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Religion and Land Use: Constraints on Local Boards' Decision Making

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Abstract: While local legislatures generally have broad authority to enact land use regulations that serve a public interest, the Religious Land Use and Institutionalized Persons Act as well as constitutional limits found in the First Amendment limit religious land use regulations that seek to restrict religious freedom. This article explores the Second Circuit's decision in *Westchester Day School v. Village of Mamaroneck*, and makes suggestions about the future implications of the court's decision.

In previous columns, we have examined the great deference that the courts show in reviewing the land use decisions of local boards as they review and approve development projects. When the projects are advanced by religious organizations, both the First Amendment Free Exercise Clause and federal religious liberty statutes place courts in a different, less deferential posture. In these cases, a denial impinges on a religious institution and the courts look more closely at the rationale for the local land use board's decision. This column explores the extent to which local boards are constrained in their decision-making when a religious land use is involved.

The most recent federal enactment affecting land use decisions involving religious institutions is the Religious Land Use and Institutionalized Persons Act ("RLUIPA") which was implicated in a recent decision of the Second Circuit Court of Appeals. *Westchester Day Sch. v. Vill. of Mamaroneck*, No. 03-9042, 2004 U.S. App. LEXIS 20327 (2d Cir. Sept. 27, 2004). Attorneys for municipalities, religious entities, and neighborhood groups are keenly interested in the extent to which RLUIPA alters the normally generous attitude of the courts in reviewing land use decisions. The district court opinion in this case had granted the Westchester Day School's motion for summary judgment and ordered the issuance of a special use permit modification. This seemingly changed significantly the standards by which land use decisions are measured when a

religious use is involved. The Second Circuit reversed the district court's summary judgment award, moderated the standards applied to the decision of the Zoning Board of Appeals, and remanded the matter for further fact finding consistent with those standards.

Background

In October 2001, Westchester Day School ("WDS") submitted an application for modification of its special permit to allow construction of a new classroom building and renovation of two existing buildings to accommodate its student population. WDS offers a "coeducational curriculum of secular and Judaic studies, daily prayer, and observance of Jewish practices and customs." *Westchester Day Sch.*, 2004 U.S. App. LEXIS 20327, at *5. The plan involved mainly the construction or renovation of facilities used for secular activities, such as classrooms for music, art, and computers. WDS also intended to build and modify facilities for a Jewish library and new chapel intended specifically for religious exercise.

After several months of public hearings and collecting comments from professionals, the Zoning Board of Appeals ("the Board"), the board responsible for issuing the permit modification, voted 3-2 to adopt a resolution denying WDS's application. "Among [the] reasons cited by the Board for denying the permit were: the potential for increased intensity of use due to increased enrollment at WDS; traffic concerns relating to increased volume and the effect on nearby intersections; and insufficient provision for parking." *Id.* at *7.

WDS sued the Village claiming that the denial constituted a substantial burden of its religious freedom in violation RLUIPA. The district court found that the Village's complete denial of the special permit modification was a violation of RLUIPA and granted summary judgment in favor of WDS and ordered the immediate and unconditional approval of the application. *Westchester Day Sch. v. Vill. of Mamaroneck*, 280 F. Supp. 2d 230 (S.D.N.Y. 2003). The United States Court of Appeals for the Second Circuit vacated the grant of summary judgment, concluding that the evidence on the record did not compel judgment in WDS's favor. *Westchester Day Sch.*, 2004 U.S. App. LEXIS 20327, at *4-*5. "[T]he [district] court's judgment depended on findings of fact upon which a factfinder could reasonably disagree." *Id.* at *5.

Discussion

RLUIPA prevents federal, state, and local governments from "impos[ing] or implement[ing] a land use regulation in a manner that imposes a substantial burden on ... religious exercise." 42 U.S.C. § 2000cc(a)(1) (2000). The claimant bears the burden of persuasion and must demonstrate that the law (including a regulation) or government practice that is challenged (1) imposes a substantial burden; (2) on the "religious exercise"; (3) of a person, institute or assembly.

“Religious exercise” is defined by the statute as “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” § 2000cc-5(7)(A). “The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise.” § 2000cc-5(7)(B). If a prima facie case is established, the government must demonstrate that its regulation furthers “a compelling governmental interest” and is the “least restrictive measure of furthering that interest.” § 2000cc(a)(1).

According to the Second Circuit, the district court had determined that the Board’s “complete denial” of WDS’s plans constituted a “substantial burden on religious exercise” because “religious exercise ... was at stake in all aspects of the proposed plan.” *Westchester Day Sch.*, 2004 U.S. App. LEXIS 20327, at *9-*10. The court found that the Board failed to establish a “compelling government interest.” *Id.* at *10.

Complete Denial

The district court stressed that the Board’s decision was a “complete denial” of WDS’s proposed plan which the Second Circuit interpreted to “imply a finding that the denial conclusively rejected the school’s plans, leaving open no possibility that the Board might be amenable to the resubmission of a modified application, addressing the problems the Board cited.” *Id.* at *12. According to the Second Circuit, a fact finder could have found otherwise. On its face, the Board’s resolution suggests that a modified plan that cures the problems and deficiencies cited by the Board might be approved. Quoting language from the Zoning Board’s resolution explaining its denial of the project as submitted, the Second Circuit determined that WDS could modify its plans for the secular facilities to mitigate traffic and parking impacts and provide the Board with the information it requested so that the Board might approve the application.

