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Religion and Land Use in New York

Does the federal RLUIPA block local regulations?

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WHILE NEW YORK STATE has a history of favoring religious and educational uses when applying local zoning and land use regulations, the federal Religious Land Use and Institutionalized Persons Act¹ (RLUIPA) has inserted a new dynamic into the local municipal review process regulating the placement and expansion of religious uses throughout the state.

The issues raised by this statute implicate everything from the U.S. Constitution to municipal home rule, as well as, the right of a community to regulate local development. RLUIPA's purpose is to prevent religious discrimination, and the right to use property for religious uses is naturally an area of much concern for religious organizations.

Likewise, limitations on the ability to regulate the size and location of such uses has become a major concern for municipalities as they must now consider RLUIPA's limitations in virtually every application by a religious group. RLUIPA is also of general concern for community groups, which often view the construction of religious uses, particularly when located in residential neighborhoods, as potentially encroaching on their quality of life.

The recent decision in *Fortress Bible Church v. Feiner*² highlights many of these competing interests and the problems

municipalities can have in trying to limit construction by a group seeking to establish a religious use.

The New York Rule

The New York courts have long held that religious and educational uses are inherently beneficial.

The New York Court of Appeals, in *Cornell University v. Barnard*³ noted that the purpose of zoning is to promote the public health safety and welfare and therefore concluded that "total exclusion of such institutions from a residential district serves no end that is reasonably related to the morals, health, welfare and safety of the community...such total exclusion is beyond the scope of localities' zoning authority."⁴

However, the same decision stated that the presumption of a beneficial effect of such uses may be rebutted and "uses which would unarguably be contrary to the public's health, safety or welfare need not be permitted at all."⁵

Following the *Cornell University* case, the Court of Appeals in *Matter of Pine Knolls Alliance Church v. Zoning Board of Appeals of the Town of Moreau*⁶ noted that although the Court in *Cornell University* had approved the special permit use as an appropriate vehicle

for reviewing an application to expand a religious use, there was no requirement for an applicant to prove the need to expand in order to obtain the special permit.⁷

In the *Pine Knolls* case, the church, which had been operating for about 30 years, sought to expand and in connection with its expansion plans, sought to construct a second access road to control the flow of traffic. The local zoning board approved the plan, except for the second driveway, citing concerns about the impacts on neighboring properties and opining that the church had the ability to upgrade the existing driveway to accommodate the additional traffic.

The church challenged the decision on the grounds that the zoning board impermissibly required the church to demonstrate a need for the additional driveway in violation of the *Cornell University* ruling that a religious institution did not have to prove need.

The Court of Appeals determined that there had been no questioning of the need to expand, but rather a finding that the expansion could be accomplished in a manner that mitigated the negative impacts on surrounding areas.⁸ The Court ruled that a municipality may require mitigating conditions so long as the conditions do not "by their cost, magnitude or volume, operate indirectly to exclude" the use.⁹

Thus, in New York, even without RLUIPA, a municipality is hard-pressed to exclude a religious use, but reasonable conditions may be placed on such uses. As a result, some argue that RLUIPA makes little difference in the balance between municipalities and groups seeking to establish

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religious uses. Yet, others view RLUIPA, for various reasons, as changing the entire landscape.

RLUIPA Statute

While also addressing the rights of institutionalized persons (prisoners), RLUIPA has specific provisions relating solely to land use regulation.

RLUIPA covers three categories of government action:

(1) if a “substantial burden is imposed in a program or activity that receives federal financial assistance, even if the burden results from a rule of general applicability”;

(2) the substantial burden affects commerce; or

(3) the substantial burden is imposed by “a land use regulation or system of land use regulations...” when the government has in place “formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.”¹⁰

As has been noted, the three categories implicate, respectively, the Spending Clause (U.S. Const. art. I, sec. 8, cl.1), the Commerce Clause (U.S. Const. art. I, sec. 8, cl.3) and the Enforcement Clause (U.S. Const. amend. XIV sec. 5).

