Religious Land Use Issues in Washington State
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Overview

- Religious Land Use Basics
- Latest Developments
- Applying the Law

Religious Land Use & Institutionalized Persons Act

- 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 interest; and
  (B) is the least restrictive means of furthering that compelling governmental interest.

  42 U.S.C. § 2000cc(a)(1)(A), (B).

Religious Land Use & Institutionalized Persons Act: Land Use Regulations

- A “land use regulation” is “a zoning or landmarking law ... that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has a ... property interest in the regulated land ....” 42 U.S.C. § 2000cc-5(5).
- Thus, “a government agency implements a ‘land use regulation’… when it acts pursuant to a ‘zoning or landmarking law’ that limits the manner in which a claimant may develop or use property in which the claimant has an interest.” *Prater v. City of Burnside,* 289 F.3d 417, 434 (6th Cir. 2002).

Religious Land Use & Institutionalized Persons Act: Substantial Burden

- "In order to prevail on a claim under the substantial burden provision, a plaintiff must first demonstrate that the regulation at issue actually imposes a substantial burden on religious exercise." *Civil Liberties for Urban Believers ("CLUB") v. City of Chicago*, 342 F.3d 752, 760 (7th Cir. 2003).
- A "substantial" burden "must be 'oppressive' to a 'significantly great' extent." *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004).
- "[T]he burden must be more than an inconvenience; it must be substantial and interfere with a tenet or belief that is central to religious doctrine." *North Pacific Union Conference Ass'n of Seventh Day Adventists v. Clark County*, 118 Wn. App. 22, 35-36, 74 P.3d 140 (2003).

Religious Land Use & Institutionalized Persons Act: Substantial Burden – Examples

- Outright Prohibition of Religious Land Use
- Repeated Denial of Permit Applications. *Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter,* 456 F.3d 978, 989 (9th Cir.2006).
- Requirement not to seek renewal of permit. *Grace Church of N. County v. City of San Diego*, 555 F. Supp. 2d 1126, 1139 (S.D. Cal. 2008).
- Removal of homeless persons from religious property. *Fifth Ave. Presbyterian Church v. City of New York*, 177 Fed. Appx. 198 (2d Cir. 2006).

Religious Land Use & Institutionalized Persons Act: No Substantial Burden – Examples

- Neutral Permit Application Process. *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024 (9th Cir. 2004).
- Denial of Incomplete Permit Application. *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024 (9th Cir. 2004).
- Sheltering homeless persons indoors rather than outdoors, when no showing was made alternative sites were not available. *City of Woodinville v. Northshore United Church of Christ*, 139 Wn. App. 639, 162 P.3d 427 (2007), *review granted by* 162 Wn.2d 1019 (Feb. 6, 2008), *argued* May 20, 2008.

Religious Land Use & Institutionalized Persons Act: Compelling Interest

- "There appears to be no dispute that local governments have a compelling interest in protecting the health and safety of their communities through the enforcement of the local zoning regulations." *Murphy v. Zoning Com'n of Town of New Milford*, 148 F. Supp. 2d 173, 190 (D. Conn. 2001); *see also Konikov v. Orange County*, 302 F. Supp. 2d 1328, 1343 (M.D. Fla. 2004).

Religious Land Use & Institutionalized Persons Act: Planning Discretion

- A government may avoid the preemptive force of any provision of this chapter by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

42 U.S.C. § 2000cc-3(e)

Religious Land Use & Institutionalized Persons Act: Attorney's Fees and Expenses

- Successful litigation on behalf of a religious institution claiming violation of constitutional or federal statutory rights may lead to award of reasonable attorney's fees and expenses under 42 U.S.C. § 1988(b). *E.g., DiLaura v. Township of Ann Arbor*, 471 F.3d 666, 670 (6th Cir. 2006).

First Amendment

- "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…."
- The First Amendment Free Exercise Clause formerly paralleled the protections of RLUIPA, requiring that the government demonstrate a compelling state interest to justify any substantial burden on religious exercise. *See generally Sherbert v. Verner*, 374 U.S. 398 (1963).
- Eighteen years ago, the United States Supreme Court clarified the law. *Employment Div., Dep't of Human Resources v. Smith,* 494 U.S. 872 (1990).
- In *Smith*, the Court held that "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest." *Open Door Baptist Church v. Clark County*, 140 Wn.2d 143, 162, 995 P.2d 33 (2000).

First Amendment: Neutral Laws of General Application

- Today, under the Free Exercise Clause, "a neutral law of general application [may] prohibit conduct that [is] prescribed by an individual's religion" and such laws do "not have to be supported by a compelling governmental interest even [if the law has] an incidental effect on burdening religion." *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1030 (9th Cir. 2004).

