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RLUIPA: Ordinance Prohibiting Non-Commercial Entities Including Churches From "Highway Commercial" Area Does Not Violate RLUIPA or First Amendment

***Alger Bible Baptist Church v. Township of Moffat*, No. 13 cv. 13637 (E.D. Mich. Feb. 5, 2014).**

Moffatt Township, Michigan (Moffatt) enacted a zoning ordinance (Ordinance) that precludes non-commercial buildings, including churches, in any area zoned "Highway Commercial." The purpose of that district "is to encourage the development of general retail, service, warehousing and distribution business, and light industry in conjunction with the M-76/M-33/I-75 interchange area." The Ordinance provides for six different types of zoned districts: (1) forested; (2) agricultural/rural residential; (3) residential; (4) village mixed use; (5) general commercial; and (6) highway commercial. Churches are not included as a primary use for any of the six districts; they are permissible "conditional uses"—upon acquiring a "Special Use Permit"—in forested districts, agricultural/rural residential districts, residential districts, and village mixed districts.

Despite the Ordinance, Alger Bible Baptist Church (ABBC) attempted to purchase an ice cream shop surrounded by 5.5 acres located in the highway commercial district, intending to erect a church in close proximity to I-75. After signing an agreement to purchase the land, ABBC attempted to have the property rezoned to "forested" land, which might allow a church as a Special Use. In July 2013, Moffatt's Planning Commission and Township Board held public meetings at which each body unanimously voted to deny the requested rezoning. ABBC filed suit, alleging that Moffatt "continues to enforce a Zoning Ordinance that treats religious organizations on less than equal terms compared to similar non-religious assemblies" in violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA). ABBC also alleged claims under the First and Fourteenth Amendments and the Michigan Constitution and moved for injunctive relief to prevent Moffatt from enforcing the Ordinance.

HELD: The United States District Court for the Eastern District of Michigan granted Moffat's motion to dismiss.

DISCUSSION: The court's analysis centered on ABBC's likelihood of success; without that factor, the church's motion to enjoin would fail. Each of ABBC's five charges was evaluated.

The first was that the Ordinance violated ABBC's right to freely exercise its religion. Despite the sweeping scope of the First Amendment's Free Exercise Clause, however, the Supreme Court has established, "[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) conduct that his religion proscribes (or prescribes)." *Dep't of Human Res. of*

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Oregon v. Smith, 494 U.S. 872, 879 (1990). Here, the Ordinance was neutral on its face. Although churches and other religious buildings were not permissible by right in any of Moffatt's six zoned districts, the same was true for many secular institutions: schools, day care facilities, lodges and clubs, stables, kennels, bed and breakfasts, cemeteries, landfills and natural resource extraction operations. ABBC argued that religious structures were not permitted in highway commercial zones while "secular institutions like theatres and commercial recreation" were permitted. The court saw no issue with this distinction: "Of course, theatres and commercial recreation generate revenue, and thus fall directly in line with Moffatt's goal of 'encourag[ing] the development of general retail' in the highway commercial district." The Ordinance was found to be facially-neutral, applying generally to all citizens--only structures that promote commercial retail and generate revenue were permissible in the highway commercial district.

ABBC also argued that the Ordinance abridged its freedom of speech and the right to peaceably assemble. But it could not show that Moffatt was preventing it from speaking on matters of religion or prohibiting its members from assembling. It simply alleged that the Ordinance prevented it from practicing its religion in the precise location it wanted. As the court noted, a church has no "constitutional right to build its house of worship where it pleases." *Grace United Methodist Church v. City of Cheyenne,* 451 F.3d 643, 652 (10th Cir. 2006).

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ABBC's Equal Protection claim was similarly unsound. It offered no evidence that similarly-situated, secular institutions had been permitted in Moffatt's highway commercial zone.

