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RLUIPA: "Individual Assessment" of Requested Modifications to Historic Structure Triggers "Substantial Burden" Claim

Chabad Lubavitch v. Town of Litchfield, no. 12-1057 cv (2d Cir. Sept. 19, 2014)

In denying an Orthodox Jewish group's application to modify and expand a historic structure in Litchfield, Connecticut the Town necessarily applied an individualized assessment of the requested modifications and triggered review under RLUIPA's prohibition against substantially burdening religious exercise, according to a recent Second Circuit decision.

In 2005, the Chabad, a Connecticut membership corporation offering weekly services to Orthodox Hasidic parishioners in the Litchfield area, purchased a property at 85 West Street to serve as its new place of worship. The property, located in the Litchfield Historic District—once deemed to be "[p]robably the finest surviving example of a typical late 18th century New England town"—boasts a two-story, "stick-style" Victorian residence constructed in the 1870's encompassing 2,600 square feet and a basement.
The Chabad applied to the historic district commission (HDC) to alter 85 West Street. The HDC asserts that the Chabad's proposed modifications called for a 17,000 square foot addition to be built at 85 West Street, including a nearly 5,000 square foot residence for Rabbi Eisenbach and his family, an indoor swimming pool, guest accommodations, kitchens, and a ritual bath. In addition, the Chabad sought to top the property with a clock tower featuring the Star of David and to incorporate several external elements that would restore some of the property's period details.

The HDC denied the Chabad's application, citing the history and importance of the Deming House to the historic character of Litchfield. The HDC deemed the clock tower "incongruous with the immediate neighborhood and the district as a whole," and found that it would "in one stroke transform[ ] the house from a residential structure in appearance to an institutional

structure." Finally, the HDC objected to the size of the proposed addition, which it characterized as "massive" and "over five times as large as" the Deming House.

The Chabad and Rabbi Eisenbach filed suit, asserting that the HDC's denial of the Chabad's application abridged their rights under the First Amendment's Free Exercise, Free Speech, and Free Association Clauses; the Fourteenth Amendment's Equal Protection and Due Process Clauses; RLUIPA's substantial burden, equal terms, and nondiscrimination provisions; as well as provisions of the Connecticut state constitution and the Connecticut Religious Freedom Act ("CFRA"). The plaintiffs also asserted that the named HDC members conspired to violate and failed to prevent the violation of their civil rights under 42 U.S.C. §§ 1985 and 1986, respectively.

Defendants' motion to dismiss Rabbi Eisenbach's claims for lack of standing was granted. The District Court noted that "RLUIPA requires a plaintiff to hold some property interest that he has attempted to use and which has been threatened by the illegal conduct of the defendant." Rabbi Eisenbach's proposed use of the facilities at 85 West Street "[did] not qualify" as such a property interest and his claim of "a right to place a mortgage lien" on the property for unpaid salary "barely warrant[ed] addressing."

The District Court later granted the defendants' motion for summary judgment. It found that the relevant Connecticut General Statutes apply to any entity seeking to alter a property in a historic district. They were therefore a neutral law of general applicability and could not, as a matter of law, impose a substantial burden on the Chabad's religious exercise -- thereby barring the Chabad's claim under RLUIPA's substantial burden provision. In addition, the court concluded that the Chabad's failure to cite a valid secular comparator was fatal to its claim under RLUIPA's equal terms provision, and that its failure to identify a religious institution that was more favorably treated and identically situated to the Chabad precluded its claim under RLUIPA's nondiscrimination provision.

HELD: On appeal, the Second Circuit reversed and remanded the District Court's finding that the Litchfield historical review process did not violate RLUIPA's substantial burden and nondiscrimination provisions.

DISCUSSION: Substantial Burden: RLUIPA's substantial burden provision provides:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—(A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest.

RLUIPA's substantial burden provision combats "subtle forms of discrimination" by land use authorities that may occur when "a state delegates essentially standardless discretion to nonprofessionals operating without procedural safeguards." (citation omitted). Under this rubric, the Circuit Court found that Connecticut's statutory scheme "undeniably demands" an individual assessment of applications to alter historic properties. Even a cursory review of the HDC's consideration of the Chabad's application confirmed that the process was "patently individualized." The HDC had probed the Chabad's proposed window and roof measurements, door selections, building materials, roof adornments, and glass type, and imposed a size

limitation on the Chabad's development based on a tailored review of surrounding properties. And it had conducted this inquiry without the guidance of regulations that dictated "the specific metes and bounds either of its inquiry or of the conditions it imposed."

> Because Connecticut's statutory scheme therefore permits—indeed, demands—application of subjective standards to individual land use applications, and because the HDC applied such subjective standards to the Chabad's application, we conclude that the HDC's denial of the Chabad's application resulted from an "individual assessment," triggering RLUIPA's substantial burden provision. The district court consequently erred in determining that the Chabad could not establish a claim under RLUIPA's substantial burden provision "as a matter of law," and we vacate the district court's judgment insofar as it concerns that claim.

Equal Terms: The Chabad failed to satisfy RLUIPA's "equal terms" provision, which states that "[n]o 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." The Chabad's sole support for its equal terms claim came in the form of one alleged comparator: the Wolcott Library, a building in Litchfield's Historic District that, according to uncontested evidence submitted by the Chabad, was permitted to construct a "substantial" addition on its property that altered the character of the property from residential to institutional. However, the Wolcott Library's expansion had been approved in 1965 by a different land use authority pursuant to a different land use regime.

Nondiscrimination: RLUIPA's nondiscrimination provision states that "[n]o government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination." As with the equal terms provision, the plaintiff bears the initial burden of establishing a prima facie claim, after which the government bears the burden of persuasion on the elements of the nondiscrimination claim.

The Second Circuit noted that it had not previously interpreted the nondiscrimination provision. "Nonetheless, the plain text of the provision makes clear that, unlike the substantial burden and equal terms provisions, evidence of discriminatory intent is required to establish a claim." The Circuit Court found that the lower court had improperly looked solely to whether the Chabad had identified comparator religious institutions that were " 'identical in all relevant respects' " to the Chabad. "This was in error. As in Arlington Heights, analysis of a claim brought under RLUIPA's nondiscrimination provision requires a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Arlington Heights, 429 U.S. at 266. Accordingly, courts assessing discriminatory intent under RLUIPA's nondiscrimination provision have considered a multitude of factors, including the events leading up to a land use decision, the context in which the decision was made, whether the decision or process departed from established norms, statements made by the decision making body and community members, reports issued by the decision making body, whether less discriminatory avenues were available and so on.

Here, the District Court had bypassed consideration of circumstantial evidence that might have supported the Chabad's claim and instead considered only the Chabad's cited comparators. While such evidence was germane to a selective enforcement analysis, it is not necessary to establish a nondiscrimination claim. "Because the district court did not look beyond religious comparators in weighing the Chabad's nondiscrimination claim, we vacate the grant of summary judgment to the defendants on this claim and remand for consideration of whether the Chabad