ZONING AND PLANNING LAW REPORT

Vol. 26, No. 3 **March 2003**

THE FIRST CHURCH OF COSTCO: LAND GRAB FOR TAX REVENUE OR PREFERENTIAL TREATMENT OF CHURCHES?

By Paul J. Weinberg

Paul Weinberg is a real estate attorney practicing in Irvine, CA. Since 1979, his Orange County practice has specialized in real estate, title, leasing, and real property development matters. Paul is the only nonarchitect member of the Laguna Beach Architectural Guild and acts as their legal counsel. He is a member of the Society of Architectural Historians and the American Institute of Architects. Paul has also served on the faculty at University of California's Hastings College of Law in San Francisco, CA, where he has taught civil trial practice. He also authors articles for the University of California's Continuing Education of the Bar Real Property Law Reporter and West Group's National Real Property Law Journal. In 1998, Paul announced the formation and opening of a private mediation service devoted to the resolution of real property disputes.

Land use planning and religious freedom are at best an awkward mix. One relies on scientific principles, the other on an appeal to the emotions and hearts of people who seek reassurance about their place in life and existence in the world. Planners crave rationality and order and a sense of cohesion. Add to that mix a bad economy and, in many cases, a desperate need of revenue and, in an already crowded world, the mix becomes volatile.

What happens when a city needs money and can generate it with tax revenue by inviting a "big box" retailer to come in and build on land the city acquires from a church? And also, what happens when a church wants to expand itself or move into a residential neighborhood and the city and the neighbors do not want them to?

Examples of these problems are proliferating everywhere now; they have brought into confrontation the subject of religious freedom, land use planning, the wish of a lot of neighbors to maintain privacy, and all of the benefits that come with low density, less traffic, few parking problems, little noise and light pollution and a clear sense of being left alone. How does the law and, more importantly, government in general come to grip with these opposing drives and try to resolve them? In many cases, not very easily and not always successfully.

The first of the major problems—how does a city get more revenue when obtaining that revenue means displacing a church?—has been brought into sharp relief by the very recent California case of *Cottonwood Christian Center v. Cypress Redevelopment Agency*, a federal district court case coming out of Orange County, California. The facts themselves are relatively simple. As the District Court itself put it:

> This case is a dispute between the City of Cypress… and the Cottonwood Christian Center…over an 18 acre parcel of property. …Cottonwood…seeks to build a church facility which would include a 4,700 seat auditorium and surrounding buildings for use in its

ministries. After failing to get the appropriate land use permits from the City, Cottonwood brought this action. Cypress, on the other hand, wants the Cottonwood property to be used as commercial retail space, with the plan to place a major discount retailer such as Costco on the Cottonwood property. To this end, the City has begun eminent domain proceedings on the Cottonwood property.[1]

Mike Berger, a noted land use attorney practicing in Los Angeles, CA, put it, though, a lot more colorfully in an article in the Los Angeles Daily Journal, a legal newspaper:

> It's been awhile since the maxim about rendering different things unto Caesar and God was first voiced, but church and state seem to be duking it out on an increasing basis these days. A current chapter is brewing in the Orange County community of Cypress, where the City says it will condemn 18-acres of vacant land that a church planned to use for a large new facility so that it can, instead, move another giant Costco outlet onto the property.
>
> From a municipality's vantage point (except for some of those quaint New England townships that want to retain their historic flavor), big boxes rule. They bring lots of customers who spend lots of money and generate lots of tax revenue. They bring traffic, too, but that is seen as a trade-off, with the municipality happily supplying the infrastructure for the ratable. Churches also generate traffic, but no local revenue.
>
> Thus, for a city, it's a no-brainer. Given a choice, you make a home for the commercial outfit and tell the church mice to pack it in. Which is exactly what Cypress has announced it will do. If the Church will not voluntarily sell its land, then the City will invoke its power of eminent domain and condemn the property. This may prove to be an interesting fight. On the one side are the City and Costco. On the other side is the Cottonwood Christian Center. If not Goliath, Cottonwood may be something more than little David, as well. The congregation long ago outgrew the small, 700 seat facility it now occupies. Every weekend, 4000 parishioners attend six services at the facility. Hundreds—sometimes thousands—are turned away. The weekend after 9/11, an extra 2000 showed up.[2]

On the face of it, this would seem to be a black and white, good versus evil, quintessentially American dispute; big bad government is weighing in on the side of big business and the "little guy" in this case here, the little religious guy, is not getting a fair shake. A torrent of editorials, one in particular from the Wall Street Journal, would seem to agree. In a 5/30/02 editorial, they cast their eastern eye on California's plight and framed the problem in black and white terms:

> Cypress and its city fathers are not bigots; they simply insist that Cottonwood's 17.9 acres are too valuable as potential tax revenue to be allowed to remain in the hands of a tax exempt church. But the whole point of property rights is that bureaucrats do not get to pick and choose who owns what. Ditto for businesses such as Costco, which should buy their land in the open market instead of relying on local governments to seize a juicy location at below market prices.
>
> The powers of eminent domain are tricky enough when exercised for highways, schools or other public uses. But when invoked on behalf of a private business it represents the worst form of public collusion. Our advice to Cottonwood is not to turn the other cheek.[3]

This is an easy position morally, to take, particularly in light of the facts. Not surprisingly, though, Costco does not want any part of it. Its President and CEO, Jim Sinegal, responded in a counter-editorial:

> In response to your May 30th editorial . . . you fail to ask Costo for our side of story. Had we been asked, we could have pointed out that we are not a party to any litigation and do not have a contract to buy any land in Cypress, nor will we have until a judge or the parties themselves resolve their dispute.
>
> We were wrongly painted in a negative light. I am resisting the urge to fully defend our role in this—it might fill several pages detailing how you were misled and how Costco is being falsely portrayed as the villain in this dispute between the Church and City. I will simply say that in 1999, before this Church, from a neighboring town, bought 18-acres in Cypress, church officials were advised in writing by Cypress that this land was in a redevelopment area, and it was designated for commercial development, and it would be highly unlikely that they would obtain permits for the planned church.
>
> The Church went ahead and bought the land anyway, paying 14 million dollars cash, in a highly speculative manner for any land developer, let alone for a church. Now, a key commercial corner sits vacant, frustrating the need of the City to increase its tax base to support schools and other services, which was the original reason for the redevelopment designation in 1990, and the Church claims that religious freedom is at state.[4]