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Finally, ABBC's RLUIPA claims were also found to be deficient. The church's most viable argument arose under RLUIPA's "Equal Terms" clause, which provides: "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." RLUIPA explicitly places the burden on the complainant to establish a prima facie case supporting this claim. A prima facie "equal terms" violation is comprised of four elements: "(1) the plaintiff must be a religious assembly or institution, (2) subject to a land use regulation, that (3) treats the religious assembly on less than equal terms, with (4) a nonreligious assembly or institution." *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty.,* 450 F.3d 1295, 1307 (11th Cir. 2006).

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The issue here was whether the Ordinance treated the religious assembly on equal terms with a nonreligious assembly or institution. RLUPIA does not define the meaning of "equal terms," and the court described a breadth of interpretation among the federal Circuit Courts. For example, the Eleventh Circuit requires a plaintiff to demonstrate "unequal treatment as compared to any secular institution or assembly," while the Third Circuit has held that "a regulation will violate the Equal Terms provision only if it treats religious assemblies or institutions less well than secular assemblies or institutions that are similarly situated *as to the regulatory purpose.*"(citations omitted). The Seventh Circuit settled on a modified version of the Third Circuit's test, concluding that the focus should be on secular assemblies or institutions similarly situated as to the "accepted zoning *criteria*" rather than the "regulatory *purpose*."(citation omitted). The Seventh Circuit's version has been adopted by the Ninth Circuit; the Fifth Circuit has also derived a similar definition.

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Although the Sixth Circuit had not expressly spoken on the subject, this court had adopted the "similarly situated secular comparator" language: "Plaintiff is required to identify a similarly situated secular comparator that received more favorable treatment." *Muslim Cmty. Ass'n of*

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Ann Arbor and Vicinity v. Pittsfield Charter Tp., 947 F.Supp.2d 752, 771 (E.D. Mich. 2013). Because ABBC had not identified a "similarly situated" comparator, its pleading was inadequate for RLUIPA's Equal Terms purposes.

Similarly, ABBC failed under RLUIPA's Nondiscrimination Clause "Nothing in ABBC's complaint, or its response to Moffatt's motion to dismiss, raises an inference that ABBC's rezoning request was denied because of its religious beliefs. Instead, the facts demonstrate that the rezoning request was denied because churches of all types, along with many other secular institutions, do not align with Moffatt's goals regarding its commercial districts."

ABBC also failed to demonstrate that the Ordinance unreasonably limited its ability to practice its faith in Moffatt. "Churches and other religious buildings are welcome in four of the Township's six zoning districts . . ." (In fact, Moffat officials had recommended that ABBC purchase the local Catholic church in order to facilitate the growth of its congregation.)

http://www.leagle.com/decision?q=In_FDCO_20140205F85.xml/ALGER_BIBLE_BAPTIST_CHURCH_v._TOWNSHIP OF MOFFATT (last accessed Feb. 6, 2014)

Speech: Ordinance Requiring Closure of Adult Bookstores in Early Morning and on Sundays Does Not Pass "Secondary Effects" Test

***Annex Books, Inc. v. City of Indianapolis*, No. 13-1500 (7th Cir. Jan. 24, 2014).**

Indianapolis, Indiana requires adult bookstores to remain closed between midnight and 10 a.m. every day of the week and all day on Sunday. No other retail businesses in the City are similarly circumscribed. Annex Books and other adult bookstores challenged the ordinance as an unlawful limitation on their free speech.

At trial before the District Court for the Southern District of Indiana, the City argued that limiting store hours reduced armed robberies near the bookstores. The court found this to be an adequate justification for the limitation on speech – specifically a control of the secondary effects of these businesses - and ruled for the City. The bookstores appealed.

HELD: The Seventh Circuit reversed, holding that the regulation was not a reasonable time, place, and manner restriction aimed at secondary effects, but rather a regulation based on the content of the material sold in the bookstores.

DISCUSSION: In *Renton v. Playtime Theaters, Inc.* the Supreme Court ruled that state and local government is free to regulate adult establishments with reasonable time, place, and manner restrictions, but that government cannot regulate the establishments based on their speech and local dissatisfaction with the content of that speech. Time, place, and manner restrictions may, however, be used to counter the "secondary effects" that are demonstrated to result to third parties from adult establishments, such as a decrease in nearby property values and an increase in neighborhood crime.

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