Washington Constitution

- "The Washington State Constitution article I, section 11 promises 'freedom of conscience in all matters of religious sentiment, belief and worship.'" *North Pacific Union Conference Ass'n of Seventh Day Adventists v. Clark County*, 118 Wn. App. 22, 31, 74 P.3d 140 (2003).
- "The test for whether a governmental action infringes on the right to freely exercise religious practices has three parts: (1) whether the party claiming an infringement has a sincere religious belief; (2) whether the governmental action burdens the free exercise of a religious practice; and (3) if so, whether the burden is offset by a compelling state interest." *Id.* at 31-32.

Washington Constitution: Zoning

- The Washington Constitution "does not include the right to be free of all government regulation." *North Pacific Union Conference Ass'n of Seventh Day Adventists*, 118 Wn. App. at 31.

- Religious Institutions are not immune from zoning regulations. *Open Door Baptist Church v. Clark County*, 140 Wn.2d 143, 168, 995 P.2d 33 (2000).

Washington Constitution: Landmarking

- Landmark Church Cases: Under the Washington Constitution, landmark preservation requirements may impose an unlawful burden on the free exercise of religion. Examples of established burdens:
  - Potential 14 month delay in demolition of historic building to construct new pastoral center. *Munns v. Martin*, 131 Wn.2d 192, 930 P.2d 318 (1997).
  - Required approval of local government before altering church exterior. *First Covenant Church v. City of Seattle*, 120 Wn. 2d 203, 840 P.2d 174 (1992) (*First Covenant II)*.
  - Nomination of church for historic landmark status when nomination would prevent sale of church property. *First United Methodist Church of Seattle v. City of Seattle*, 129 Wn.2d 238, 916 P.2d 374 (1996).

Washington Constitution: Landmarking

- Examples of no burden:
  - Requirement that church apply for conditional use permit. *Open Door Baptist Church v. Clark County,* 140 Wash.2d 143, 995 P.2d 33 (2000).
  - Denial of conditional use permit where church fails to establish infeasibility of alternative options. *North Pacific Union Conference Ass'n of Seventh Day Adventists v. Clark County*, 118 Wn. App. 22, 74 P.3d 140 (2003).

Washington Constitution: Landmarking

- NOTE: If a burden on religious free exercise is found, historic preservation alone is not a compelling government interest sufficient to overcome the burden. *E.g., Munns*, 131 Wn.2d at 209.

Latest Developments: Tent City

Photo sourced from City of Woodinville website

Latest Developments: Tent City

- Tent City – Originated with WTO Protests
- Roving homeless encampments
- Tent City 3 – Seattle & Surrounding Areas
- Tent City 4 – Eastside
- Hosted by Religious Institutions – Usually outdoors
- “Administered” by secular homeless advocacy groups and residents
- Up to 100 residents
- Repeated Legal Battles with Cities

Latest Developments: *City of Woodinville v. Northshore United Church of Christ*

"This is a case in which persons of good faith and compassion on all sides have struggled to deal with a chronic problem of our society-homelessness. Our resolution of the issues that we address today does not diminish the fact that homelessness and society's response to it will continue to be matters of substantial public importance. It is also clear that the answers to these issues are not simple."

Latest Developments: *City of Woodinville v. Northshore United Church of Christ*

- In 2004, Share/Wheel and the Northshore Church agreed to host Tent City 4.
- The parties executed a Temporary Property Use Agreement in August 2004 to memorialize their agreement to allow hosting on City property.
- In 2006, the City passed Ordinance 419 to temporarily prevent development on property in the R-1 zone, where the Church was located
- The Church applied for a permit to host on its own property in 2006.

Latest Developments: *City of Woodinville v. Northshore United Church of Christ*

- City declined permit request and sought restraining order to prevent hosting without a permit
- Trial court ruled City's agreement was enforceable and denial of permit was lawful, and enjoined hosting without a permit.
- The Court of Appeals affirmed the decision, finding the 2004 agreement enforceable and denial of the permit lawful where other options for hosting existed.
- NOTE: the Court of Appeals did not consider the Washington Constitutional argument because it was not properly briefed; this issue is pending review at the Washington Supreme Court.