Cooler heads looking at the controversy, though, see the problem in this case not as one rooted in a conflict between church and state, but one of a city's overzealous application of a finding of a blighted area to give it the justification to condemn the property and take it. This, unfortunately, is at the heart of a lot of land use decisions across the country, as is pointed out by Professor George Lefcoe, of the University of Southern California School of Law:

> The whole problem is cities are in a mad race for revenues. But redevelopment is not suppose to be used for that. So in redevelopment, it is always Halloween. Cities wear a "blight" costume to hide the ugly face of tax dollars.[5]

In a personal interview, Professor Lefcoe expanded on this point:

> I am a great fan of redevelopment. One of the problems, though, is instead of using it for planning, we use it as a substitute. We wind up refereeing disputes between developers and neighbors, rather than engaging in overall planning . . . There is a rush for tax increment and tax revenues; everyone is bending over backwards to get Costco. This is no one's idea of a contiguous use of an area . . .

Churches *have* fought back, most recently with a piece of litigation signed during the sunset period of President William Clinton's term, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). This turned out to be an interesting piece of legislation; it melded churches and prisoners in the same statutory framework. Its first section (42 U.S.C.A. § 2000cc) is entitled "Protection of land use as religious exercise"; its second section (42 U.S.C.A. § 2000cc-1) is entitled "Protection of religious exercise of institutionalized persons."

The relevant words of the Act itself are unusually simple:

> (1) General rule
>
> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—
>
> (A) is in furtherance of a compelling governmental interest; and
>
> (B) is the least restrictive means of furthering that compelling governmental interest.[6]

The Act goes on to attempt to implement an equal protection clause:

> No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.[7]

And finally, the Act appears to try to protect churches from being excluded from a community:

> No government shall impose or implement a land use regulation that—
>
> (A) totally excludes religious assemblies from a jurisdiction; or
>
> (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.[8]

The Act has been criticized by scholars as "sublimely vague" and just as vigorously touted by others:

> Minority religions have a much harder time of obtaining approval for construction for a house of worship—and for utilizing that place of worship in an important religious way—than do majority religions . . . Minority religions . . . are often least able to bear the financial cost of the process and face an unsympathetic political constituency. They fare significantly less well before government boards having almost unchecked discretion and an unsympathetic constituency. Accordingly, these congregations are too often forced into the courts to defend their free exercise rights . . .[9]

A somewhat ugly face on this whole problem is added by the fact that churches are able to raise enough money to hire attorneys to invoke this legislation; a cottage industry has arisen of lawyers ready and willing to "carry the torch" of religious liberty. The bigger question, though, is, what happens when a church, perhaps guided by a religious and missionary zeal, injects itself into a land use controversy, seeking, in reality, special treatment because of its religious status? How does the system cope with what has to be denoted as an inherent imbalance?

ZONING AND PLANNING LAW REPORT

Editorial Director
Tim A. Thomas, Esq.
Contributing Editors
Patricia E. Salkin, Esq.
Kenneth H. Young, Esq.
Electronic Composition
Specialty Composition

Published eleven times a year by
West Group
Editorial Offices: 50 Broad Street East, Rochester, NY 14694
Tel.: 585-546-5530 Fax: 585-258-3774
Customer Service: 610 Opperman Drive, Eagan, MN 55123
Tel.: 800-328-4880 Fax: 612-340-9378

Subscription: $384.50 for eleven issues

ISSN 0161-8113

Professor Lefcoe makes the point, as do a lot of scholars, that the *Cottonwood* case really has nothing to do with the church at all: "This is simply a way to generate tax revenue; it depends more on the blight of an area already taken into account . . ."[10]

Interestingly, the judicial opinion on the topic saw it exactly the same way:

> Defendants advanced two interests for refusing to grant Cottonwood a [Conditional Use Permit] and condemning the Cottonwood Property—blight and generating revenue for the City. Neither interest is sufficiently compelling to justify burdening Cottonwood's religious exercise.
>
> "Blight" can constitute "an 'esthetic harm.'" [Citations.] The Supreme Court has held that esthetic concerns are substantial governmental interests. [Citation.] It is, however, only a compelling interest that can justify burdening Cottonwood's religious exercise rights. *Moreover, it is evident that the refusal to grant Cottonwood's application for a CUP was not at all premised on blight. The construction of a church on the Cottonwood property would eliminate the blight.*
>
> A second problem with Defendants' asserted justification is that the evidence does not necessarily support a finding of blight. Although the City asserts that its 1990 determination of blight is conclusive, the examination of local laws under the strict scrutiny analysis requires not only that the governments stated purpose is a compelling interest, but that it is also a genuinely-held purpose. [Citation.] A 12-year-old determination of blight hardly seems compelling—indeed, it did not compel the City to take action until after Cottonwood purchased the Cottonwood Property.
>
> […]
>
> Even if Defendants had compelling reasons to burden Cottonwood's religious exercise, they must do so in the least restrictive means. Far from doing that, the City has done the equivalent of using a sledgehammer to kill an ant. Assuming that removing the blight from the Cottonwood Property was a compelling state interest, the City could eliminate the blight simply by allowing Cottonwood to build its church. The area would be developed, would provide substantial community services, and Cottonwood's religious exercise would not be infringed.[11]

Another equally aggravating problem, though, occurs here, when cities simply deny the religious institution the right to expand or modify their facilities, citing neighborhood incompatibility, unlawful expansion of use, or other environmental impact. In some ways, this is a more classic iteration of the problem. Interestingly, though, with RLUIPA, the churches have a new weapon; they can move to the front of the line and invoke religious discrimination as a reason why they cannot get a building permit. While a little lower-profile in the media, this is a much more common and widespread problem than the Cottonwood one. Not surprisingly, as with many issues involving religions, the parties are very polar. Probably the most high-profile proponent of abusing RLUIPA to allow religious institutions of preference is the non-profit organization of the Beckett Fund for Religious Liberty located in Washington, D.C. Its two lead attorneys, Anthony Picarello and Roman Storzer, are listed as either amicus or lead counsel on many of the cases invoking RLUIPA's provisions in this context around the country. They have written an editorial, posted on a general law website known as "FindLaw," that summarizes how they look at the zoning process as it is applied to religious institutions:

