

Zoning Finds Religion

by Samuel W. Meekins Jr.

In response to what Congress saw as local governments' hostility toward acts of religious exercise, the Religious Land Use and Institutionalized Persons Act (RLUIPA) became law in 2000. The statutory scheme can be found at 42 U.S.C. § 2000cc, *et seq.* Congress's prior attempt to insert itself into local zoning decisions that affect 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 Anthony M. Kennedy as part of a six-justice majority. The Supreme Court felt the RFRA unlawfully extended existing free exercise jurisprudence. Does a similar fate await the RLUIPA?

Section (a) of the RLUIPA makes it illegal for any government to regulate land use in a way 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 such a 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 exercise. Substantial case law has already been developed in the federal circuits interpreting the RLUIPA as it applies to local government application of zoning laws—often 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 2000cc(a)(2), titled "The Scope of Application." The statute sets forth three perceived grounds for federal intervention

into a local venue's decisions: (A) The program that imposed the substantial burden receives federal financial assistance; (B) 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 for property. (C) would seem to apply in every instance in which a church is required to obtain a conditional use permit to operate within a specific zone of a city. Conditional use permit procedures usually provide for the governing body, based upon recommendations and public input, to individually assess whether 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 the use permit would impose a substantial burden on the applicant's religious exercise. If it does, the government would have to produce evidence of compelling interest and least restrictive means in order to avoid RLUIPA implications.

Equally interesting under the act is the interface with the free exercise clause of the First Amendment. Under traditional First Amendment jurisprudence, the 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 or her religious belief. See: *Shubert v. Verner*, 374 U.S. 398 (1963). Under the RLUIPA, however, "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, the RLUIPA provides that a person's religious exercise could be substantially burdened merely by the government's preventing the use of real property, even if no specific religious tenet of the person would be affected by the denial of that use.

The question will be answered by a Supreme Court that has been increasingly hostile to the expansion of federal power. When the Court's makeup is changed by two new justices who are favorites of the religious right (if Samuel A. Alito Jr. is confirmed), the landscape will be set. Can the new Court actually declare unconstitutional a law that makes it easier for churches to establish places of worship in locales that Congress has declared to be hostile to such religious practices? We will see. ☪



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