Latest Developments: *Temple B'Nai Torah v. City of Bellevue*

- Temple B'nai Torah invited Tent City 4 to camp outside on its property within the Bellevue City limits
- City enacted temporary moratorium to study regulation
- City prepared legislative record and adopted general "temporary encampments" ordinance
- Tent City 4 applied under the ordinance, and the City issued a permit and imposed permit conditions
- Tent City 4 filed a LUPA petition and challenged constitutionality of conditions; case removed to federal court
- City, Tent City 4, Temple, and Greater Seattle Church Council negotiated consent decree entered by Judge Coughenour

Latest Developments: *Temple B'Nai Torah v. City of Bellevue* Federal Consent Decree

- Acknowledged validity of Bellevue ordinance
- Upheld health and safety requirements for encampment
- Allowed hardship exemptions
- Limited visits to once per year
- Limited duration to 90 days

Latest Developments: Housing Crisis

- “From Seattle to Athens, Georgia, homeless advocacy groups and city agencies are reporting the most visible rise in homeless encampments in a generation.”
- “Nearly 61 percent of local and state homeless coalitions say they've experienced a rise in homelessness since the foreclosure crisis began in 2007, according to a report by the National Coalition for the Homeless.”
- "What's happening in Seattle is what's happening everywhere else — on steroids…." -- Tim Harris, executive director of Real Change.

  Source – Associated Press, September 18, 2008

Latest Developments: Housing Crisis

- Green Bay Wisconsin Religious "affiliated" shelter opened without required permit

- "We believe we are protected by the First Amendment, because serving the homeless is part of our essential ministry…." Deacon Tim Reilly, Green Bay Press Gazette, September 4, 2008.

- City evaluating legal options but had not issued fines or penalties: "Ultimately, no guarantees are forthcoming from this author that a court will not rule against Green Bay's conditional use requirement as applied to religiously affiliated homeless shelters on private property."

Latest Developments: Establishment Clause

- In *Van Orden v. Perry*, 545 U.S. 677 (2005), the Court by a vote of 5-4 ruled that a Ten Commandments monument located on the Texas Statehouse lawn since the early 1960s did not violate the First Amendment's Establishment Clause. The critical fifth vote came from Justice Breyer's concurrence. Noting the monument's age, the context in which the monument sat, the lack of religious purpose and the lack of historical complaints, Justice Breyer concluded that the underlying purposes of the Establishment Clause would not be served by requiring removal of the monument.
- By contrast, in *McCreary County v. ACLU*, 545 U.S. 844 (2005), the Court by a vote of 5-4 ruled that a Ten Commandments plaque located on county property violated the Establishment Clause. In so ruling, the majority noted that the plaque was recently placed on county property and that the county officials who placed the plaque on county property did so to advance religion.

Latest Developments: Establishment Clause
Card v. City of Everett

Jim Bates/The Seattle Times, via Associated Press

Latest Developments: Establishment Clause
Card v. City of Everett, 520 F.3d 1009 (2008)

- On March 26, 2008, the Ninth Circuit ruled that a Ten Commandments monument located outside the Old City Hall in Everett did not violate the First Amendment's Establishment Clause or the Washington State Constitution.
- This was the Ninth Circuit's first opportunity to address the issue of the constitutionality of such a monument after the decisions in *Van Orden* and *McCreary County.*
- The court did not provide an expansive ruling that all governmental displays of the Ten Commandments were *per se* constitutional. Accordingly, more recent displays of the Ten Commandments or other religious displays, such as holiday displays, may still be subject to attack on constitutional grounds in the Ninth Circuit and might be analyzed under the more restrictive U.S. Supreme Court test in in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

Applying the Law: Ordinances

1. Permitting, Zoning & Conditions
2. Facial Neutrality ("Neutral law of general applicability")
3. Legislative Record
4. Discretion for Hardships
5. Moratoria -- RCW 35A.63.220

Applying the Law: Application Process

- Compliance with neutral conditions is not per se unlawful
- Reasonable timing for approval
- Fees. *See Open Door*, 140 Wn.2d at 160 (denying Church's free exercise claim, but noting with approval Court of Appeals' directive that County waive $5,523 fee to apply for the conditional use permit upon showing of inability to pay).
- Document application of conditions and tie to legislative or empirical record

Applying the Law: Conditions

- Conditions tied to health and safety
- Conditions that appear to render use impossible or highly impractical will be closely scrutinized
- Tie conditions to legislative record
- Examples of conditions in *Bellevue* consent decree:
  - Certificate of insurance
  - 90 Day Duration
  - Food refrigeration requirements
  - Water supply requirements
  - Shower & Toilet Requirements

Applying the Law: Enforcement

- Injunctive relief
- Application of agreement or conditions
- Fines and Penalties
- Removal of Use – Least Restrictive Means?
- Beware of the Establishment Clause

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