> Zoning officials have a nasty habit: When confronted with a religious freedom claim from a house of worship, they reflexively assure the public and the press that the case is merely a "land use dispute." This assertion is almost never correct, but it is frequently made nonetheless.
>
> Why do zoning officials repeat this mantra? It might seem to be a shrewd, concerted media strategy designed to distract attention from what is really a prohibition on religious exercise. (After all, zoning officials often rely on their well-funded lobbying groups, ranging from the National League of Cities to the American Planning Association, for coordinated advice on media relations and other issues of common concern.) However, our experience on these cases suggest that the typical reaction of zoning officials is less deliberate and more a matter of culture, a shared, pernicious mindset.
>
> In short, zoning officials have grown too accustomed to operating with virtual impunity in their own municipal fiefdoms. As they see it, so long as the case falls within the sacrosanct category of "land use dispute," they are acting within the realm of their legitimate authority and need not fear running afoul of the Constitution.
>
> The reality is far different. Since virtually the dawn of zoning in the early Twentieth Century, zoning laws and officials have been subject to various constitutional limitations, including those that protect religious freedom. Because zoning officials so often forget this basic fact—wilfully or otherwise—Congress recently passed [RLUIPA] as a helpful reminder.[12]

In a personal interview, Roman Storzer talked at some length about his role as an attorney in land use cases:

> This is a new area of law. What rights do churches have to be free of certain land use regulations? . . . We see ourselves as civil rights law lawyers, not land use lawyers; we're concerned with problems where children are forbidden to bring Bibles to school; we are concerned

with problems where churches or synagogues are forbidden from putting up menorahs in towns; we have clients that are bigger churches, but they aren't typical as bigger churches usually have political power; the smaller churches don't.[13]

Mr. Storzer goes on to point out that, under the *Cottonwood* opinion, the strict scrutiny standard of review has to be applied whenever RLUIPA is invoked. The opinion in *Cottonwood* itself would seem to agree:

> RLUIPA provides a strict scrutiny standard of review for land use cases.…
>
> RLUIPA is the most recent in a series of tugs and pulls between Congress and the Supreme Court to define the scope and extent of the Free Exercise Clause. In [Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990)], the Supreme Court rejected a long history of Free Exercise Clause jurisprudence that required strict scrutiny of any state action that substantially burdened religious freedom. [Citations.] Instead of the traditional strict scrutiny test, the Supreme Court determined that the adoption of a neutral, generally applicable law did not violate the free exercise clause regardless of its potential effects on religious exercise. [Citation.]
>
> The decision in *Smith* set off significant controversy. In response, Congress passed and President Clinton signed the Religious Freedom and Restoration Act of 1993 (RFRA) . . .. Acting pursuant to the Enforcement Clause of the Fourteenth Amendment to the Constitution [citation], RFRA was designed to "restore the compelling interest test as set forth in" [Sherbert v. Verner, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963)] and [Wisconsin v. Yoder, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972)] Wisconsin v. Yoder, 406 US 205 (1972)]. 42 U.S.C. § 2000bb(b)(1). Thus, as far as Congress was concerned, the *Smith* court's "neutral, generally applicable" jurisprudence was retired and claims under the Free Exercise clause were to be determined under the familiar strict scrutiny test.
>
> The Supreme Court, however, had other ideas, and in *City of Boerne v. Flores*, 521 U.S. 507, 536, 117 S. Ct. 2157, 2172, 138 L. Ed. 2d 624 (1997), the Court held that RFRA was unconstitutional. The court determined that RFRA exceeded Congress' enforcement authority and was instead an attempt to expand the Constitution's substantive rights. *Id.*
>
> Congress once again acted. In July, 2002, Senators Orrin Hatch, Republican of Utah and Edward Kennedy, Democrat of Massachusetts, introduced RLUIPA in the Senate. Gaining bipartisan support, RLUIPA unanimously passed both houses of Congress and was signed by President Clinton on September 22, 2000.
>
> The jurisdictional underpinning for RLUIPA is distinct from RFRA. First, RLUIPA only covers state action aimed at land use decisions and persons in jails or mental facilities. [Citation.] Second, application of RLUIPA is limited to cases that affect federally financed programs, interstate and foreign commerce or cases where the land use decisions are part of a system of "individualized assessments." [Citation.] By limiting RLUIPA in this way, Congress has acted primarily pursuant to its power under the Spending and Commerce Clauses, [citations]. Only application of RLUIPA to "land use regulation[s] or system[s] of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments" comes under the rubric of Congress' authority under the enforcement clause of the Fourteenth Amendment. [Citation.] *To the extent that RLUIPA is enacted under the Enforcement Clause, it merely codifies numerous precedents holding that systems of individualized assessments, as opposed to generally applicable laws, are subject to strict scrutiny.*[14]

Applying the strict scrutiny standard to land use decisions involving churches definitely gives them a leg up; it allows reviewing courts to "second guess" what a land use body did involving them, whereas other land owners have to accept the much lower standard of a rational basis, i.e., if there was any rational basis for the land use body to decide the way they did, a court is unlikely to interfere. Not surprisingly, this is an enormously powerful weapon in the church's pocket. The bigger question, though, is, to decide whether it is fair to give churches special treatment as opposed to equal treatment with everyone else. There are a number of very recent cases across the country showing how the courts are dealing with it.

One of the most hotly litigated cases comes out of the Eastern District of Pennsylvania, the 2002 case of *Congregation Kol Ami v. Abington Township*, resulting in a published opinion on 10/16/02 by the U.S. Court of Appeals for the Third Circuit.[15]

The *Kol Ami* case is a classic case in the idiom of a religious institution seeking to expand or modify a use and invoking RLUIPA's provisions to do it. Congregation Kol Ami is a reform Jewish synagogue that wants to relocate to an 11-acre parcel in the mist of, as the Third Circuit put it: "A purely residential section of Abington Township…in the Philadelphia suburbs, zoned R-1 residential under the township zoning ordinance."[16]

The Third Circuit laid out the salient facts beautifully:

> After the congregation entered into an agreement of sale with the Sisters of Nazareth, the current owners of the property, it sought zoning approval from the Township Zoning Hearing Board ("ZHB") seeking either a variance or a special exception, and alternatively for permission to use the property as an existing non-conforming use. When the congregation's application was denied by the

ZHB, the congregation…filed suit in the District Court…against the ZHB, Abington Township, its board of commissioners and its director of code enforcement . . . seeking injunctive, declaratory and compensatory relief for alleged civil rights violations pursuant to 42 U.S.C. § 1983. The complaint also alleged a violation of the Religious Land Use and Institutionalized Persons Act of 2000 . . .

