

ORDINANCES

Public Incentive Programs and Religion

by Devala Janardan, Associate Counsel

The scenery 30 miles southwest of Cincinnati, Ohio, consists of sparsely populated rolling hills, valleys and farm country. There is not much going on until you get to the town of Petersburg, Kentucky. Here, the Answers in Genesis ministry (AIG) built the Creation Museum, a "state-of-the-art 70,000 square foot museum [which] brings the pages of the Bible to life, casting its characters and animals in dynamic form and placing them in familiar settings."[1] The Creation Museum has proved popular, passing one million visitors in its first three years of operation. It has also been controversial, but is limited to the theology v. science-type discussions often heard in the media.

Now, another large-scale project is making headlines, but this time involving a government controversy. The new project is the AIG-backed Ark Encounter: a $125 million theme park that includes a full-size, all-wood replica of Noah's Ark. AIG has created a for-profit business structure, but the park will be managed by subsidiaries of AIG. Kentucky Governor Steve Beshear held a press conference to announce the project, along with a series of tax incentives for the Ark Encounter.[2] The incentives come through the Kentucky Development Tourism Act, which provides the developers of tourism projects the ability to recover up to 25% of the project's development costs, based on project performance, over a ten-year term. Instantly, the media and blogosphere went up in arms about whether offering tax incentives to a religious-themed park offends the Establishment Clause of the First Amendment. A few recent cases may help analyze the issue.

In December 2010, the Fourth Circuit Court of Appeals released its opinion on a case concerning an Establishment Clause challenge.[3] The First Baptist Church submitted a proposal to Arlington County, Virginia, in which an existing church would be demolished, and in its place, would be a new ten-story building. A new church would occupy the first two floors of the building and the remaining eight floors would consist of affordable- and market-rate rental housing. The Church conveyed the property to a private development corporation and intended to use the proceeds from its sale to the developer to pay for its portion of the construction costs associated with the project. The developer obtained financing from Arlington County through its Affordable Housing Investment Fund and also obtained tax credits from the federal government for low-income housing. A neighbor of the Church brought a lawsuit claiming that the financing arrangement violated the Establishment Clause.

In determining whether Arlington County acted in a manner which offended the Establishment Clause, the Fourth Circuit focused on the *Lemon* test, which focuses on "both the *purpose* of the County's activity in participating in the development of the housing project and *the effect* of its involvement. . . . [T]he Establishment Clause prohibits state action with a sectarian legislative purpose or with the primary effect of advancing religion, including fostering an "excessive entanglement" with religion.[4] The complaint against Arlington County alleged the County's announced purpose to create affordable housing was actually false and the County's purpose in reality was to aid the Church in rebuilding. The Fourth Circuit sided with the County, stating that the County's announced purpose to provide affordable housing was undoubtedly a legitimate, secular goal. Further, statements by the County Manager that the project would have to produce sufficient capital to meet the Church's needs and emails sent by the Church discussing the use of County loan funds to meet construction costs were not enough to show a sectarian purpose on the part of the County.

The Fourth Circuit also held that the County's activities did not have the principal or primary effect of advancing religion. While the opposition argued that the County had overvalued the value of the property in order to make the deal beneficial for the Church, the Court found otherwise. The Court stated that there was 1) nothing that showed that the Church received payments for any consideration other than the property's purchase price; 2) the proximity of the church and its steeple to secular tenants is not the equivalent of religious indoctrination; and 3) that having members of the Church on the development company's board of directors did not make the corporation sectarian simply because directors on the board are members of a religious organization. However, the Court did state that if the County provided funds that were used to fund religious activities of the Church, then this would violate the Establishment Clause.[5]

A slightly older Sixth Circuit Court of Appeals case also gives guidance. The city of Detroit created an exterior beautification program for the area surrounding its professional football and baseball stadiums. Under the program, the City would reimburse 50% of the costs associated with improving the facades of buildings. A small percentage of the grants distributed went to churches that made exterior improvements. In *American Atheists, Inc. v. City of Detroit*, the Sixth Circuit Court of Appeals held that this arrangement did not violate the Establishment Clause.[6] Importantly, the Sixth Circuit detailed five ways in which a government program may have the primary effect of advancing religion: 1) it skews selection criteria that stack the deck in favor of groups that engage in religious indoctrination; 2) it leads to religious indoctrination that could reasonably be attributed to governmental action; 3) the government benefit itself has an inherently religious content; 4) the recipient diverts secular aid to further its religious mission;

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regulation in Canada for the purposes of conservation.

