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Case Commentary - Martin v. Corporation of the Presiding Bishop: Should Zoning Accommodate Religious Uses or Vice Versa?

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commercial use by claiming that revenues are necessary to fund religious activities,[19] judges cannot defer robotically to assertions or dismissals of religious purpose. As untidy as the inquiry may be, evidentiary probes into religious belief, sincerity, centrality, and alternative avenues for exercise are unavoidable in the statutory preference setting.

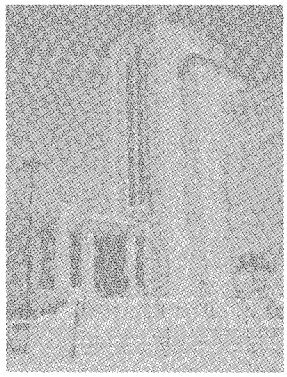
Finally, the *Martin* court's failure to flesh out why municipal concerns were insufficient to outweigh the church's religious interests leaves the statutory balancing test untethered to underlying principle. Although the court mentions, approvingly, that the Church of Jesus Christ of Latter-day Saints had already agreed to a reduction in steeple height, that does not provide an objective indicator for establishing reasonableness. Would the court have found denial of a 200-foot-tall steeple not a "reasonable" regulation if the church had earlier jettisoned a 300-foot-tall proposal?

Conclusion

Statutes granting preferences to religious land uses inherently present problems of institutional competence. They require legislative, executive, and judicial branches of government to engage in case-by-case determinations about religious institutions made awkward by the free exercise clause, a constitutional provision whose very purpose is to secure for religious actors a sphere of autonomy regarding the definition of religion. If *Employment Division v. Smith* has kept courts out of the messy business of finding and weighing undue burdens on religion,[20] then statutory preferences work just as hard to keep courts in that messy business. Inveighing against a judicial invasion of free exercise rights, *Martin* reins in an overzealous trial judge. It does not, however, supply an analytical framework capable of deciding cases further away from the bright line of this church steeple.

19. Casting commercial, revenue-generating uses in religious terms is not unusual. *See* Steve Bailey, *Downtown Proposal: Tower In, Chapel Out*, THE BOSTON GLOBE, p. A1, July 6, 2001; St. Bartholomew's Church v. City of New York, 914 F.2d 348, 354 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (involving an attempt to build an office tower to finance an expanded ministry). Recognizing this possibility, a joint statement issued by Senators Hatch and Kennedy and accompanying RLUIPA, states that not every activity carried out by a religious entity or individual constitutes "religious exercise." In many cases, real property is used by religious institutions for purposes that are comparable to those carried out by other institutions. While recognizing that these activities or facilities may be owned, sponsored or operated by a religious institution, or may permit a religious institution to obtain additional funds to further its religious activities, this alone does not automatically bring these activities or facilities within the bill's definition or [sic] "religious exercise." For example, a burden on a commercial building, which is connected to religious exercise primarily by the fact that the proceeds from the building's operation would be used to support religious exercise, is not a substantial burden on "religious exercise." Cong. Rec. S7776 (July 27, 2000).

20. Indeed that was one of the expressly articulated purposes of *Smith*. 494 U.S. at 886-87.



Martin v. Corporation of the Presiding Bishop: Should Zoning Accommodate Religious Uses or Vice Versa?

By Alan C. Weinstein

In *Martin v. Corporation of the Presiding Bishop*, 747 N.E.2d 131 (Mass. 2001), 53 ZD XX, the highest state court in Massachusetts ruled that the Dover Amendment,[1] a state statute that denies local government the authority to "prohibit, regulate or restrict the use of land or structures for religious purposes . . ." authorized the Town of Belmont to grant a church special permission to build a steeple for a newly built Church of Jesus Christ of Latter-day Saints temple that was taller than the local zoning provisions would normally allow. Since *Martin* involved a Massachusetts statute, normally the decision would evoke limited interest, and have little precedential value, in other states. So why, you may ask, am I reading four comments about the case in *Land Use Law and Zoning Digest*? The answer is simple. The U.S. Congress has ensured, in a new law, that many communities will soon face the same basic issue in the *Martin* case: Should zoning accommodate religious uses or vice versa?

THE IMPACT OF RLUIPA

In September 2000, President Bill Clinton signed into law the Religious Land Use & Institutionalized Persons Act of 2000 (RLUIPA).[2] RLUIPA affects all local land-use regulations, including historic landmarking. It affects religious

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1. Mass. Gen. Laws Ann. ch. 40A § 3. (2001).