Central to the case are certain provisions of the Abington Township zoning ordinance whose purpose, under a 1996 amendment, is "to provide low density, single family, neighborhoods." Under the ordinance, the R-1 residential district only permits a handful of uses by right: agriculture, live stock, single family detached dwellings and conservation and recreation preserve. Similarly, the ordinance only permits a handful of uses by 'special exception', including a kennel, riding academy, municipal complex, outdoor recreation, emergency services, and utility facilities. The ordinance does not permit churches or other religious institutions in R-1, except those that are legal, non-conforming uses, even by special exception. Nor does it allow a myriad of other uses such as schools, hospitals, theaters and day care centers in R-1 residential districts. These uses are, however, permitted in other districts in the township…[17]

During the preliminary litigation at the trial stage, the congregation moved for partial summary judgment on its claim that the ordinance was unreasonable on its face because it prohibited houses of worship from locating in residential neighborhoods. The District Court granted the motion and also granted injunctive relief, ordering the ZHB to conduct hearings on the congregation's application for a special exception. The township appealed, and asked for a stay of the injunction, but the applications were denied. The ZHB held a special exception hearing and concluded that the proposed use would not "adversely affect the health, safety and welfare of the community" and that the use was "consistent with the spirit, purpose and intent of the ordinance." The ZHB therefore granted the congregation a special exception and since that time, the township has also approved the congregation's land development plan. The township pursued the appeal to the Third Circuit, running into claims of mootness in light of the ZHB's act.

The Court of Appeals disagreed not only with the mootness issue, but also with the District Court's handling of the application for injunction:

> Under the ordinance, places of worship are not among the uses that are permitted to apply for a special exception. Such an omission is a de jure exclusion of that use from the R-1 residential district. . . .
> The District Court's conclusion appears to be a blanket determination that, as a category, places of worship cannot be excluded from residential districts. In combination with the court's order requiring the ZHB to hold a special exception hearing, the court functionally altered the township's ordinance in two ways. First, it gave the ZHB authority it did not otherwise possess—the authority to entertain a request for a special exception by a place of worship in an R-1 residential district. Prior to the District Court's order, the only means for a place of worship to obtain permission to locate in the R-1 residential district was by way of a variance. By permitting places of worship to apply for a special exception, the District Court altered the standard of proof that the congregation must meet in order to obtain approval from the ZHB by removing the much more onerous requirement that the congregation proved "unnecessary hardship."
>
> […]
>
> Second, the court's categorical determination that houses of worship further the public interest open the door for other places of worship to request the same treatment—a special exception hearing in residential zones where they are currently excluded. Supreme Court precedent is clear that the First Amendment prohibits municipalities from applying their laws differently among various religious groups. [Citations.] Further, discrimination against a future similarly situated religious land owner would be a clear violation of the equal protection clause. [Citation.] As a result, the District Court's determination altered Abington's zoning plan by giving the ZHB authority to grant a special exception to places of worship in an R-1 residential district not only in this case, but also in future situations where a place of worship seeks to locate in such a district.
>
> These effects, which operate by virtue of the precedent of the District Court's opinion (unless reversed on appeal), impose a burden on the township…
>
> The congregation makes much of the fact that the District Court did not order the ZHB to grant the special exception, but only required it to hold a hearing. That is, because the ZHB's determination to grant the special exception is said to have been 'voluntary', the congregation submits that we do not have any power to undue what has been 'voluntarily' done. We disagree. *This argument overlooks the fact that the ZHB was completely without authority to consider the request for a special exception absent the District Court's order, which compelled it to do so.*[18]

The Third Circuit sent the case back down to the District Court for findings as to whether the religious use was sufficiently similar to the residential uses in the R-1 zone where the parcel is located. The Third Circuit "telegraphed its punch," by adding this language:

> We do however, offer some observations on that issue should the District Court need to revisit it.
>
> First, we note that there is no evidence of anti-Jewish or anti-religious animus in the record…
>
> Second, the facts of this case illustrate why religious uses may be, in some cases, incompatible with

> the place of "quiet seclusion." When conducting its comprehensive plan in 1992, the Township determined that institutional uses, such as schools, churches and hospitals, have distinctive requirements that would best be addressed by placing them in particular districts. Specifically, the township concluded that although these entities "provide many benefits to the community," they also "have specific use, space and location requirements which are inherently different from other land categories . . . [and] necessitate [ ] a separate land use classification." [Citation.] To that end, the CS-Community Service District was established to meet the particular needs of churches and other institutions. [Citation.]
>
> In view of the enormously broad leeway afforded municipalities in making land use classifications . . . it is strongly arguable that the township's decision to group churches together with schools, hospitals, and other institutions is rationally related to the needs of these entities, their impact on neighboring properties, and their inherent compatibility or incompatibility with adjoining uses. If so, the foregoing standard of review in land use cases will be met.…
>
> Finally, we do not believe land use planners can assume any more that religious uses are inherently compatible with family and residential uses. [Citation.] Churches may be incompatible with residential zones, as they "bring congestion; they generate traffic and create parking problems; they can cause the deterioration of property values in a residential zone . . ." [Citation.] Thus, the District Court must refrain from making a blanket determine that religious institutions are inherently compatible, and, as argued by the congregation, "essential to residential zoning."[19]

Interestingly, the Third Circuit appears to apply the rational relation test, notwithstanding the invocation by the *Kol Ami* plaintiffs of the RLUIPA violation. The Third District also made clear in several places in its opinion that courts, in essence, are not supposed to interfere with local land use decisions:

> The Township invokes the well established principle that, in the federal Constitutional universe, federal courts accord substantial difference to local government in setting land use policy, and that only where a local government's distinction between similarly situated uses is not rationally related to a legitimate state goal, or where the goal itself is not legitimate, will a federal court upset a local government's land use policy determination.[20]

This is a point made by the lawyers for the township and, in fact, some of the scholars as well. In a personal interview, the lead attorney for Abington Township indicated that she saw the application of RLUIPA in the case as "violat[ing] states' rights; this is the last bastion of local control. Other than federal fair housing law and environmental laws, case law has given great difference to local land use decisions and, more importantly, local authority."[21]

The same attorney, in an article published on FindLaw's website, reiterated the point:

> [T]his federal take over of local land use control constitutes an obvious violation of the Constitution's federalism. If land use is not an inherently local concern, then virtually nothing is. Second, RLUIPA also constitutes an establishment of religion on the part of Congress, for it systematically favors religious organizations over their secular neighbors.[22]

The author goes on to point out that RLUIPA and its contents were passed without the benefit of any input from planners, land use officials, or neighbors of any religious building. She is pretty vocal about it:

> Violating the rule against the establishment of religion by the federal government, both political parties knelt before the altar of religious lobbyists. They refused to ask the hard questions about RLUIPA, even after repeated requests to testify from groups like the National League of Cities.
>
> As a result, the hearing record relies on anecdotal accounts of discrimination against religious buildings and land use (there are precious few cases). It also fails to make a substantial inquiry into the negative secondary affects religious buildings and other religious institutions can rain down on their residential neighbors.
>
> In effect, the members of Congress ignored every homeowner in the county (a silent majority if there ever were one) in favor of creating a more favorable climate for religious buildings. Helping such uses is one thing; but Congress went further—permitting religious land owners to ignore the obligation of every land user, to be concerned about effects on neighbors.[23]

The proponents of RLUIPA really do not deny that. For example, the Sidley Austin Brown & Wood law firm manual on RLUIPA, entitled "Questions and Answers About the Federal Religious Land Use Law of 2000," recites the same facts:

> At numerous committee hearings, prominent legal scholars, religious liberty lawyers, and civil rights and religious leaders testified about wide spread discrimination and land use regulation and about how Congress could constitutionally remedy such discrimination. In all, Congress held six house committee hearings and three senate committee hearings that included discussions of religious land use concerns.[24]

The question is thus posed: If RLUIPA's drafters did not listen to the planners, the cities or the neighbors, how were their concerns taken into account?

Courts wrestle with this issue now. Sidley Austin Brown & Wood is litigating one in Ventura County, CA, the *Ventura County Christian High School v. City of San Buena Ventura* case.[25]

That case involves a Christian high school leasing a vacant high school property and beginning to install modular classroom units on the land for use. The Christian high school attempted to install the modular units without getting a city use permit, and the city objected, refusing them the right to do it. They filed an action, and in it claimed a violation of RLUIPA.

The court, however, saw the dispute not as a religious exercise violation, but simply a failure of a land owner or land user to comply with local zoning:

> It appears that, without erecting different facilities (i.e., the modular units), Ventura Christian's use of the property may be a continuation of an existing use, and therefore would not require a [Conditional Use Permit] . . . However, when plaintiffs chose to install modular units on the property, this was an expansion of their use of the property, thereby requiring a CUP . . . The city has provided the court with a number of CUPs that it has issued to secular and religious entities for the construction of various structures, including modular units on VUSD property.
>
> The evidence directly contradicts plaintiff's allegation that several other private groups had erected modular units on leased school district land at least eight different locations, and had not been required to seek a CUP to do so . . . In light of the above, plaintiffs do not appear to be very likely to succeed on the merits of their claims, as the evidence does not indicate that they have been placed on "less than equal terms" with secular entities in the city . . . The right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) the conduct that his religion prescribes (or proscribes). (Employment Div. v. Smith 494 US 872, 879 (1990)) . . .
>
> Plaintiffs argue that their claims involve "hybrid" constitutional rights, including the right to freedom of religious exercise, "freedom of association and the right to equal protection of the laws and due process" . . . However, in order to assert a "hybrid rights claim", a free exercise plaintiff must make out a "colorable" claim that a companion right has been violated—that is, "a fair probability" or a "likelihood", but not a certitude, of success on the merits . . . The court concluded supra that plaintiffs have not presented adequate evidence for the court to find that they have been treated unequally under the law. Further, plaintiffs have not provided the court with authority that indicates that a neutrally enforced zoning ordinance may violate the constitutional right to freedom of association under the First Amendment. Therefore, the court concludes that this is not a "hybrid rights claim" and strict scrutiny would be inappropriately applied here.[26]

Looking between the lines in this opinion, it is clear that the *Ventura County* court was not willing to give special deference to a religious institution when doing so was going to grant them privileges over and above what a secular user of city property would have to do. A valid public safety argument was proffered by the city, too. When the high school built the modular buildings, they apparently did not do much to ensure the safety or freedom from nuisance of or by the surrounding neighbors:

> On September 12, 2002, Frank Nelson, civil engineer who currently works for the city performed a "site inspection" of the property, and made the following observations regarding the installation of the modular units: "Earth materials were moved from the high side to the low side and this created steep slopes next to the backyards of the homes [nearby]; grading and drainage devices to [sic] not appear to have been engineered, checked, permitted or inspected and as a result; and I see no storm water treatment devices at all. The existing drainage devices that appeared to have been in place since before the grading was done do not appear to have been properly maintained . . ."[27]

So how is RLUIPA supposed to be applied? When is the strict scrutiny test invoked and when is the more relaxed rational relation test propounded in *Smith* adequate? A recent federal district court case in San Jose seems to indicate that, like *Ventura County*:

> In order to show a free exercise violation using the "substantial burden" test, the religious adherent . . . has the obligation to prove that a governmental [action] burdens the adherents practice of his or her religion…by preventing him or her from engaging in conduct or having a religious experience which the faith mandates. This interference must be more than an inconvenience; the burden must be substantial and an interference with a tenet or belief that is central to religious doctrine.[28]

The San Jose case involved, on stipulated facts, the purchase by the San Jose Christian College of the former St. Louise Hospital property in the city of Morgan Hill with the intent to use this site for its college campus. The Christian college unsuccessfully applied to re-zone the property for educational use; the site is not presently operating as a hospital, but is the only site within Morgan Hill presently zoned for hospital use. The city denied the re-zoning application and then asserted several bases for its decision, including both the city's preference to retain the existing hospital's zoning as well as the applicant's failure to comply with the city's CEQA-base re-zoning application requirements.