The progressively ambitious nature of the ALSA could be a model for other jurisdictions seeking to promote land use conservation. However, the ALSA lacks clarity in several key areas, hindering its effectiveness. Most significantly, it fails to clearly define key terms, such as "market based instruments" or "Stewardship Units." It fails to address critical details regarding Conservation Tools—for example, the ALSA leaves the following details to be included in supporting regulations:

- the restrictions imposed by Conservation Directives, how Directives are to be enforced, what constitutes loss or injury and how compensation is to be calculated;
- how Exchange, and Conservation Offset Programs are to be established, managed, and monitored;
- how Stewardship Units are to be created, classified, authenticated or distributed;
- the terms and conditions of use of TDC Scheme units are unclear, as are how these units can be sold, assigned, or otherwise disposed of; and
- how the Exchange is to function is unclear (for example, the TDC Schemes).

(Brownlee, LLP's *Alberta Land Stewardship Act: Maximizing your Municipality's Impact,* 2010). These gaps in the details seriously impair the ability of local governments to make use of the Conservation Tools. To the extent that municipalities wish to adopt conservation measures, such as a Conservation Offset Programs, in municipal or inter-municipal plans, the tools may become ineffective if they are inconsistent with regulations adopted under the ALSA at a later date.

Further, the development of Regional Plans for five of the seven Regions has not begun, and it is unclear when all seven Regional Plans will be completed. As mentioned, compliance with Regional Plans is mandatory, and, given the costs associated with developing and amending municipal and inter-municipal plans, many municipalities may avoid adopting new land use regulations until their Regional Plan is completed. This could result in outdated land use regulations being used, stagnating development or increasing inter-municipal disputes over development in fringe areas.

Accordingly, any government, provincial or local, seeking to employ similar conservation tools or planning regimes to those under ALSA should address these uncertainties by, for example, developing the supporting regulations concurrently with its conservation legislation, or providing for the greater involvement of municipalities and inter-municipal negotiations in plan development. ML

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and 5) it excessively entangles the government in religious affairs.[7] In the *Detroit* case, the Sixth Circuit ruled that none of the five ways applied to Detroit's exterior beautification program. So, will the Ark Encounter theme park withstand an Establishment Clause legal challenge? The law itself and its purpose are arguably neutral. It is a financial incentive used to stimulate the economy through tourism-related projects, including those with cultural, historical, recreation, and entertainment value. The real question is whether the tax incentives have a primary effect of advancing religion. As the Sixth Circuit stated in the *Detroit* case, "a program may have the primary effect of advancing religion if the recipient divert[s] secular aid to further its religious mission."[8] With respect to this, the court in *Detroit* stated "most of the aid the churches received—cosmetic repairs to walls, doors, awnings and parking lots, as well as limited landscaping—does not have dual uses capable of diversion from a secular to a religious purpose. . . . [U]nlike a teacher, a sign-language interpreter, or even an overhead projector —all of which conceivably can be used to communicate secular and religious messages—a brick, gutter or bush (unless burning) cannot be co-opted to convey a religious message."[9]

It will be harder for Kentucky to pass this test. The Ark Encounter's marketing website states that "[t]hrough construction of a massive full-scale Noah's Ark, the Ark Encounter will present . . . a reminder about the Bible's account of the Ark" and "[t]he Ark Encounter will be an immersive, historically-themed experience . . . . [I]t is not an amusement park."[10] Governor Beshear states that "[b]ringing new jobs to Kentucky is my top priority, and with the estimated 900 jobs this project will create, I am happy about the economic impact this project will have on the Northern Kentucky region."[11] The difficult part will be reconciling Kentucky's announced purpose of job creation and economic development with the effect of the government's involvement with the Ark Encounter. The scenario might be set for the perfect storm. ML

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The U.S. Court of Appeals for the First Circuit turned to several analytical measures to determine whether the law violated the Establishment Clause – the three-part analysis in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the "endorsement" analysis in Justice O'Connor's concurrence in *Lynch v. Donnelly*, 465 U.S. 668 (1984), and the "coercion" analysis of *Lee v. Weisman*, 505 U.S. 577 (1992). Under *Lemon*, a court was to consider whether the statute had a secular legislative purpose, whether its principal or primary effect was one that neither advanced nor inhibited religion, and whether it fostered excessive entanglement with religion. Here, "by design," the recitation of the Pledge was "meant to further the policy of teaching our country's history to the elementary and secondary pupils of the state," and its primary effect was not the advancement of religion, but the "advancement of patriotism through a pledge to the flag as a symbol of the nation." The statute also did not endorse, favor or promote religion, and, in context, the Pledge's words "under God" did not convey a message of endorsement.

The court next held that the Pledge did not violate the Free

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