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Law

Religious institutions claim federal law trumps local zoning and land-use codes

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To Eric Nestor, the Religious Land Use and Institutionalized Persons Act is a blessing.

The eight-year-old federal law is permitting Chesapeake Church to challenge what Nestor, the church's lawyer, says are Calvert County's overly restrictive zoning regulations in order to keep direct main-road access to its counseling center and food bank.

"Basically where we are is, but for that statute, the church's dispute with the county would be over," Nestor said.

To Daniel Karp, who is representing Calvert County in a lawsuit filed by Chesapeake Church, the act gives religious institutions unfair power to try and strong-arm municipalities into letting them use their land however they want, no matter the zoning rules.

"I guess it could be variously described as an attempt to level the playing field ... or it can be described as giving the church not only a shield but a sword," Karp said.

RLUIPA states that governments may not regulate land use "in a manner that imposes a substantial burden on the religious exercise" of people or institutions unless there is a "compelling governmental interest" and the regulation is the least restrictive means of furthering that interest.

Significantly, a religious institution that wins a case under the act can recover attorneys' fees.

Since the law's enactment in 2000, hundreds of suits have been filed by religious groups claiming that denials of their land-use applications violate their civil rights under the law.

The statute's broad application has "destabilized the power relationship in local governments," said Marci Hamilton, a church-state expert and visiting professor at Woodrow Wilson School at Princeton University who represents several municipalities in RLUIPA cases.

Prior to the act, Hamilton said, a church would negotiate with a local government over the size and location of a building project.

Now, she said, "There's no negotiation. If the local government says, 'No, you can't do it in that location,' the answer is, 'Good. Meet us in federal court.'"

"I think RLUIPA is a well-intentioned law," said Steven M. Silverberg, a land-use attorney in White Plains, N.Y. "The intention was to ensure that certain religious organizations were not discriminated against.

"But the law is drafted so broadly and so vaguely," he added, "that people are applying it in ways I don't think Congress ever intended."

No suit needed

Experts say there have not been many actual lawsuits in Maryland, but there have been a few. There have also been instances where a religious organization did not have to sue.

An example of the latter was the fight over the 100-year-old Rochambeau apartment building, which the Baltimore Archdiocese knocked down in 2006 to make way for a prayer garden next to the Baltimore Basilica. Though the city's urban-renewal plan for the area favored preserving historic buildings, officials were swayed to permit the demolition after considering the possibility of a church lawsuit under the act.

"[T]he combination of the statute and cases that have been decided on First Amendment grounds made it clear that, were the city to have denied the demolition permit, it would have certainly faced litigation and might well not have succeeded, so the legal considerations were part of the judgment, but ultimately the mayor made a decision based on what he thought was best for the city," said Ralph S. Tyler, who was city solicitor at the time.

The law can be a "club" for religious institutions, said James D. Lawlor, a Silver Spring solo practitioner who publishes the Land Use Legal Report. Neither side wants to litigate, so sometimes they work out a settlement instead, he said.

"Even if you win and collect your attorneys' fees at the end, you're talking substantial upfront costs, and these cases do take a while to work their way through the court system," Lawlor said.

Roman P. Storz, a Washington, D.C., lawyer who represents religious groups in RLUIPA litigation, said he believes Maryland has seen few cases because it is a relatively densely populated state. City-dwellers tend to be used to diversity and more tolerant of minority religions, he said.

"I think that exhibits a general tolerance toward religious institutions in this state, and in most cases towns and counties realize the importance of religion and religious institutions in public life and treat them with respect," said Storz, of Storz & Greene PLLC. "There are, of course, exceptions. ... In those cases, it's good that there are constitutional and statutory protections that prevent discrimination and burdensome restrictions."

Equal footing or special treatment?

One case that did reach litigation was Trinity Assembly of God of Baltimore City v. People's Counsel for Baltimore County et al, which made it to the Court of Special Appeals and was decided against the church earlier this month. It was the first RLUIPA case to be decided by a Maryland appellate court, the opinion said.