RLUIPA further provides that implementation of a land use regulation in a manner that discriminates, excludes, limits or otherwise treats a religious institution or assembly on “less than equal terms with a nonreligious assembly or institution” would be an action that substantially burdens religious exercise.¹¹

Once a religious institution carries its burden of establishing that a regulation substantially burdens the exercise of religion, the burden shifts to the government to defend the regulation at issue. Further, under the statute, religious exercise “includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”¹²

One of the most significant aspects of RLUIPA for municipalities is that, unlike an ordinary land use challenge that generally can (with a few rare exceptions) at most result in a reversal of the decision and a direction that the approval be granted, RLUIPA allows courts to fashion a remedy,

which can and has included compensatory damages and attorney’s fees.

Application in the Courts

While there have been exceptions, a significant number of decisions applying RLUIPA have given broad application to the statute.

For example, in *STS. Constantine and Helen Greek Orthodox Church v. City of New Berlin*,¹³ the Seventh Circuit found a substantial burden on a church that was denied a PUD (planned unit development) zone for church use in order to operate the church on 40 acres of land purchased for that purpose.

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There have been exceptions as well. In *Libolt v. Town of Irondequoit*¹⁴ the Fourth Department held that there was a compelling state interest in maintaining the community’s single-family zoning and that denying a religious order the right to maintain a halfway house (which charged a per diem fee) in a single-family zone, did not violate RLUIPA.

In addition, the Seventh Circuit drew an interesting distinction in determining whether there was a burden on religious exercise. In *World Outreach Center v. City of Chicago* and *Trinity Evangelical Lutheran Church v. City of Peoria*,¹⁵ the court held that the World Outreach Center had been substantially burdened but that the Trinity Evangelical Church had not.

The portion of the decision involving the Trinity Evangelical Lutheran Church’s RLUIPA claim against the City of Peoria appears to be a somewhat unique decision. That claim involved the church’s plan to acquire a building on a parcel located next to its existing church building.

After the church purchased the adjoining parcel, a neighborhood group applied to the city to have the building on that par-

cel designated a landmark. The landmark designation was granted. Thereafter, when the church sought to demolish the now-landmarked building to build a new center, the city denied the application citing the landmark status.

The circuit court affirmed the dismissal by the district court, finding the burden on the church was only modest and not substantial. Significantly, the court determined that the burden would only be substantial if the church had no alternative. Instead, the court noted there was a market for the landmarked property.

Consequently, the court reasoned that the church had the ability to sell the property and use the proceeds from such sale to construct its center on the adjacent site also owned by the church. The court went on to conclude it was likely the purpose of “this litigation is to extract a commitment from the City to allow Trinity to build the family-life center on the empty lot, and so viewed the suit has succeeded.”

After appearing to avoid the issue of the constitutionality of RLUIPA by either remanding or dismissing cases on procedural grounds, in 2007, the Second Circuit ruled that RLUIPA is constitutional and upheld the finding of an RLUIPA violation by the Southern District of New York in *Westchester Day School v. Village of Mamaroneck*.¹⁶ In that case, a local zoning board of appeals denied an application by a religious school for a special permit to expand its facilities.

More Recent Decisions

In the last several months, there have been two other significant RLUIPA decisions.

In *Rocky Mountain Christian Church v. The Board of County Commissioners of Boulder County*,¹⁷ the county had a comprehensive plan in place to maintain the area’s rural character. The church sought to build a 28,000 square foot gymnasium and a 6,500-square-foot chapel and to expand the school building by an additional 57,500 square feet, construct a gallery space connecting the buildings, and expand the main worship building’s seating capacity by 150 seats.

The county required a special permit for any facility in excess of certain thresholds, which were exceeded by this application.

The Tenth Circuit ruled that the county’s

denial of the application violated RLUIPA as the county treated the church's application differently than a previous application submitted by a school, which the county had granted. The court found that the two applications to be sufficiently similar to demonstrate the county's unequal treatment of the church application.

The court noted that county staff had treated this application differently, even in the manner in which the review was processed and that the jury had properly weighed "evidence of the County's land use regulation effectively excluding churches more heavily than the County's record of approving special use applications."¹⁸

Ultimately, the court concluded that there was a substantial burden on the religious exercise of the church as a result of the denial. The county has recently petitioned the U.S. Supreme Court for review and it will be interesting to see if the case is accepted for review.

The other recent case, mentioned in the first paragraph of this article, is from the Southern District of New York, *Fortress Bible Church v. Feiner*.¹⁹ This case demonstrates just how much difficulty a municipality can get itself into.

