785–86, 935 P.2d at 1272).

ment, not on the church, to justify this burden.[182] Additionally, there was no basis on the record to conclude that the conditional use requirement necessarily protected the public or that these same public interests could not have been adequately protected by less restrictive means.[183] The dissent emphasized that the strict scrutiny test in Washington was adopted to critically review any state action that burdens the free exercise of religion,[184] and if the coercive effect of an enactment operates against a party's religious practices, it unduly burdens the free exercise of religion.[185]

The dissent also claimed that enforcement of the ordinance demonstrated a "dramatic, all-encompassing burden" on Open Door's free exercise of religion.[186] Even if the regulation was facially neutral with respect to churches, previous Washington Supreme Court decisions have held that incidental burdens on religion triggers strict scrutiny.[187] First, Open Door was administratively burdened,[188] and, in fact, the burden was "much heavier" than those in the landmark cases.[189] Furthermore, and unlike many previous religious land use jurisprudence cases, the zoning authority's denial of Open Door's conditional use

182. *Open Door Baptist Church*, 140 Wash. 2d at 173, 995 P.2d at 48. At the time the facts arose, Clark County expressly prohibited establishment of new churches within its borders. After the record closed, however, Clark County amended its ordinances to allow churches as a permitted use in some zones. *See* CLARK COUNTY, WASH., CODE § 18.313.020.

183. *Open Door Baptist Church*, 140 Wash. 2d at 171, 995 P.2d at 48–49.

184. *Id.* at 180, 995 P.2d at 52.

185. *Id.* at 181, 995 P.2d. at 53.

186. *Id.* at 193–94, 995 P.2d at 59 (stating that "[e]stablishing a church anywhere in Clark County requires that the religious practitioners must first submit to an expensive and extremely detailed permitting process of doubtful outcome administered wholly at the discretion of secular authorities.")

187. *Id.* at 183–84, 995 P.2d at 54.

188. *Open Door Baptist Church*, 140 Wash. 2d at 185–92, 995 P.2d at 33–34. The dissent listed several reasons why Open Door was burdened: (1) the ordinance makes it clear it is not of general application but is designed to give "special consideration" to each individually requested use; (2) the ordinance grants unlimited authority to the hearings examiner to approve, approve with conditions, disapprove, or revoke the permit; (3) the applicant must prepare and submit nine bound volumes of plans, application forms, zoning, vicinity, topological, and soils maps, aerial photographs, environmental information including water courses, soil stability studies, wildlife habitat information, historic and cultural information, and detail all nearby land use and transportation facilities, for country bureaucratic review at a preapplication conference, thus commencing the hearings gauntlet; (4) eight bound volumes of an even more detailed actual application for the conditional use permit must then be prepared and submitted at applicant expense; and (5) the ordinance empowers a county hearings examiner to impose, in addition to regulations and standards expressly specified in the title, other conditions deemed necessary to protect the best interest of the surrounding property or neighborhood, or the county as a whole. *Id.* at 185–189, 995 P.2d at 55–57.

189. The dissent found that the landmark cases, *supra* note 77, were similar to *Open Door* because, *inter alia*, the landmark ordinances are also 'zoning' ordinances, and "if they are not to be justified under the 'police power'—then what is their justification?" *Open Door Baptist Church*, 140 Wash.2d at 177, 185, 995 P.2d at 51, 55.

permit led to significant administrative burdens: "[T]he church was actually coerced to build and then surmount a mountain of paperwork, pleading with secular authorities in a preapplication conference, running a public hearings gauntlet, simply in order to exist."[190] The dissent concluded that it could "scarcely imagine a more comprehensive and open-ended regulation of church affairs by secular authorities" than the undeniably burdensome conditional use permit application process.[191] Second, Open Door was financially burdened. Not only did the county impose a permit application fee equal to two and a half months of the church's total income, but Open Door had to pay for the compilation of the volumes of data required to complete a conditional use permit application.[192]

In acknowledging the financial burden placed on Open Door, the dissent proceeded to analyze whether local government had a compelling interest for burdening the church, and furthermore, whether enforcement of the ordinance was the least restrictive means of achieving the zoning law's goals.[193] A compelling state interest must be "based on the necessities of national or community life such as clear threats to public health, peace, and welfare."[194] Here, the dissent argued that neither Clark County nor the majority elucidated any interest that would meet this burden.[195] The dissent further reasoned that the refusal to exempt Open Door from the conditional use process demonstrated an "inflexible design to burden," but did not speak to "acts of licentiousness or compelling threats to peace and safety, which are the only constitutionally permissible predicates to justify the imposition of such a burden."[196] The dissent further reasoned that the County did not show that the conditional use process was the least restrictive means of accomplishing the state's objectives.[197]

The dissent concluded by arguing that Open Door had not asserted a constitutional right to be free from reasonable zoning ordinances, but rather that it merely sought to enjoy its constitutionally protected right to exist free of governmental interference that was not

190. *Id.* at 192, 995 P.2d at 58.