2. Pub. L. No. 106-274, codified at 42 U.S.C.A. § 2000cc (2000).

uses by imposing a "strict scrutiny" standard if such regulations are challenged. In addition, RLUIPA contains provisions mandating that local land-use regulations must grant "equal treatment" to a religious assembly or institution;[3] not discriminate against any assembly or institution on the basis of religion or religious denomination;[4] and not impose or implement a land-use regulation that totally excludes religious assemblies from a jurisdiction or unreasonably limits religious assemblies, institutions, or structures within a jurisdiction. [5]

RLUIPA is the latest act in a drama, involving courts and legislatures at both the federal and state level, that began with a 1990 U.S. Supreme Court decision holding that the First Amendment's free exercise clause did not warrant exemptions from "neutral laws of general application" for religious practitioners or institutions. [6] The decision was promptly denounced by a broad spectrum of religious and political groups that urged Congress to "restore" the religious protections the Court had removed. Congress responded in 1993 by enacting the Religious Freedom Restoration Act (RFRA),[7] a law that effectively overturned the Court's 1990 ruling. RFRA proved to be relatively short-lived, however; in a 1997 decision,[8] the Court declared the statute unconstitutional. In the wake of that decision, religious and political groups again sought the aid of Congress in drafting a religious freedom law. Three years later, Congress enacted RLUIPA, which its proponents claim avoids the constitutional pitfalls of RFRA,[9] a claim that those who opposed RFRA dispute.[10]

The turmoil has not been limited to the federal government. Since 1990, several state supreme courts have rejected the U.S. Supreme Court's approach to religious freedom claims brought on state constitutional grounds[11] and a number of states have approved statutes or constitutional amendments comprehensively addressing religious freedom.[12] Still other states, such as Massachusetts, have adopted more narrowly focused religious freedom laws.

How Should Local Governments Respond?

The first RLUIPA challenge was filed within days after the law was signed and new challenges are being filed weekly. How should local governments respond to this new law? The first response every local government should make to RLUIPA is to examine the text of its land-use regulations affecting religious uses and how those regulations have been applied. At minimum, the zoning ordinance must provide reasonable locational options for new or expanding houses of worship and accessory religious uses such as schools. Where locational options are effectively non-existent or extremely limited, a local government should undertake a planning study that seeks to determine how it might accommodate the needs of religious uses without unduly harming surrounding property owners.

Local governments also should examine whether they are making adequate locational options for "social service" uses, such as shelters for the homeless or victims of domestic abuse and facilities to feed the homeless and indigent. The claims of religious institutions that a local government must allow them to "minister to the poor" at a location of their choosing is blunted when a zoning code designates reasonable locational options for both secular and religious groups to provide such services. Finally, the local government should make sure that no religious denomination has been singled out for either favorable or unfavorable treatment in the land-use regulatory process and that applications from religious uses are treated no differently than similar applications from secular uses.

NEEDED: ROOM FOR ACCOMMODATION

We are clearly in the midst of a dynamic environment—socially, politically, and legally—regarding the conflict between religious institutions and land-use regulation. Regrettably, elements on both sides at times have advocated extreme positions. Some religious institutions claim that their rights to build a new facility, or expand an existing one, is almost absolute and that government may never lawfully landmark a property devoted to religious use if the congregation objects. Some local officials and citizens groups argue that "religious freedom" should apply only to beliefs and practices, and thus decisions about where a house of worship may locate, whether it may expand, or whether it should be landmarked involve nothing more than property rights, and thus a religious institution should be treated no differently than a discount store or movie theater. There is surely room for accommodation between these extremes.[13]

3. 42 USCA § 2000 cc (b)(1) provides: "No 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."

4. 42 USCA § 2000 cc (b)(2) provides: "No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination."

5. 42 USCA § 2000 cc (b)(3)(A)&(B).

6. Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).

7. Pub. L. No. 103-41, codified at 42 U.S.C. §§ 2000 bb – 200bb-4 (1994).

8. City of Boerne v. P.F. Flores, 521 U.S. 507 (1997).

9. *See, e.g.*, information available on the RLUIPA website of The Becket Fund for Religious Liberty at www.rluipa.org/index.html. *See also* Stuart Meck, *Religious Land Use and Institutionalized Persons Act*, ZONING NEWS, January 2001, at 1.

10. *See, e.g.*, Letter of July 24, 2000 from Professor Marci A. Hamilton to members of the Senate, analyzing RLUIPA and concluding that it is constitutionally infirm at www.marcihamilton.com/rlpa/rluipa_letter.htm.

11. Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 CATH. LAW. 25, 44 (2000).

12. *See* ALA. CONST. amend. 622; Ariz. Rev. Stat. §§ 41-1493 to 41-1493.02 (Supp. 1999); Conn. Gen. Stat. Ann. § 52-571b (West Supp. 2000); Fla. Stat. ch. 761.01-761.05 (2000); 2000 Idaho Sess. Laws 133-34; 775 Ill. Comp. Stat. Ann. 35/10, 35/15, 35/20, 35/25 (West 1998); 2000 N.M. Laws 17; Okla. Stat. Ann 51 §§ 251-258 (West Supp. 2000); R.I. Gen. Laws § 42-80.1-3 (1998); S.C. Code Ann. §§ 1-32-10, 1-32-20, 1–32-30, 1-32-40, 1-32-45, 1-32-50, 1-32-60 (Law. Co-op. Supp. 1999); Tex. Civ. Prac. & Rem. Code Ann. §§ 110.003-110.012 (Vernon Supp. 2000) (containing an exemption for land-use regulation).

13. In the *Martin* case itself, for example, the Mormons' original application proposed a 94,100-square-foot temple topped with six steeples, the tallest of which would rise to 156 feet. After hearing the concerns of neighbors and town officials, the final plan reduced the size of the temple to 68,000 square feet with a single 83-foot-high steeple.