The Fortress Bible Church was seeking to build a new facility in the town and as an initial step in the process, the town had to complete a review of potential adverse environmental impacts under New York's State Environmental Quality Review Act (SEQRA).²⁰ Ultimately, the town issued findings concluding that the church's proposal had too many adverse environmental impacts. The church then brought a claim under RLUIPA challenging the town's actions.

As a threshold issue, the town claimed that SEQRA did not fall within RLUIPA. The court, however, rejected that argument noting that SEQRA was part of an individualized assessment of a land use application and fell within the scope of RLUIPA.

On the facts of the case, the town was severely hampered by the court's finding that the majority of the town's witnesses lacked credibility and, in fact, the court sanctioned the town for spoliation of evidence.

To the extent the facts were clear to the court, they were not helpful to the town. The court noted that initially the town's then planning commissioner thought the

town could issue what is known as a conditioned negative declaration under SEQRA. Such a declaration would have permitted implementation of certain mitigation measures to address any traffic concerns raised. This would have limited the environmental review process.

But the town did not adopt this recommendation and instead, the environmental review process continued and was used to develop the ultimate findings statement issued by the town determining that the project should not be constructed as proposed.

The court found that during a meeting in July 2000, the town supervisor said that half the issue was traffic and the other half was the church's tax exempt status. During that meeting, the supervisor then suggested that the church should either donate a fire truck or make some other payment to the town in lieu of taxes.

One of RLUIPA's most significant aspects is that, **unlike** an ordinary land use challenge that generally can **at most** result in a reversal of the decision and a direction that the approval be granted, RLUIPA **allows courts to fashion a remedy** that can and has included **compensatory damages and attorney's fees**.

The court noted that it was the supervisor's testimony that the church's tax exempt status was impeding the approval. Further, the court made note of the planning commissioner's testimony that at least one member of the town council told him to help stop the project.

As a result of this and other evidence, the court found violations of RLUIPA and the First Amendment and determined that there was a substantial burden on the church's religious exercise and no compelling state interest being protected by the town. The town's SEQRA findings were vacated and the town was ordered to complete the processing of the church's site plan application with 60 days, without further SEQRA review.

The court further directed the church's

counsel to submit information on claims for compensatory damages for increased construction costs and attorney's fees.

Conclusion

RLUIPA implicates a wide range of local government activities. Zoning variances, site plan approval and special/conditional use permits are among the areas of regulation that most frequently create a forum for an RLUIPA violation claim.

Zoning ordinances must be drafted in an even-handed manner so as not to be viewed as discriminating against religious exercise. Municipalities must, among other things, be certain that permitting requirements do not single out religious institutions and practices and that such permitting requirements are appropriately related to legitimate concerns that fall within the scope of municipal land use regulations.

The *Fortress Bible Church* case demonstrates the danger of going beyond those areas and considering such other issues like tax exempt status.

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1. 42 U.S.C. 2000cc
2. ___F. Supp2d___, 2010 WL 3199876 (S.D.N.Y. 2010).
3. *Cornell University v. Bagnardi*, 68 N.Y.2d 583, 503 N.E.2d 509, 510 N.Y.S.2d 861 (1986).
4. Id. at 594.
5. Id. at 595.
6. 5 N.Y.3d 407, 838 N.E.2d 624; 804 N.Y.S.2d 708 (2005).
7. Id. at 409.
8. Id. at 413.
9. Id. at 414.
10. 42 U.S.C. 2000cc (a)(2).
11. 42 U.S.C. 2000cc (b) (1), (2) and (3).
12. 42 U.S.C 2000cc (5) (7) (A).
13. 2005 U.S. App Lexis 1552 (7th Cir. 2005).
14. 66 A.D.3d 1393, 885 N.Y.S.2d 806 (4th Dept. 2009).
15. 591 F.3d 531 (7th Cir. 2009).
16. 504 F.3d 338 (2d Cir. 3007).
17. 613 F.3d 1229 (10th Cir. 2010).
18. Id. at 1239.
19. ___F.Supp2d___, 2010 WL 3199876 (S.D.N.Y. 2010).
20. Article 8 of the New York Environmental Conservation Law and its implementing regulations set forth in 6 NYCRR Part 617