The court in the San Jose case followed, in essence, the *Ventura County* court's reasoning:

> [T]urning next to the RLUIPA claim, it too fails. Under the Act, "no government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that the imposition of the burden on that person, assembly or institution—(a) is in furtherance of a compelling governmental interest; and (b) is the least restrictive means of furthering that governmental interest." [Citations.] In order to establish a prima facie case that RLUIPA has been violated, SJCC must present evidence that the city's denial of the re-zoning application "imposed a substantial burden" on the "religious exercise" of a person, institution or assembly. SJCC has failed to make this showing.[29]

The San Jose case is on appeal; the Beckett Fund has joined as an amicus on the plaintiff's side, and the American Planning Association has joined on behalf of the City. Not surprisingly, the case is being widely watched and, even though on appeal, has been quoted in subsequent federal opinions.[30]

The detritus of RLUIPA's passage is littering the courts now; it seems that when a religious institution gets a land use decision it does not like, it can invoke RLUIPA and try to take the matter out of the hands of local land use officials. Was this what RLUIPA's framers intended? That is hard to tell; the vagueness of the language and the lack of input from municipalities, planners, and affected neighbors probably resulted in a skewed piece of legislation.

The bigger question, whether RLUIPA is unconstitutional, though, remains to be decided. It is this author's opinion that, if a lack of constitutionality is found, it will be because of the very reverse of the reasons that the law was probably passed for; it grants an undue preference to religious institutions and discriminates against neighbors and others affected by that preference. The vagueness of the law will undoubtedly contribute to its demise, if in fact that demise takes place. The volatility of the question, though, guarantees that it will be litigated with the same vigor and, as the reader can see, across the entire country until, most likely, the United States Supreme Court takes the issue up. In the meantime, municipalities will now have to tread more carefully when they encounter a land use challenge from a religious institution.

Costco will most certainly have suffered, as did Wal-Mart and other "big box" retailers, negative public reaction and criticism from what appeared to be an event that they had little to do with: the City of Cypress' naked attempt to perform a land grab for its own benefit. The vast majority of the RLUIPA cases, though, are not so black and white and will be a lot harder to resolve.

NOTES

1. Cottonwood Christian Center v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1209 (C.D. Cal. 2002).
2. "Double Cross—would you rather have a church or a Costco?; Michael M. Berger; Los Angles Daily Journal, 6/13/02.
3. "The First Church of Costco"; Wall Street Journal 5/30/02.
4. "Costco Isn't The Villain In Church-City Dispute"; Wall Street Journal, 6/12/02.
5. "Cities Grab Land For Revenue, But Judges Are Slapping Their Hands," Evan Halper, Times Staff Writer, Los Angeles Times, 8/24/02; California Metro Section; Part 2, Page 8.
6. 42 U.S.C.A. § 2000cc(a)(1).
7. 42 U.S.C.A. § 2000cc(b)(1).
8. 42 U.S.C.A. § 2000cc(b)(3).
9. Keetch and Richards, The Need for Legislation to Enshrine Free Exercise in the Land Use Context, 32 U.C. Davis L. Rev. 725 (Spring, 1999). See also Sidley Austin Brown & Wood, Questions and Answers About the Federal Religious Land Use Law of 2000, at 2:27-31.
10. Personal interview of Professor George Lefcoe, University of Southern California School of Law, of 1/9/03.
11. Cottonwood Christian Center v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1227-29 (C.D. Cal. 2002).
12. "When Land Use Issues Are Also Religious Freedom Issues," Anthony Picarello and Roman Storzer; the Beckett Fund for Religious Liberty; 1/30/02; http://writ.news.findlaw.com/commentary/20020130_Storzer.html.
13. Interview with Roman Storzer of 1/9/03.
14. Cottonwood Christian Center v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1220-21 (C.D. Cal. 2002) (emphasis added).
15. Congregation Kol Ami v. Abington Township, 309 F.3d 120 (3d Cir. 2002).
16. Id., 309 F.3d at 124.
17. Id.
18. Id., 309 F.3d at 131-33 (emphasis added).
19. Id., 309 F.3d at 143-44.
20. Id., 309 F.3d at 125.
21. Interview with Marci Hamilton of 1/11/03.
22. "Struggling With Churches as Neighbors: Land Use Conflicts Between Religious Institutions and Those Who Reside Nearby," by Marci Hamilton, 1/17/02; FindLaw's Legal Commentary, Page 2, paragraph 5; "http://writ/finelaw.com/hamilton/20020117.html" http://writ.news.findlaw.com/hamilton/20020117.html.
23. "Struggling With Churches as Neighbors: Land Use Conflicts Between Religious Institutions and Those Who Reside Nearby" by Marci Hamilton, 1/17/02; FindLaw's Legal Commentary, Page 2, paragraphs 7 and 8; http://writ.news.findlaw.com/hamilton/20020117.html.
24. Questions and Answers About the Federal Religious Land Use Law of 2000, Sidley Austin Brown & Wood Religious Institutions Group and the RLUIPA Litigation Task Force, page 11:21-17.

25. Ventura County Christian H.S. v. City of San Buena Ventura, Case No. CB-02-08379 CAS, 2002 U.S. Dist. Lexis 22992.

26. Id.

27. Id.

28. Bryant v. Gomez, 46 F.3d 948, 948-49 (9th Cir. 1995), as cited in San Jose Christian College v. City of Morgan Hill, 2002 U.S. Dist. Lexis 4517 (N.D. Cal., San Jose Div., filed 3/8/02), 3:3-8.

29. Bryant v. Gomez, 46 F.3d 948, 948-49 (9th Cir. 1995), as cited in San Jose Christian College v. City of Morgan Hill, 2002 U.S. Dist. Lexis 4517 (N.D. Cal., San Jose Div., filed 3/8/02), 2:33-40.

