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Featured Case:

RLUIPA: Denial of Church's Application to Amend County's Water and Sewer Plan is "Zoning" Change, Triggering RLUIPA

Redeemed Christian Church of God (Victory Temple) Bowie, Maryland v. Prince Georges County, no. 20-2125 (4th Cir. Nov. 3, 2021).

Construing a County's denial of a church's application for legislative amendment of a water and sewer plan as a "zoning" action for purposes of RLUIPA, the Fourth Circuit affirms a lower court injunction requiring that the County grant the amendment and allow the church to proceed with building a larger facility.

Founded in 2002, the Redeemed Christian Church of God (Victory Temple) Bowie, Maryland (Church) grew rapidly. By 2018, with a congregation of more than 2,000, the Church purchased nearby land in Bowie, intending to build a much larger facility. Before making the purchase, the Church conducted traffic and feasibility studies to confirm that the site would pass engineering and logistical requisites. While the Church was aware that the site would need to be upgraded from a "Category 5" water and sewer classification (slated for future community water and sewer development) to a "Category 4" classification, it purchased the land believing that such a change would be accommodated.

The County Water and Sewer Plan (Plan) requires that Category 5 properties be redesignated to Category 4 (properties for which the subdivision process is required) prior to the development review process, by way of a legislative amendment. An application for amendment must be submitted to the County's Department of Permitting, Inspections and Enforcement (DPIE), which gathers relevant data including

environmental factors, economics and general fiscal concerns, conformity with zoning, and impacts on traffic, and submits the proposal to the County Executive—who in turn provides the package and recommendations to the County Council for its legislative action on the matter.

In January 2019, the DPIE circulated the proposal for comment to various stakeholders. While the Bowie City Manager expressed approval of the proposed change, the Bowie City Council recommended denial following public hearings. The County Council then conducted hearings and received input from the County's Transportation Committee, one member of which is the Chair of the Council. In recommending denial of the Plan application for amendment to Category 4, that member cited:

> [T]raffic impacts, the environmental impacts, the economic impact, the fiscal impact, potential pollution and air pollution, lack of infrastructure, including for stormwater management, potential impact on the quality of life, inconsistency with the General and Area Master Plans, no demonstration of a hardship by [Victory Temple], and, additionally, the City of Bowie's position.

In May 2019, the Council denied the Church's application. The Church sued under RLUIPA in October 2019; in June 2020, after a virtual bench trial, the district court found in favor of the Church: the County's denial of the application constituted a substantial burden because the Church could not build the larger structure it needed while the property remained in Category 5. Under RLUIPA-mandated strict scrutiny, the court concluded that the County had failed to show that its denial of the application constituted the least restrictive means to achieving a compelling governmental interest. It enjoined the County's denial of the application.

On appeal, the County argued that RLUIPA did not apply to the legislative amendment at issue. The Circuit parsed RLUIPA, which only applies where:

> the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

The question was thus whether the County's action involved an "individualized assessment" of the proposed use, and whether the requested amendment was a "land use regulation." The first inquiry was easily answered in the affirmative: the County had clearly reviewed the specifics of the Church's individualized use, including building size, spaces in the parking lot, nearby traffic conditions, and so on.

Less obvious was whether the County's analysis of the Church's proposed use was made pursuant to a land use regulation--"a zoning . . . law or the application of such a law, that limits or restricts a claimant's use or development of land."

The County argued that, under Maryland state law, an amendment to a water and sewer plan is a comprehensive planning action, not a zoning law or application thereof. The Circuit rejected that proposition: while instances may exist where the construction of certain federal statutes may depend on state law, "[i]n the absence of a plain indication to the contrary . . . it is to be assumed when Congress enacts a statute that it does not intend to make its application dependent on state law." (That logic was particularly applicable here, because the very impetus for RLUIPA was to preserve religious rights against local hegemony, which could be easily accomplished if local definitions took precedence).

The Circuit found that, while the precise contours of "zoning" could be difficult to delineate, "at its core [zoning] involves the division of a community into zones based on like land use." (citation omitted). The court also cited Black's Law Dictionary: "zoning" is "[t]he legislative division of a region, esp[ecially] a municipality, into separate districts with different regulations within the districts for land use, building size, and the like."

