Cases



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Land Use

RLUIPA — Environmental Regulations and Zoning

New York's environmental law known as the State Environmental Quality Review Act (SEQRA) requires review of certain discretionary land use decisions. Under SEQRA, if a preliminary analysis determines that a project might have an adverse environmental impact, then the developer must provide an Environmental Impact Statement and related studies on the environmental effects of the project.

The Fortress Bible Church operated a church and school in Mt. Vernon, New York. Its pastor concluded that the Church could better fulfill its mission in larger facilities and located a site in the town of Greenburgh, New York. The six acre property was vacant except for a small residence. Believing that it could build a new house of worship on the site, the Church bought the property in 1998 and submitted an application to build a structure and use the property. The Church needed three discretionary approvals, including acceptance of the site plan, waiver of a parking island requirement and a variance for setback.

The Town's planning director concluded that the environmental impact would be negligible and recommended that the project be approved without requiring further SEQRA review. At a meeting to consider the Church's application, some members of the Town council expressed concern about the burden that a non tax-paying entity might impose. One councilmember suggested that site approval could be expedited upon the Church's donation of a fire truck to the community. Others complained that the property had better uses. The Church decided not to donate a fire truck or to make payments in lieu of taxes. The council subsequently voted to require the Church to comply with the substantial requirements of SEQRA.

The administrative process extended for years without the Church gaining approval from the Town. According to the lower court, during this period the Town removed its planning director, seeking a more aggressive posture as to the requirement that the Church comply with the onerous provisions of SEQRA. In mid-2003, the Church filed suit in federal court under the Religious Land Use and Institutionalized Persons Act (RLUIPA) and for violation of its First Amendment rights. It also claimed Equal Protection violations as a "class of one" among other causes of action. The trial lasted 26 days and the district court sided with the Church on all issues.

On appeal, the Second Circuit affirmed, finding no merit in the Town's arguments. Of importance to local governments, the court considered whether RLUIPA applies to environmental laws such as SEQRA. The Circuit Court concluded that although RLUIPA did not directly apply to environmental laws, RLUIPA did apply in this case because the Town had attempted to utilize SEQRA as a land use regulation.

To reach this conclusion the court found that "SEQRA by itself is not a zoning law,[but] in this case the Town used the SEQRA review process as its vehicle for determining the zoning issues related to the Church's land use proposal." (citation omitted). In so doing, the Town brought SEQRA within the ambit of RLUIPA. Recognizing that a local government could avoid RLUIPA compliance by re-characterizing any number of land use decisions as "environmental," the court sought to prevent municipalities from preempting RLUIPA applicability through zoning decisions masked as environmental regulations.

The lower court had concluded that discretionary zoning decisions when applied to First Amendment protected uses trigger strict scrutiny. The Second Circuit, however, recognized that the prevailing rule among the circuits is that the rational basis standard of review applies to those decisions and concluded that it did not have to decide whether strict scrutiny might apply. The lower court had identified facts confirming that that the Town's reasons for denying the Church's application were pretextual and that its witnesses were not credible. As a result the Second Circuit concluded that even applying a rational basis standard the Town's denial of the Church was unsupportable.

In its appeal the Town sought to avoid liability under the Equal Protection Clause "class of one" theory by arguing that the Church had not pointed to a single comparator against whom the Church's treatment could be validly referenced. The court noted that in the Second Circuit a "class of one" theory can prevail when the Government, acting as the sovereign, treats one person differently from another similarly situated. The court found that this was an unusual case in which the Church had presented several comparators, each not fully similar to the Church's case yet sufficiently similar in some respects to support the claim that the Church was treated unfairly. The Second Circuit concluded that "...the Church has presented overwhelming evidence that its application was singled out by the Town for disparate treatment." *Fortress Bible Church v. Feiner*, No. 10-3634 (2d Cir. Sept. 24, 2012).

RLUIPA – Article III Standing

The Village of Kiryas Joel was incorporated in 1977 as an enclave for followers of a particular sect of Hasidic Judaism. The Village is populated exclusively by followers of the sect, a majority of whom support the present leader. Plaintiffs in this case are a minority of "dissident" inhabitants of the village, who do not accept the legitimacy of the leader. These parties have engaged in litigation

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in state and federal courts for decades. In the latest installment of this long-standing feud, plaintiffs asserted a variety of claims under 42 U.S.C. §§ 1983 and 1985 for alleged violations of their First and Fourteenth Amendment rights, and a claim under the Religious Land Use and Institutionalized Persons Act, (RLUIPA) for alleged discriminatory application of the village's zoning laws. The district court dismissed some of plaintiffs' claims on *res judicata* grounds, other claims on the basis of plaintiffs' lack of standing, and the rest on their failure to state a claim on which relief could be granted. The Second Circuit affirmed.