191. *Id.* at 193, 995 P.2d 59.

192. *Id.* (stating that Open Door's application must be accompanied by a fee in excess of $5,500, which does not include the costs to produce the applications when Open Door is a small community that exists from offering to offering, with a monthly income of about $2,000).

193. *Id.* at 195–96, 995 P.2d at 59–60.

194. *Id.* at 194, 995 P.2d at 59 (citing *Munns*, 131 Wash. 2d at 200, 930 P.2d at 318).

195. *Open Door Baptist Church*, 140 Wash. 2d at 194, 995 P.2d at 59.

196. *Id.* at 195, 995 P.2d at 60.

197. *Id.*

narrowly tailored to protect a compelling governmental interest.[198] The dissent posed the following question: "If religious liberty is subject to the 'police power,' what remains of religious liberty?"[199]

IV. SIGNIFICANT SHIFT?

Open Door marked a significant shift in Washington's religious land use jurisprudence. The Washington Supreme Court displayed a far less protective treatment of church organizations than previously reflected in other decisions. Consequently, *Open Door* cuts against the court's traditional view that the Washington Constitution absolutely protects the free exercise of religion. More specifically, and as the following analysis shows, the court misapplied the strict scrutiny test, and in so doing left the future of religious land use jurisprudence in doubt.

A. *How* Open Door *Was Wrongly Decided*

In *Open Door,* the Washington Supreme Court correctly stated the test for free exercise challenges in Washington: a governmental action does not violate a person's right to the free exercise of religion under article I, section 11 unless (1) the person's religious belief is sincerely held, (2) the governmental action burdens the free exercise of that belief, and (3) the burden is not offset by a compelling state interest.[200] However, the application of this test was seriously flawed. Although the court correctly determined that Open Door embodied sincere religious beliefs,[201] it failed to recognize that the test's second requirement—a burden on this religious belief that is caused by government[202]—was satisfied. Indeed, the court held that the burden requirement was unsatisfied even though there were both administrative and financial burdens placed on the church.[203]

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198. *Id.* at 199, 995 P.2d at 62. Justice Charles Z. Smith concurred specially in the dissent, stating that while he could not "adopt the expansive rhetoric of the dissent," he nevertheless agreed in principal with its conclusion:

> It is my strong belief that our courts must at all times stand as a bulwark between the State and the church to assure the free exercise of religion guaranteed by our Constitution. The courts must then be vigilant against seemingly minimal encroachments by the State which would lead us towards sanctioned government intervention such as practiced in some totalitarian nations characteristically controlling the exercise of religion through licensing schemes requiring ultimate approval by secular authorities.

Id. at 171–72, 995 P.2d at 62.

199. *Id.* at 179, 995 P.2d at 52.

200. *Id.* at 152, 995 P.2d at 38.

201. *Id.*

202. *Id.*

203. *Cf. Id.* at 171, 995 P.2d at 48.

The zoning ordinance at issue placed an administrative burden on Open Door. Although the previously mentioned historic preservation trilogy[204] cases are factually dissimilar, they plainly illustrate the minimum requirements necessary to satisfy the burden element. Moreover, the historic preservation trilogy cases support the view that Clark County's zoning ordinance unduly burdened Open Door. Note that in *First Covenant II*, the court found an administrative burden when the ordinance required that the church seek approval from a government body before exterior alterations could be made to the building.[205] Similarly, in *United Methodist Church*, the court found an administrative burden when the church was required to obtain city approval before making exterior alterations.[206] Finally, in *Munns*, an administrative burden was found, based on a possible fourteen-month delay in the advancement of a church restoration project.[207]

Open Door undeniably faced a substantially greater administrative burden than the churches listed in the three cases above. First, Open Door faced an immediate burden, where in previous cases, the churches faced possible burdens. Second, Open Door had only sixty days to submit an extensive permit application, or it would be forced to shut its doors. Furthermore, the permitting process itself was an immense administrative burden; Open Door was required to prepare and submit *nine bound volumes* of plans and application forms regarding zoning, vicinity, topology, soil; environmental information including water courses, soil stability studies, wildlife habitat, historic and cultural information; and details regarding all nearby land use and transportation facilities.[208] Indeed, this process was only the beginning—it merely started county bureaucratic review at a preapplication conference, thus commencing a series of hearings.[209] These burdens placed on Open Door were far more substantial and immediate than those placed on the aforementioned precedents. Consequently, the burden should have shifted to the County to prove it had a compelling state interest for upholding an ordinance that inadvertently violates the free exercise of religion.