Those factors required a finding that the decision on an application for legislative amendment regarding water and sewer categories was a "zoning" action:

> **[I}t is not the label that a government puts on its regulation that determines whether RLUIPA applies, but rather how the regulation actually functions. If a regulation divides a community into zones, restricting or limiting how land can be used within each zone, the regulation is a zoning law subject to RLUIPA. Our approach is entirely consistent with the protections RLUIPA affords religious land use, requiring an ambiguity to be construed in favor of broad protection of religious exercise.** This functionalist approach was embraced in 2012 by the Second Circuit, which ruled that, although environmental review considerations were typically not zoning laws and thus not subject to RLUIPA, "when a statutorily mandated environmental quality review process serves as a vehicle to resolve zoning and land use issues, the decision issued constitutes the imposition of a land use regulation as that term is defined in RLUIPA." *Fortress Bible Church v. Feiner*, 694 F.3d 208, 216 (2d Cir. 2012).

The Circuit acknowledged that it was expanding its delineation of RLUIPA. In *Bethel World Outreach Ministries v. Montgomery County Council*, 706 F.3d 548 (4th Cir. 2013), it had construed RLUIPA's zoning provision but had not ruled that denial of the church's application would *per se* trigger RLUIPA. "Today, we recognize that such a denial may be sufficient to do so."

Given that RLUIPA applied, the County was required to satisfy strict scrutiny. It failed:

> Put succinctly, the County never sought to show at trial that it considered alternatives — such as roadway improvements or additional road signs — before denying the Application. At bottom, we agree with the district court that the County's denial of the Application fails strict scrutiny review. In these

circumstances, the court did not abuse its discretion in granting Victory Temple the injunctive relief that is appealed from.

LINK

Short Summaries:

Contracts: New York City Law Invalidating All Personal Guarantees of Commercial Leases During Covid Violates Contracts Clause

Melendez v. City of New York, 20 cv 4238 (2d Cir. Oct. 28, 2021).

In an important decision from the Second Circuit today, the panel upheld some laws adopted by NYC to address the effect of the pandemic on lessees, but reversed the lower court as to a provision that prevented landlords from ever pursuing a lease guarantor for lost rents during the 16 month period of the effective period of the law. The panel concluded that the Plaintiffs had pled sufficient facts to overcome their legal burden in pursuing the claims and seemed to rely primarily upon the failure of the law to "means" test or otherwise test the ability of the lessees to pay or the guarantors to pay or to evaluate the basis for the claims of inability to pay rents. I skimmed it so may be missing something or misinterpreting, so the case is attached.

LINK

Ethics: Disbarment for Prosecutor Who Withheld Exculpatory Evidence

Attorney Grievance Commission, v. Cassilly, AG No. 31 (Md. Oct. 22, 2021).

On Friday the Maryland Court of Appeals disbarred a former elected prosecutor for what can only be described as despicable conduct. The facts are in the opinion, but I'll try a very brief summary – the prosecutor handled a murder trial of a man convicted twice and sentenced to death. Following conviction (many years later) the prosecutor was provided with evidence that the FBI expert who had testified to hair sample evidence implicating the defendant was nothing short of a liar and had probably lied in the specific case. The Prosecutors with this exculpatory evidence not only failed to disclose it, but continued to fight claims of innocence by the accused.

All I can say is we're better than that and need to be. Our responsibility is both to the public and those we prosecute and litigate against. We shouldn't need rules of professional conduct or cases like this to inform us of our duties. Let this case be a reminder to us that we wield substantial powers and must use them honestly and fairly.

LINK

Mandates: Teachers Preliminarily Enjoin New York City's Vaccine Mandate on Religious Grounds

Kane v. de Blasio, 21 cv 2678 / *Keil v. City of New York*, 21 cv 2171 (2d Cir. Nov. 28, 2021).

The Second Circuit concludes that NYC's vaccine mandate is not subject to a facial challenge but that an as-applied challenge applies to teachers who seek a religious exemption. The teachers union complained about the vaccine mandate. The union and city failed to mediate the dispute and it went to arbitration. The arbitrator's award became the subject of this suit as was the mandate itself. The arbitration award concluded that a person could not obtain a religious exemption/accommodation if among other things the leader of the religion supported the vaccination requirement. The court concluded that religious exemptions need to be individual and that an accommodation based on another person's view of what the religion allows is improper for determining whether an accommodation should be extended. As always, I may have missed some of the finer points in this case, so take a look yourselves. I think it fair to opine that a health order requiring vaccination applied to a resident population may not include the need for religious accommodation, whereas an employer's mandate applied to employees will require one under Title VII. Could be wrong, so feel free to straighten me out.

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