The Court first addressed the doctrine of *res judicata* as it applies to plaintiffs' constitutional and RLUIPA rights. Plaintiffs claimed that the Village violated these rights by requiring the dissident group to obtain certain permits in order to use Village property as a synagogue, while not requiring the same for members of the mainstream sect. The Court found that *res judicata* applied, as the same "nucleus of operative facts" had already seen final adjudication in two previous lawsuits in New York state court. Plaintiffs argued that preclusion was inappropriate because the action involved new factual allegations related to the property. This failed to persuade the Court. It found that the new facts were not new at all, and plaintiffs could not avoid the effect of *res judicata* by "simply splitting up claims".

The Court then addressed whether plaintiffs had standing to allege claims by individuals not party to the action. Generally, because Section 1983 rights are personal, organizations lack standing to assert such claims for their members. An organization may, however, bring a Section 1983 suit on its own behalf so long as it can independently satisfy the requirements for Article III standing. Plaintiff Kiryas Joel Alliance (KJA), an unincorporated, nonprofit association that advocates for the rights of the citizens of the Village, asserted that it had suffered an injury because it had diverted resources from other activities to provide security for non-party dissident citizens. The Court rejected this argument. KJA lacked standing because it had failed to allege that any of the non-parties were members of KJA. It also had failed to seek inclusion of the non-parties in the case.

Finally, the Court dismissed all remaining claims due to plaintiffs' failure to state a claim upon which relief could be granted. The Court held that the religion-based claims under the Equal Protection Clause failed because the plaintiffs had not shown that defendant's actions were animated by intentional religious discrimination, as opposed to political differences. Similarly, the Court found that the plaintiffs' Establishment Clause claim failed. Their allegations of an overlap between the Village's leadership and the religious sect, standing alone, were insufficient to establish an "excessive entanglement" under the *Lemon* test. The Court also dispensed with plaintiffs' conspiracy claim as vague and without merit. *Kiryas Joel Alliance v. Village of Kiryas Joel*, No. 12-217 (2d Cir. Sept. 10, 2012).

Tax Liens- Authority of FHFA

Local governments encourage the construction of energy-efficient buildings, "green" retrofits and local employment by providing development loans to commercial and residential property owners. These loans, issued under the localities' Property Assessed Clean Energy (PACE) programs, are classified as "assessments." If a scheduled loan payment is not made, the delinquent amount attaches to the subject property as a "tax lien" and remains with the property in the event of sale. In some instances, the localities provide that these tax liens are senior to pre-existing and underlying mortgages.

In 2008, responding to the nation's real estate crisis, the Federal Housing Finance Agency (FHFA) appointed itself conservator over the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac). In July 2010, the FHFA issued a directive to Fannie Mae and Freddie Mac to take "protective actions" with respect to PACE programs that impose first-priority liens on participating properties. The same day, the Office of the Comptroller of the Currency (OCC) issued guidance that national banks should be aware of the FHFA directive and take action to mitigate exposure to first-lien collateral. Fannie Mae and Freddie Mac subsequently ceased purchasing first-priority PACE mortgages.

Given that Fannie Mae and Freddie Mac own or guarantee more than half the home loans in the United States and influence home mortgage practices generally, the directive posed a major threat to the viability of first-lien PACE programs. The Natural Resources Defense Council (NRDC) and the Town of Babylon, New York, a first-priority lien jurisdiction, challenged the authority of the FHFA to issue its cautionary directive in two cases brought in the Southern District and Eastern District of New York, respectively.

They claimed that the FHFA directive violated the Administrative Procedures Act (APA) in that the FHFA had acted in an arbitrary and capricious manner and had failed to solicit notice and comment. They further challenged the directive as violating the National Environmental Policy Act because it did not provide an environmental impact statement.

The two district court cases examined the relevant FHFA enabling legislation, 12 U.S.C. § 4617, which clearly conferred on the agency broad powers to take precautionary measures. As conservator, the FHFA had authority to "take such action as is — (i) necessary to put the regulated entity in a sound and solvent condition; and (ii) appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity." 12 U.S.C. § 4617(b)(2)(D).

More importantly, Section 4617 expressly limited judicial review of the FHFA's exercise of powers as a conservator. Both district courts concluded that the challenge to the FHFA's issuance of the directive was precluded by 12 U.S.C. § 4617(f) and granted motions to dismiss by the FHFA and OCC.

On appeal, the City and the NRDC argued that the FHFA had issued its directive not as a conservator but as a regulator, which made its actions subject to the APA. The Second Circuit affirmed the decisions of the courts below: although the FHFA did have regulatory powers, in this context it was clearly acting as a conservator. *Town of Babylon v. FHFA, et al.; NRDC,*