If the Board’s decision was not a complete denial and left open the possibility of approval of a modified plan, then it is less likely to constitute a “substantial burden.” Nothing in the record compels the finding of a complete denial, so whether the Board’s ruling constituted a complete denial was a fact to be determined by a fact finder. The court concluded that “the finding of a complete denial was essential to the court’s finding of ‘substantial burden,’ that reason alone would compel [the court] to vacate the grant of summary judgment.” *Id.*

Substantial Burden on Religious Exercise

In dicta, the Second Circuit expressed concerns with the district court’s broad application of RLUIPA protection. The district court found the WDS’s entire plan to be “religious exercise” because WDS “delivers a secular and religious education in a religious environment,” so any improvement to the school’s facilities that improves the students’ educational experience is protected

by RLUIPA. *Id.* at *17. “According to this logic, any improvement or enlargement proposed by a religious school to its secular educational and accessory facilities would be immune from regulation or rejection by a zoning board so long as the proposed improvement would enhance the overall experience of the students.” *Id.* at *17. Such a determination raises serious constitutional issues.

As a legislative accommodation of religion, RLUIPA occupies a treacherous narrow zone between the Free Exercise Clause, which seeks to assure that government does not interfere with the exercise of religion, and the Establishment Clause, which prohibits the government from becoming entwined with religion in a manner that would express preference for one religion over another, or religion over irreligion. *Id.* at *18. According to the Second Circuit, if the district court’s interpretation of RLUIPA is applied, it raises serious questions about whether the statute “goes beyond the proper function of protecting the free exercise of religion into the constitutionally impermissible zone of entwining government with religion.” *Id.* at *19 (citing *City of Boerne v. Flores*, 521 U.S. 507, 537 (1997) (Stevens, J., concurring)).

Compelling Governmental Interest

The district court, found that the Board’s denial of the permit was not justified by compelling governmental interests. The Second Circuit disagreed holding that for summary judgment purposes this finding was not compelled by the record and that the matter should have been submitted for further proceedings for findings of fact on these issues.

The district court looked at three aspects of the Board’s decision and, in each case, found that no compelling interest was involved. The first of these was traffic impact. The district court asserted that “‘traffic concerns have never been deemed compelling government interests.’” *Id.* at *21-*22 (quoting *Westchester Day Sch.*, 280 F. Supp. 2d at 242). The Second Circuit found that the district court should have exercised “judicial restraint” and there was no need for the court to “establish [such] a far-reaching constitutional rule.” *Id.* at *23. The court found no compelling authority for such a rule.

Second, the district court was not convinced that the Board’s traffic experts proved that the lack of sufficient parking spaces would cause an immediate threat to the public health or safety. Third, the district court found that the Board did not act in good faith, “but that its ‘abrupt reversal of its prior approval ... was a reaction to belated public outcry, a paradigm of what has been referred to as the NIMBY (Not In My Back Yard) syndrome.’” *Id.* at *24 (quoting *Westchester Day School*, 280 F. Supp. 2d at 243). Regarding both of these findings, the Second Circuit determined that the district court failed to establish that “no reasonable trier of fact could, upon the record presented, find otherwise.” *Id.* at *25.

Conclusion

The *Westchester Day School* case illustrates how courts could misconstrue RLUIPA to give religious land uses, including their secular as well as spiritual facilities, a greater preference over proposals submitted by purely secular institutions raising Establishment Clause concerns. Such an interpretation of the statute would be suspect if it favored, in the Second Circuit's words, religious over irreligious land uses. This could be the result if RLUIPA is too broadly interpreted and fact-based denials or conditions are routinely overturned unless there is evidence that they are motivated by discriminatory intentions. A denial based on traditional land use impact analyses is not necessarily a violation of RLUIPA, particularly where the nature of the denial leaves room for the religious institution to modify its proposal to mitigate adverse impacts and secure approval.

When RLUIPA was adopted, Congress found that “[c]hurches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation.” Congress found that recent trends in the manner that Americans worship have resulted in increased disputes over the application of local zoning ordinances to religious uses of property.

RLUIPA requires local governments to implement land use regulations in a manner that treats religious assembly or institutions on equal terms, is nondiscriminatory, and does not exclude or unreasonably limit religious assembly within a jurisdiction. Religious land uses can cause heavy traffic, overflow parking, noisy assemblages, radiating light from cars and poles, visual disturbances, stormwater runoff, soil erosion and sedimentation, flooding, and a host of other typical off-site impacts. The Second Circuit decision appears to leave land use boards free to examine those impacts, require their mitigation, deny projects where their religious sponsors are not forthcoming with reasonable changes, and otherwise act as land use bodies are charged to act in the public interest.

Judicial decisions in New York that preexisted RLUIPA made it clear that religious land uses advance the public welfare and the courts have consistently held that religious uses of property, and a wide variety of accessory uses, are in the public interest. Absent clear evidence to the contrary, such land uses must be accommodated by land use regulations and permitting agencies. RLUIPA adds to this historical protection by increasing the burden on land use boards to show the public interests to be protected by land use conditions and denials where the religious institution can make out a *prima facie* case of religious discrimination. Neither the common law nor the statutory protection, however, strip land use decision makers of the authority to ensure that religious land uses mitigate their adverse impacts and take into account surrounding conditions when proposing new or expanded facilities.

Curiously, decisions like the Second Circuit's may save RLUIPA from charges that it is unconstitutional under the Establishment Clause. To the extent that reasonable, fact-based conditions imposed on religious land uses are upheld, RLUIPA avoids the charge that it causes privileges to flow directly to religious landowners solely because of their religious character. To the extent that RLUIPA is used to cause local land use boards to become deeply entangled in religious considerations, rather than land use impact consideration, it runs further risk of being declared unconstitutional under the Establishment Clause.