Daniel Karp is representing Calvert County in a lawsuit filed by Chesapeake Church.

Trinity Assembly wanted to install a 250-square-foot electronic sign that would be visible from Interstates 83 and 695, which run in tandem adjacent to the church's property off West Joppa Road in Baltimore County. The church wanted to display directions and inspirational messages on the sign.

County zoning laws, though, would allow a sign of just 25 square feet. The Court of Special Appeals held that Trinity would not be substantially burdened by the county's denial because it could convey its messages in many other ways.

Peter M. Zimmerman of the county's Office of People's Counsel said the decision goes a long way toward establishing that the religious land-use law does not always trump zoning concerns.

"One of the good things about this case is that it shows — and there are other ones around the country — that land-use laws are legitimate," said Zimmerman.

The Chesapeake Church case is another in which the religious institution in question did sue. According to Karp, the church, which sits on a major road, uses an old residential driveway for the adjacent food pantry and counseling center. The county does not want the driveway connecting to a major road and would like the church to send pantry and counseling clients through the main church driveway.

The church argues that the counseling center and food bank are part of its religious mission, but that it does not want to send those clients through the main driveway. Pastors of other churches send clients to the pantry and counseling center but might not if they perceived that in doing so, they would be sending them to another church.

Karp, like Nestor, said the church likely would not have been able to sue without the act.

"The inventive minds of its lawyers and others would not have discerned a constitutional or any kind of a violation from the county's decision that the driveway be closed," said Karp, of Karpinski, Colaresi & Karp P.A. in Baltimore. "I think RLUIPA has been, in my opinion, misused [in] this case, certainly misused in the CSA case and misused in a bunch of cases around the country who believe it gives them a basis for more than equal treatment."

It does, Nestor said.

"Yeah, that's what the law was written for," said Nestor, who is a government lawyer and Chesapeake Church member. He is handling the case pro bono.

The act recognizes the special place religious institutions hold in American life, he said.

He said RLUIPA shifted the burden of proof in a dispute between government and a religious group; instead of the religious group having to prove why it should be allowed to do what it wants with its land, the county must prove why it should not.

State vs. federal

Nestor also said that the act lets religious groups litigate land-use cases in federal court, which is beneficial because they can argue de novo. In state court, any review of a county's land-use decision would be done on the record, and in the Chesapeake Church case, there isn't much of a record, he said.

Other religious land use-related cases in Maryland include:

- A Muslim group's fight with a rural Frederick County town over its plans to build a mosque and retreat center. This is probably the highest-profile RLUIPA-related dispute in Maryland, though no litigation has been filed yet.

Storzer, who represents the person selling his land to the Muslim group, said many RLUIPA cases involve minority religions.

"The other interesting thing is that in the great majority of these cases, my clients are Muslim, Hindu, Buddhist, Jewish, exactly the kind of minority that have been targeted in the past and the reason Congress passed this legislation," he said. "That's indicative of the fact that there truly is discrimination going on."

- A predominantly black Seventh-day Adventist Church's suit against Prince George's County over the county's refusal to adjust its water and sewer regulations to allow the congregation to build a new church.

Reaching Hearts International Inc. sued the county in U.S. District Court in Greenbelt, alleging racial discrimination, religious discrimination and a RLUIPA violation. A trial is set for April.

Several experts predicted the U.S. Supreme Court would eventually either clarify what constitutes a "substantial burden" or rule on the constitutionality of the statute.

"I would not be surprised to see RLUIPA before the Supreme Court in the near future," said Eric Rassbach, national litigation director of the Becket Fund for Religious Liberty, a Washington, D.C.-organization that has represented many RLUIPA plaintiffs. "The first wave of appeals is starting to reach the court and eventually it will find a case it likes."

(Nora Lockwood Toher contributed to this article. She writes for Lawyers USA, a sister publication of The Daily Record.)

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