



Zoning Finds Religion

By

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In response to what Congress saw as local government's hostility toward acts of religious exercise, the Religious Land Use and Institutionalized Persons Act ("RLUIPA") was enacted by Congress and signed into law by President Clinton in 2000. The statutory scheme can be found at 42 U.S.C. § 2000cc, et seq. Congress' prior attempt to insert itself into local zoning decisions affecting religious exercise was titled the Religious Freedom Restoration Act of 1993 ("RFRA"). That Act was declared unconstitutional by the Supreme Court of the United States in City of Boerne v. Flourez, Archbishop of San Antonio, et al., 521 U.S. 507 (1997). The decision was authored by Justice Kennedy as part of a six justice majority. Justice O'Connor dissented as did, to greater and lesser degrees, Justices Breyer and Souter. The Supreme Court felt RFRA was not in furtherance of existing First Amendment rights of free exercise jurisprudence.

While a full exposition of the Act, nicknamed (phonetically) R-LUPA, is beyond the scope of this comment, Section (a) of the Act makes it illegal for any government to impose or implement a land use regulation that imposes a substantial burden on the religious exercise of any person, assembly or institution unless the government can demonstrate that it has a compelling interest in imposing the burden and that it is using the least restrictive means available to accomplish that compelling interest. The Act defines religious exercise as any exercise of religion, including the use, building or conversion of real property for religious purposes. Substantial case law has already been developed in the various federal circuits interpreting RLUIPA as it applies to local government's application of zoning laws and conditional use permits to prevent, among other things, the construction or rehabilitation of churches in municipal zones.

The federal nexus for the legislation is found in 42 U.S.C. § 2000cc(a)(2) titled “The Scope of Application.” The statute lays forth three possible grounds for federal intervention into a local venue’s decisions: (A) the receipt of federal financial assistance for the program that imposed the substantial burden; (B) the imposition of the burden affects interstate commerce; and (C) the burden is imposed in a land use system under which the government makes individualized assessments of proposed uses of property. Putting that into English, Section (C) seems to apply in every instance in which a church is required to obtain a conditional use permit to operate within a specific zoning district. The conditional use permit procedures usually provide for the governing body, based upon recommendations and public input, to make an individualized assessment as to whether or not a use permit should be granted. Under those circumstances, RLUIPA would be implicated and the question would then arise as to whether the denial of a use permit to the person or institution would impose a substantial burden on their religious exercise. If it does, the government would have to produce evidence of compelling governmental interest and least restrictive means in order to avoid the RLUIPA implications.

Equally interesting under the Act is the interface with the free exercise clause of the First Amendment. There is case law holding that a government may impose some burdens upon religion as long as it arises from laws of general applicability. See, e.g., Employment Div. v. Smith, 494 U.S. 872 (1990). Under traditional First Amendment jurisprudence, substantial burden on the free exercise of religion is held to be imposed only when a person is required to forego a tenet of his/her religious belief. See: Shubert v. Verner, 374 U.S. 398 (1963). Under RLUIPA, however, it is specifically stated that “religious exercise” includes any exercise of religion “whether or not compelled by or central to a system of religious belief” and specifically applies to the “use, building or conversion of real property for the purpose of religious exercise.” 42 U.S.C. § 2000cc-5(7)(A) and (B). Hence, RLUIPA provides that a person’s religious exercise could be substantially burdened merely by the government’s preventing his/her use of real property for religious purposes even if no specific religious tenet of the person would be affected by the denial of that use.

The question yet to be answered is how RLUIPA will be interpreted by a Supreme Court which is becoming increasingly hostile to the expansion of federal power at the expense of state's rights. The Supreme Court's make-up has been changed by two new justices that are favorites of the religious right. Will the new Court actually strike down a law that makes it easier for churches to establish their places of worship in locales that Congress has declared to be hostile to such religious practices? Time will tell. that Congress has declared to be hostile to such religious practices? We will see.

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Samuel W. Meekins, Jr. joined our firm in 1982 after serving two years as an Assistant Commonwealth's Attorney. Mr. Meekins has extensive experience in trials, arbitrations and mediations in federal and state courts. He has litigated matters involving land use, zoning and environmental issues. Most recently he achieved a highly acclaimed settlement with a local government on behalf of a church under the Religious Land Use and Institutionalized Persons Act. He also successfully sued another local government under the Virginia Procurement Act to prevent the sale/lease of a piece of property needed for future roadway construction. In addition, he has successfully defended and prosecuted civil claims involving ground water issues and alleged construction defaults. Mr. Meekins also has extensive litigation experience in matters involving intra-corporate disputes, employer/employee relations, wrongful death claims and white collar criminal defense. He is the past president of the firm, former chairman of the Virginia Beach City School Board and current President of the Virginia Beach Central Business District Association.

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