30. See, e.g., Grace United Methodist Church v. City of Cheyenne, 235 F. Supp. 2d 1186 (D. Wyo. 2002).

RECENT CASES

Massachusetts Court Finds Continuing Obligation to Provide Affordable Housing Units under Comprehensive Permit

In Zoning Bd. of Appeals of Wellesley v. Ardemore Apartments Ltd. Partnership, 436 Mass. 811, 767 N.E.2d 584 (2002), the Supreme Judicial Court of Massachusetts held that the owner of a 36-unit apartment building in an area zoned as a single-family district had a continuing obligation to make some of the apartments available at below-market rents where permission to build the complex had been secured under the state's comprehensive permit statute.

As explained by the court, a comprehensive permit is available under the Massachusetts statute only when proposed housing is subsidized by the federal or state government "under any program to assist the construction of low or moderate income housing." In this case, the owner had been able to obtain a comprehensive permit because construction financing had come from state agencies under the "State housing assistance for rental production program." 767 N.E.2d at 586.

The court ruled that the owner could not escape its obligation to provide affordable housing under the comprehensive permit merely because of the passage of time:

> We conclude that, where a comprehensive permit itself does not specify for how long housing units must remain below market, the Act requires an owner to maintain the units as affordable for as long as the housing is not in compliance with local zoning requirements, regardless of the terms of any construction subsidy agreements. . . . By receiving permission to build a multi-unit apartment building in violation of local zoning laws the owner received—and continues to receive—a great benefit. We see nothing in the Act to suggest that the Legislature intended to override local zoning autonomy only to create a fleeting increase in affordable housing stock, leaving cities and towns vulnerable to successive zoning overrides, and the issuance of a never-ending series of comprehensive permits.

Id. at 587-88.

New Jersey Court Examines Preemptive Aspect of Right to Farm Act

In Township of Franklin v. Hollander, 172 N.J. 147, 796 A.2d 874 (2002), the Supreme Court of New Jersey held that the state Right to Farm Act "preempts municipal land use authority over commercial farms." The court then proceeded to examine the intricate relationship between commercial farming activities, which are governed by the Right to Farm Act, and local zoning and land use ordinances enacted pursuant to the Municipal Land Use Law.

Under the Right to Farm Act, primary jurisdiction over disputes between municipalities and commercial farms rests with the County Agricultural Boards (CABs) and the State Agricultural Development Committee (SADC). However, the court explained, "the authority of the agricultural boards is not unfettered when settling disputes that directly affect public health and safety." 796 A.2d at 877. In such cases, "the boards must consider the impact of the agricultural management practices on public health and safety and temper their determinations with these standards in mind." Id.

The court elaborated at some length:

> As a general rule the threshold question will be whether an agricultural management practice is at issue, in which event the CAB or SADC must then consider relevant municipal standards in rendering its ultimate decision. . . . There will be those cases where the local zoning ordinance simply does not affect farming. There will be other disputes where, although the ordinance has a peripheral effect on farming, it implicates a policy that does not directly conflict with farming practices. In such cases greater deference should be afforded to local zoning regulations and ordinances. Even when the CAB or SADC determines that the activity in question is a generally accepted agricultural operation or practice[,] the resolution of that issue in favor of farming interests does not vest the board with a wide-ranging commission to arrogate to itself prerogatives beyond those set forth in the Act. The boards must act in a manner consistent with their mandate, giving appropriate consideration not only to the agricultural practice at issue, but also to local ordinances and regulations, including land use regulations, that may affect the agricultural practice.

796 A.2d at 877-78.

The court stated that "a fact-sensitive inquiry will be essential in virtually every case." 796 A.2d at 878.

"Agricultural boards will have to deal with an array of matters that are within the traditional jurisdiction of local authorities such as hours of operation, lighting, signage, ingress and egress, traffic flow, and parking, to name just a few." Id. The court concluded:

> We recognize that the task before the agricultural boards is complex. Agricultural activity is not always pastoral. The potential for conflict between farming interests and public health and safety exists. Nevertheless, we repose trust and discretion in the agricultural boards to decide carefully future disputes on a case-by-case basis and to balance competing interests. We are confident that the boards will conduct those proceedings and reach their determinations in good faith, cognizant that the benchmark for those decisions is the understanding that government has an obligation to deal forthrightly and fairly with property owners and their neighbors.

Id.

Ohio Court Orders Compensation for Temporary Taking, Among Other Issues

The Supreme Court of Ohio answered various questions about takings law in that state in a quirky case, State ex rel. Shemo v. Mayfield Hts., 95 Ohio St. 3d 59, 2002-Ohio-1627, 765 N.E.2d 345 (2002). As an initial matter, the court held that its two-pronged takings test, based on the U.S. Supreme Court's *Agins* decision, is "disjunctive" when the case involves an as-applied takings claim. In other words, "a compensable taking can occur *either* if the application of the zoning ordinance to the particular party is constitutionally invalid, i.e., it does not substantially advance legitimate state interests, *or* denies the landowner all economically viable use of the land." 765 N.E.2d at 350. The Ohio court acknowledged that its prior decisions had caused some confusion on this issue among the lower state courts. "Although in previous cases we have applied the test in a conjunctive fashion, those cases involved merely challenges to the constitutionality of [zoning] ordinances and did not involve takings claims. . . . We now clarify that satisfaction of either prong of the *Agins* test establishes a taking." Id.

In the *Shemo* case, it was undisputed that the property at issue had been subject for several years to single-family zoning classifications that did not substantially advance legitimate state interests. Therefore, the court held that a compensable temporary taking had occurred, even though the property owners did not prove that they had been deprived of all economically viable use of the property.

The court completely rejected the city's argument that there could be no taking because the single-family residential zoning existed at the time the owners acquired the property. Referring to the *Palazzolo* decision, the court stated, "The United States Supreme Court recently rejected a similar argument that a purchaser or a successive title holder is deemed to have notice of an earlier-enacted land restriction and is barred from claiming that it effects a taking[.]" 765 N.E.2d at 352.

The court also held that invalidation of the ordinances as applied to the property at issue did not relieve the City of its duty to compensate the property owners for the temporary taking. The court found that compensation for a nine-year period was required under *First English*.

