Parties Say Ruling Clarifies Issues Under Religious Land Use Law

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A federal judge has handed down a mixed ruling on a lawsuit charging that changes made in the Village of Pomona's zoning and environmental ordinances were intended to discriminate against organizers of a rabbinical college.

Southern District Judge Kenneth Karas (See Profile) allowed facial challenges to the ordinances to proceed, saying that advocates of the proposed Congregation Rabbinical College of Tratikov Inc. had sufficiently alleged a "substantial burden" on the exercise of religion under the Religious Land Use and Institutionalized Person Act (RLUIPA).

But Karas also granted the village's motion to dismiss the complaint on as-applied challenges to the zoning and environmental laws on the grounds that the congregation never submitted a formal application. It was not enough Karas said, for the plaintiffs to claim any application would be futile because of entrenched opposition to the 100-acre project.

The ruling in *Congregation Rabbinical College of Tartikov v. Village of Pomona*, 07-CV-6304 was hailed by lawyers for both sides.

"We couldn't have asked for anything better," said Paul Savad of Savad Churgin in Nanuet, for the college plaintiffs. "What the judge said here was that, even if a law looks facially neutral, you can look behind it if we are the only property in the village that it affects. We are going to prove that the laws that were passed by the village after we purchased the property were discriminatory."

But Marci Hamilton, a published author on RLUIPA and a professor at the Benjamin N. Cardozo School of Law, who represents the village, said she was very pleased.

"Our primary argument was that any developer, including a religious developer, has to file at least one application, particularly where you have this large, multi-tiered proposal," Hamilton said. "I think it's a landmark decision. It clarified a tremendous amount of case law that says you must make an application in order to make an as-applied challenge."

The six-year old case was brought by a religious corporation formed in 2004 with the idea of building a college for the training of rabbis who could resolve conflicts in rabbinical courts. It purchased a 100-acre tract of land in the village and the town Ramapo in August of 2004 and another 30 acres to provide a buffer between the college and the surrounding community.

In its lawsuit, also brought by individual rabbis, the congregation said the college was needed because there was a shortage of trained rabbinical judges, and the only other college in the area that provides a "full course of study or religious environment"—Kollel Beth Yechiel Mechil of Tartikov in Brooklyn—was overcrowded and for several years had shut its doors to new rabbis.

The planned college calls for housing for rabbinical students, their families and their children, up to 10 shuls to accommodate Orthodox Jews of all sects and traditions, four rabbinical courtrooms and multiple libraries. It is intended to serve the large Orthodox community in the villages of the Town of Ramapo as well as other villages in Rockland County.

But the property lies within a district that is zoned for approximately one acre for the development of single-family homes; multiple dwellings are not allowed.

The plaintiffs claimed the village amended its regulations defining "educational institution" and dormitories in 2004 to require that a qualified institution be accredited by the state Department of Education—knowing the college was not accredited—and barred dormitories with separate cooking facilities.

Also, in 2007, the village adopted a wetlands protection ordinance requiring a 100-foot buffer around wetlands of 2,000 square feet or more—a measure the plaintiffs charged was passed "specifically" to block the college.

The plaintiffs cited comments by town officials, some of whom were elected on the promise to "fight this plan" and "stand up to this threat."

One alleged statement made by the village's attorney, Doris Ulman, at a seminar on RLUIPA, was that residents should not "cave into them and sell our houses."

The plaintiffs said that the statement referred to the Hasidic population. However, Hamilton said yesterday the village will prove that the Ulman quotation was taken out of context and that the first zoning changes were made before officials even knew a college would be proposed for the site.

'Genuine Concern'

Karas, in his 102-page opinion, said the village expressed concern at oral argument that the plaintiffs were intending to build "Wake Forest University in Pomona," in other words, a 5,000-student college. "For a residential community such as Pomona, the idea of a large college being built might be of profound and genuine concern for local residents and public officials, and it may be why Defendants and residents want to block the construction of Plaintiffs' college," Karas said, taking the allegations as true for purposes of a motion to dismiss. "However, in this lawsuit Plaintiffs allege that Defendants are blocking their college not because of its physical size or the number of students and faculty that may reside, study, and work there, but because it is an Orthodox/Hasidic rabbinical college that would employ, educate and house members of the Orthodox/Hasidic community."

Karas first held the plaintiffs had standing and that their facial challenges to the ordinances under RLUIPA, 42 U.S.C. 2000cc et seq., the Equal Protection Clauses of the New York and U.S. Constitutions, the First Amendment and the Fair Housing Act, were ripe for review.

But the as-applied challenges, including those under the First Amendment and RLUIPA, were not yet ripe, he said, because the college had not submitted a formal application or asked for a variance. The judge said he lacked subject matter jurisdiction because there had been no "final decision" and the plaintiffs had fallen short in their argument under the so-called "futility exception."

Without "at least one meaningful development proposal," the judge said he would be unable to determine that rejection of the application is "virtually certain,"

Turning to the substance of the facial challenges, Karas said the rabbis and the congregation alleged a discriminatory purpose for Equal Protection purposes in the timing of the changing of the zoning law in 2004 and in public comments by town officials.

"At this stage of the litigation, these allegations are sufficient to establish Plaintiffs' claim that the challenged ordinances were enacted with the purpose of discriminating against members of Orthodox and Jewish communities," Karas said.

And while the village may challenge the assertion that the changes did not adversely affect the plaintiffs, that they served compelling interest or were otherwise lawful, Karas said "this is not the time

to test those defenses."

On the plaintiffs' Free Exercise claims under the First Amendment, he said the allegations passed muster considering the changes in the ordinances when they are taken together, as well as the comments by public officials.

On the plaintiffs' free speech claim, Karas said they "have plausibly (if barely) pled enough facts to establish that the rabbinical college would engage in and foster expressive conduct."

The RLUIPA claim survives, he said, because the plaintiffs had alleged a "substantial burden" on the exercise of their religion.

"While the RLUIPA does not exempt religious institutions from complying with facially neutral permit and variance application procedures, it does protect such institutions from land use regulations that substantially affect their ability to use their property in the exercise of their religion," he said, and the plaintiffs had alleged that the "combined effect (even a subtle one) of the challenged ordinances is to bar the construction of a rabbinical college, and *only* do that."

The plaintiffs' only option at this point, he said, "is to seek a text amendment to the Zoning Code, a legislative process" they claim "would be cumbersome and, given the hostility of Defendants, fraught with indefinite delay and uncertainty."

The next step in the case is the filing of a formal answer by the village, which had moved to dismiss based on the inadequacy of the complaint.

Hamilton said she is confident the village will prevail.

"They have wasted all these years litigating in federal court," she said, "The court said there was barely enough facts to survive a motion to dismiss, but that he would not dismiss because he had to take the facts as true."

Savad had a different view.

"We're ready for depositions, we're ready for discovery and we're ready to try this case," Savad said. "All this does is level the playing field. It doesn't say 'You can have a college.' We're not asking the judge to order a building permit."