There was also a financial burden on Open Door. Although the permit application cost of $5,500 may be waived,[210] the church would

204. *First Covenant II*, 120 Wash. 2d at 203, 840 P.2d at 174; *First United Methodist Church*, 129 Wash. 2d at 238, 916 P.2d at 374; *Munns*, 131 Wash. 2d at 192, 930 P.2d at 318.

205. 120 Wash. 2d at 219, 840 P.2d at 183.

206. 129 Wash. 2d at 242, 916 P.2d at 376.

207. 131 Wash. 2d at 210, 930 P.2d at 326.

208. *Open Door Baptist Church*, 140 Wash. 2d at 186, 995 P.2d at 55–56 (emphasis added).

209. *Id.* at 186, 995 P.2d at 56.

210. *Id.* at 170, 995 P.2d at 47.

bear the costs of compiling the data and information required to submit the conditional use permit application. For a church that survives on its weekly offering, this burden is substantial.

Additionally, because the Washington Supreme Court has often based the finding of a burden on future possibilities,[211] Open Door would face greater obstacles if the County denied the conditional use permit. At the time of the hearing, Clark County did not list churches as a permitted use anywhere in the county.[212] The burden on the church would consist of looking for a new site, purchasing property, again going through a permitting process, and then building a new church. These burdens are, by any reasonable standards, immense. Moreover, members of the congregation would face significant burdens; they would be forced to travel greater distances to attend church services and activities, possibly seek another church, or maybe be forced into not attending any church at all. The court's failure to acknowledge these hardships indicates that previous protections that were afforded to the free exercise of religion have been diminished.

Because the court should have found the burden requirement satisfied, it also should have shifted the burden to local government, which would have then had to prove a compelling interest in order for the law to be upheld. Without such an analysis, there is little indication of what the compelling state interest could have been in this case. The court did, however, articulate its view that the state's police power to regulate growth through zoning helps safeguard public health and safety values.[213] However, under the *Sherbert* test, the court has an obligation to balance the church's free exercise of religion against the state's police powers. Open Door is a very small church, which calls into question the need for such an extreme measure of the requirements of the conditional use process. Furthermore, there is no indication that requiring Open Door to go through the conditional use process was the least restrictive means of achieving the growth management goal. Open Door stated that it would comply with other land use requirements,[214] and it could have taken other measures, short of fulfilling the conditional use permit, to mitigate any health or safety issues.

Nevertheless, this discussion is merely speculation given the court's failure to shift the burden to local government. However, it does indicate that the Washington Supreme Court has lowered the

211. *Munns*, 131 Wash. 2d at 192, 930 P.2d at 318.
212. *Open Door Baptist Church*, 140 Wash. 2d at 174, 995 P.2d at 49.
213. *See id.* at 167, 995 P.2d at 46.
214. *Id.* at 195, 995 P.2d at 60.

protection that is afforded to religious activities under the state constitution. In order to shed light on the debate between the valid interests of zoning and religious freedom, the court should have correctly applied the *Sherbert* test, shifted the burden to Clark County, and then balanced the competing interests. Perhaps local government's interest would have outweighed Open Door's interest. However, the court failed to even apply the appropriate analysis, which created many unanswered questions regarding future religious land use jurisprudence in this state.

B. A Lowering of Washington's Standard to the Federal Standard

More significant than the holding in *Open Door*, which required the church to apply for a conditional use permit, the Washington Supreme Court implicitly indicated that it is lowering the standard of review from strict scrutiny to the current federal standard for free exercise challenges.

The Washington Supreme Court relied on several federal appellate court cases, stating that these decisions were instructive because they demonstrated that Clark County's actions would pass constitutional muster.[215] It has never been disputed that the Washington Constitution provides greater protection than the Federal Constitution.[216] However, the plain language of the court's statement with regard to the precedential value of the federal appellate court decisions indicates that Washington's traditionally strong protection of religious activities has been weakened. The court, by relying so heavily on federal cases, blurred the line between the Washington Constitution and the Federal Constitution. This result will negatively impact future analysis and interpretation of Washington's religious free exercise issues.

In *Open Door*, the Washington Supreme Court did not apply the strict scrutiny test, but instead applied the current federal test set forth in *Smith* and later affirmed in *City of Boerne v. Flores*.[217] In *Smith*, the Supreme Court held that the compelling interest test was inapplicable to challenges of valid and neutral laws of general applicability.[218] Under this test, Open Door would lose both the challenge against the permit requirement and a subsequent challenge based on a denied permit.