Finally, the court dismissed the city's argument that res judicata barred the takings claim because the claim could have been asserted by the property owners in an earlier declaratory judgment action brought against the city:

> Respondents are correct that res judicata generally bars litigation of all claims that either were or *might have been* litigated in a first lawsuit. [Citation omitted.] Unlike other judgments, however, and consistent with the persuasive weight of authority, a declaratory judgment is not res judicata on an issue or claim not determined thereby even though it was known and existing at the time of the original action. [Citation omitted.] Thus, a declaratory judgment determines only what it actually decides and does not preclude other claims that might have been advanced. Therefore, [the owners'] failure to raise their takings claim in their previous declaratory judgment action does not bar their takings claim in this mandamus proceeding.

Id. at 355.

Ohio Manufactured Housing Statute Invalid under Home Rule Law

The Supreme Court of Ohio struck down a state manufactured housing statute because it violated the Home Rule provision of the Ohio Constitution. Canton v. State, 95 Ohio St. 3d 149, 2002-Ohio-2005, 766 N.E.2d 963 (2002). The statute generally prohibited municipalities from restricting the location of manufactured homes in zones where single-family homes were permitted. The statute also contained an exception that allowed private landowners to prohibit manufactured homes by incorporating restrictive covenants into their deeds. The statutory prohibition and the statutory exception were both challenged in a declaratory judgment action by the City of Canton, which argued that its home rule powers were infringed by the statute.

The court began by noting that municipalities in Ohio derive their powers of self-government directly from the Ohio Constitution. The court then held that a state statute takes precedence over a conflicting municipal police power ordinance only if the statute is a "general law." The court then applied a four-part test, and concluded that the statute was not a general law for purposes of home-rule analysis.

First, the court found that the statute was not part of a "statewide and comprehensive legislative enactment." 766 N.E.2d at 968. The court found that "the state does not

have a statewide zoning scheme, nor does the state have a comprehensive plan or scheme for the licensing, regulation, or registration of manufactured homes." Id. Second, the court found that because of the exception for restrictive covenants, the statute did not "apply to all parts of the state alike and operate uniformly throughout the state." The court stated that, "Although the state maintains that the goal of the statute is to foster more affordable housing across the state, the statute contains an exception that wholly defeats the stated purpose. . . . This exception provides suburban portions of the state with newer housing developments the opportunity to opt out . . . by incorporating restrictive covenants in their deeds. . . . Thus, we hold that [the statutory provisions] do not have uniform application to all citizens of the state, and as such are not general laws." Id. at 969.

Under the third part of its "general law" test, the court found that because of the exception for restrictive covenants, the state statute could not be considered one that "set[s] forth police, sanitary or similar regulations." Rather, the court characterized the statute as one that "purports only to grant or limit the legislative power of a municipal corporation to set forth police, sanitary or similar regulations." Id. Finally, the court found that the statute failed the fourth part of the general law testbecause it did not "prescribe a rule of conduct upon citizens generally." Id. at 970. The crucial factor in this last part of the test was that "the statute applies to municipal legislative bodies, not to citizens generally." Id.

The court therefore held that the statute was not a general law, and was in violation of the Home Rule provision of the Ohio Constitution. The court stated that "this statute, which attempts to limit the ability of political subdivisions to zone their communities as they see fit, strikes at the heart of municipal home rule: the orderly planning of a city." Id.

NOTED IN BRIEF

A commercial AM radio station was not a public utility for purposes of the Ohio statute that exempts public utilities from zoning regulations. Washington Twp. Trustees v. Davis, 95 Ohio St. 3d 274, 2002-Ohio-2123, 767 N.E.2d 261 (2002). The Supreme Court of Ohio found "very few characteristics" that would qualify the station as a public utility. "We do acknowledge that the broadcast is available to the listening community indiscriminately—that is, all interested listeners with radios may receive the broadcast within the station's coverage area. But . . . there is no evidence of the extent to which the community actually avails itself of that service." 767 N.E.2d at 265. The court also found that possession of an FCC license was not enough to automatically qualify the station for the public utility exemption. "While governmental regulation is one factor to be considered in the public utility analysis, that factor alone does not render an entity a public utility." 767 N.E.2d at 266. Examining other factors, the court found "minimal evidence that Citicasters possesses attributes typical of a public utility." Id. The court stated that "the service provided by Citicasters cannot be considered essential to the general public. One cannot equate the importance of this radio broadcasting service (which consists of a self-determined format intermixed with commercial advertising) with the essential nature of services provided by traditional public utilities such as electricity, gas, and local telephone services." Id. The court also noted that "the public has no right to demand or receive radio services, as it cannot require a radio station to serve its market or to broadcast in any particular format. Moreover, Citicasters presented no evidence beyond its FCC licensing to demonstrate that its operations are conducted as a matter of public concern." Id.

A city violated Washington statutory law when it required, as a condition for subdivision plat approval, that a developer make improvements to an existing street bordering the proposed subdivision. Benchmark Land Co. v. City of Battle Ground, 146 Wash. 2d 685, 49 P.3d 860 (2002). The Supreme Court of Washington held that the condition was invalid under state law because it was not supported by substantial evidence. The court said, "The required expenditure for street improvements was not directly related to the traffic generated by the development. . . . Rather the required improvements would relieve a preexisting deficiency. In addition, the traffic studies found that the subdivision would have little to no impact on safety and operations on the section of the roadway Benchmark was required to improve." 49 P.3d at 865. The court found it unnecessary to reach the question of whether the condition was also unconstitutional.

Overruling a prior decision, the Supreme Court of Connecticut held that under the General Statutes, "an appeal may be taken to a zoning board of appeals by any aggrieved party during a period established by a rule of that board, or if no such rule is established, within thirty days of notice of the action from which appeal is sought." Munroe v. Zoning Bd. of Appeals of Town of Branford, 261 Conn. 263, 802 A.2d 55, 60 (2002); overruling Loulis v. Parrott, 241 Conn. 180, 695 A.2d 1040 (1997). The court emphasized that the statutory 30-day period is triggered by notice of the zoning officer's action, and not by the action itself. The court cited the "fundamental principle" that "without notice that a decision has been reached, the right to appeal from that decision is meaningless." 802 A.2d at 60.