Ninth Circuit Establishes Test For Whether Zoning Ordinances Treat Religious Land Uses On Less Than "Equal Terms"

On July 12, 2011, in *Centro Familiar Cristiano Buenas Nuevas, et al. v. City of Yuma,* the Ninth Circuit Court of Appeals, with jurisdiction over California, established the test to interpret the "equal terms" provision of the federal "Religious Land Use and Institutionalized Persons Act," or RLUIPA. (*Centro Familiar Cristiano Buenas Nuevas, et al. v. City of Yuma,* 2011 U.S.App.Lexis 14247 (9th Cir. 2011).)

The Ninth Circuit, in striking down zoning regulations for a tourist district in Yuma, Arizona, held that local land use provisions may not treat religious uses less favorably than nonreligious uses that are "similarly situated with respect to an accepted zoning criteria." The Court further held that such unequal treatment of religious uses may not be excused, even if the government has a "compelling" interest in discrimination. The case was remanded back to the district court for a determination of monetary damages.

The Court found it relatively easy to find a RLUIPA violation in *Centro Familiar*, since the challenged ordinance treated religious "membership organizations" less favorably than non-religious "membership organizations." However, RLUIPA violations under the rule of *Centro Familiar* will not always be so easy to spot. Particularly with the potential that money damages are available for an "equal terms" violation, cities are well advised to undertake top-to-bottom review of their zoning ordinances, to ensure that no provision unlawfully discriminates against religious uses.

RLUIPA has two major sections. The "substantial burden" provision prohibits a government from implementing land use regulations that impose a "substantial burden" on religious exercise, unless those regulations further a "compelling governmental interest" by the "least restrictive means." The "substantial burden" provision has been interpreted by the Ninth Circuit in previous decisions, and is not addressed in *Centro Familiar*.

RLUIPA's other major section, "equal terms," prohibits a government from treating a religious assembly or institution "on less than equal terms" compared with a nonreligious assembly or institution. Until now, the Ninth Circuit had not interpreted the "equal terms" provision. In *Centro Familiar,* the Ninth Circuit examined the various standards from sister circuits and selected the touchstone to be used here.

Centro Familiar is a challenge to land use regulations for a three-block, "lively pedestrian-oriented," downtown tourist district. The ordinance allows "membership organizations (except religious organizations)" to operate on the so-called "street of fun" without a permit (i.e., as of right). "Religious organizations," on the other hand, are required to obtain a conditional use permit. The City's offered basis for the distinctive treatment of religious uses was to avoid the "damper" effect of a state law that barred issuance of liquor licenses for premises within 300 feet of a church.

Centro Familiar, a Christian congregation, purchased a building in the tourist district. It applied for a use permit, which was denied on the grounds that a church would be inconsistent with a "24/7 downtown neighborhood involving retail, residential, office and entertainment." The church sued for a declaratory judgment invalidating the zoning ordinance, an injunction requiring

issuance of the use permit, and monetary damages. At trial, the federal district court concluded that the City's different treatment of churches did not violate the "equal terms" provision and denied the church's claims. During pendency of appeal, the church lost its building to foreclosure.

The Ninth Circuit reversed. In finding a violation of RLUIPA's "equal terms" provision, the Court addressed only the requirement, on the "face" of the zoning ordinance, that "religious organizations," and not other, secular "membership organizations," obtain a use permit. Thus, the Court did not address an "as applied" situation, in which a facially "neutral" ordinance is allegedly imposed in a manner that treats the church on a less-than-equal basis.

The Court held that RLUIPA's "equal terms" provision does not require that religious uses be treated identically to every other nonreligious use, and that a "city may be able to justify some distinctions drawn with respect to churches, if it can demonstrate that the less-than-equal-terms are on account of a legitimate regulatory purpose, not the fact that the institution is religious in nature." This standard, the Court announced, is similar to the test used in the Third Circuit, which looks to whether a religious use is treated equally to nonreligious uses that are "similarly situated as to the regulatory purpose" of the zoning ordinance at issue. Additionally, the Court held that a violation of "equal terms" provision – unlike a violation of RLUIPA's "substantial burden" provision – may not be overcome by a showing that the challenged zoning regulation is the least restrictive means of furthering a compelling governmental purpose.

Under this standard, the Court found that the City's ordinance violated the "equal terms" provision. The Court noted that, had Centro Familiar been a secular "membership organization" with identical land use impacts, it would not have required a use permit. The Court reasoned that "[i]t is hard to see how an express exclusion of 'religious organizations' from uses permitted as of right by other 'membership organizations' could be other than 'less than equal terms' for religious organizations." The Court also noted that the ordinance allows by right other uses that would also seem incongruous with a district of "lively" entertainment, such as "corrections facilities."

The Court held that the church's claims for declaratory and injunctive relief were moot, due to the church's loss of ownership of the building. However, the Court – distinguishing *Sossamon v. Texas*, a 2011 U.S. Supreme Court case which held that money damages are not available under RLUIPA against a state defendant – held that money damages may still be available against a local agency, if the plaintiff can prove a RLUIPA violation and damages. Finding that the zoning regulations violated RLUIPA's "equal terms" provision, and that the church's claim for monetary relief was not made moot by its loss of the affected property, the Court remanded the case to the district court for determination of the church's claim for damages.

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