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215. *Id.* at 161, 995 P.2d at 43.
216. *Id.* at 152, 995 P.2d at 38.
217. 521 U.S. at 507.
218. *Smith*, 494 U.S. at 885.

However, in *First Covenant II*, the Washington Supreme Court expressly rejected *Smith*.[219] Initially, in *First Covenant I* the court concluded that landmark preservation was not a "compelling interest" that justified the burden on First Covenant's right to free exercise, and therefore, application of the City's ordinances violated First Covenant's free exercise right under the state and federal constitutions.[220] The City of Seattle appealed, and the Supreme Court vacated the judgment and remanded it to the Washington Supreme Court for "further consideration in light of [*Smith*]."[221] On remand, the Washington Supreme Court reinstated its holding in *First Covenant I*, and thereby held that the City of Seattle's ordinances violated the free exercise clause guarantees of the First Amendment and article I, section 11 of the Washington Constitution: "[A]rticle I, section 11 of the state constitution, which absolutely protects the free exercise of religion, extends broader protection than the First Amendment to the federal Constitution."[222] Washington expressly rejected the notion that the compelling state interest test was inapplicable to neutral applications of the law, and the *First Covenant II* court thereby affirmed the *Sherbert* test for religious land use challenges.

The Washington Supreme Court took a step toward overruling *City of Sumner*[223] and *First Covenant II*[224] when it did not find a burden in *Open Door* by relying on recent federal case law and arguably eliminated the compelling state interest test for Washington free exercise challenges. The ramifications of this shift are both significant and unsettling, for this change in reasoning indicates that religious institutions are now seemingly destined to lose land use battles in Washington that they previously would have won.

V. CONCLUSION

The Washington Supreme Court wrongly held in *Open Door* that requiring a church to go through the costly and laborious process of applying for a conditional use permit did not impermissibly burden the church's right to freely exercise its religion under the state constitution. Although the court concluded with the affirmative statement that the free exercise of religion remains an area around which government must tread lightly, and precedent makes clear that closure of

219. 120 Wash. 2d at 208, 840 P.2d at 177.
220. 114 Wash. 2d at 408–9, 787 P.2d at 1361.
221. City of Seattle v. First Covenant Church of Seattle, Wash., 499 U.S. 901 (1991).
222. *First Covenant II*, 120 Wash. 2d at 229–30, 840 P.2d at 189.
223. 97 Wash. 2d at 1, 639 P.2d at 1358.
224. 120 Wash. 2d at 203, 840 P.2d at 174.

a church requires a compelling state interest,[225] the court did not protect Open Door, and in doing so, lessened the protection of religious activities. Moreover, in relying almost exclusively upon federal court decisions despite Washington's greater degree of protection by way of its Religious Freedom Clause,[226] the court indicated a shift in Washington's test for religious land use cases. By not finding a burden, and thereby failing to shift the burden to the state to prove a compelling interest, the Washington Supreme Court adopted the federal test and lowered the level of protection that has historically been afforded to religious activities in this state.

The Washington Supreme Court must preserve the protection of religious uses and activities in Washington. Justice O'Connor, writing in dissent in *City of Boerne v. Flores*, argued that the compelling interest test set forth in *Sherbert* should be controlling for free exercise challenges.[227] She has stated that the rejection of the *Sherbert* test, which required the government to justify a law that substantially burdened religious conduct, is supported neither by procedure nor history.[228] She concluded that the decision to override *Sherbert* "has harmed religious liberty."[229] Similarly, by not giving *Sherbert* its proper application under Washington law, the Washington Supreme Court has harmed the free exercise of religious beliefs.

The Washington Constitution absolutely protects the free exercise of religion for all individuals.[230] The free exercise test in Washington must remain strict. Open Door faced immense burdens in attempting to exercise its religious rights: the conditional use process imposed an administrative burden and a financial burden. Open Door, along with other churches and religious activities in Washington, has a constitutional right to be free from governmental action that violates its rights to the free exercise of religion under the Washington Constitution.

The Washington Supreme Court should re-examine its holding in *Open Door*, correctly comply with the strict scrutiny test, and require the government to justify its infringing behavior when a burden to religious activity is found. Accordingly, when a court balances these two legitimate interests, said interests being the free exercise of religion and the public's need for protection with zoning ordinances, the free exercise of religion *must* win.

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225. *Open Door Baptist Church*, 140 Wash. 2d at 171, 995 P.2d at 48.
226. WASH. CONST. art. I, § 11.
227. 521 U.S. 507, 546 (1997).
228. *Id.* at 547.
229. *Id.*
230. *Munns*, 131 Wash. 2d at 200, 930 P.2d at 321.