2004-05

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION
399 Federal Bldg, 110 Michigan NW, Grand Rapids, MI 49503

LIVING WATER CHURCH OF GOD, d/b/a OKEMOS CHRISTIAN CENTER, a Michigan ecclesiastical non-profit corporation,

Plaintiff/Appellant,

v

MERIDIAN CHARTER TOWNSHIP, SUSAN McGILLICUDDY, MARY HELMBRECHT, BRUCE D. HUNTING, JULIE BRIXIE, STEVE STIER, ANDREW J. SUCH, ANNE W. WOIWODE, in their official capacities as members of the Meridian Township Board,

Defendant/Appellee.
_____/

Hon. Robert Holmes Bell

Docket No. 5-04-CV-06

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AMICI CURIAE BRIEF OF MICHIGAN TOWNSHIPS ASSOCIATION AND MICHIGAN MUNICIPAL LEAGUE

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STATEMENT OF FACTS

Amici Curiae concur with the Summary Of Facts Involved set forth in DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT and incorporate it by reference herein.

STATEMENT OF INTEREST OF AMICI CURIAE

The Michigan Municipal League is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 511 Michigan cities and villages of which 430 are also members of the Michigan Municipal League Legal Defense Fund. The Michigan Municipal League operates the Legal Defense Fund through a Board of Directors. The purpose of the Legal Defense Fund is to represent the member cities and villages in litigation of statewide significance. This Brief Amicus Curiae is authorized by the Legal Defense Fund's Board of Directors.[1]

The Michigan Townships Association is a Michigan non-profit corporation whose membership consists of in excess of 1,235 townships within the State of Michigan joined together for the purpose of providing education, exchange of information and guidance to and among township officials to enhance the more efficient and knowledgeable administration of township government services under the laws of the State of Michigan. Through its Legal Defense Fund, the Michigan Townships Association has participated on an amicus curiae basis in a large number of state and federal cases presenting issues of statewide significance to Michigan townships.

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[1]The Board of Director's membership includes: the President and Executive Director of the Michigan Municipal League and the officers and directors of the Michigan Association of Municipal Attorneys: William B. Beach, City Attorney, Rockwood; John E. Beras, City Attorney, Southfield; Randall L. Brown, City Attorney, Portage; Ruth Carter, Corporation Counsel, Detroit; Peter Doran, City Attorney, Traverse City; Bonnie Hoff, City Attorney, Marquette; Andrew J. Mulder, City Attorney, Holland; Clyde Robinson, City Attorney, Battle Creek; Debra A. Walling, Corporation Counsel, Dearborn; Eric D. Williams, City Attorney, Big Rapids; and William C. Matthewson, General Counsel, Michigan Municipal League.

The Michigan Townships Association and the Michigan Municipal League believe that the within case presents issues of importance not just to the instant defendants, but also to local governments throughout Michigan and elsewhere. In appealing the denial of its special use permit application, the Plaintiff is seeking a level of favored status that neither the United States Constitution nor the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 USC § 2000cc, provide it. Approval of the Plaintiff's claim would subvert established principles of law in a manner that would seriously undermine local land use authority to the detriment of the general public and property owners who rely on the protection and stability that local land use controls provide.

Amici Curiae recognize that this Court would be little served by an amici curiae brief merely rehashing the discussion of case law set forth in the Defendants' very thorough brief filed in support of their Motion For Summary Judgment. Accordingly, while Amici Curiae concur with the various arguments set forth in Defendants' Brief, they will focus this Brief on one key subject: the judicially recognized standards for finding a legally cognizable "substantial burden" on religious exercise and whether the Plaintiff is likely to be able to show that the hardship to it resulting from the denial of its special use permit application rises to those standards. In doing so, Amici Curiae will primarily focus their discussion on cases decided subsequent to the filing of Defendants' Brief and other cases not otherwise discussed therein.[2]

[2]Amici Curiae emphasize that they concur with Defendants' argument that the denial of the special use permit was not an "individualized assessment" under RLUIPA and therefore did not trigger RLUIPA's protections. Amici Curiae simply have nothing to add to the thorough discussion of this issue in Defendants' above-mentioned Brief.

LAW AND ARGUMENT

I. THE "STRICT SCRUTINY" TEST INVOKED UNDER RLUIPA APPLIES ONLY IF, AMONG OTHER THINGS, A PLAINTIFF PROVES A "SUBSTANTIAL BURDEN" ON RELIGIOUS EXERCISE. INCONVENIENCE, ECONOMIC BURDENS AND/OR THE INABILITY TO ESTABLISH A DESIRED RELIGIOUS USE(S) ON A SINGLE SPECIFIC SITE HAVE NOT BEEN RECOGNIZED TO CONSTITUTE SUCH A "SUBSTANTIAL BURDEN".

RLUIPA applies, in pertinent part, to land use regulations involving an "individualized assessment" of property use which impose a "substantial burden" on free exercise of religion. RLUIPA does not define "substantial burden". However, as has been noted by a number of courts, the legislative history of RLUIPA evidences an intent to utilize the traditional "substantial burden" test as set forth in Religious Freedom Restoration Act ("RFRA") 42 U.S.C. §§ 2000bb-2000bb-4 and Free Religious Exercise jurisprudence. See Civil Liberties For Urban Believers v City of Chicago, 342 F3d 752, 760-761 (7Cir, 2003); Vineyard Christian Fellowship of Evanston v City of Evanston, 250 FSupp2d 961, 991 (N.D. Ill., 2003).[3]

In the recent case of Episcopal Student Foundation v City of Ann Arbor, 341 FSupp2d 691(ED Mich, 2004), the district court summarized the general nature of these rulings as loosely falling into two camps:

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[3]This judicial conclusion is primarily based upon the following legislative statement on RLUIPA:

> "[RLUIPA] does not include a definition of the term 'substantial burden' because it is not the intent of [RLUIPA] to create a new standard for the definition of 'substantial burden' on religious exercise. Instead, that term as used in [RLUIPA] should be interpreted by reference to Supreme Court jurisprudence." Joint Statement of Senator Hatch and Senator Kennedy on Religious Land Use and Institutionalized Persons Act of 2000, July 27, 2000, Congressional Record, Page S7776.

> "On the one hand, courts routinely find substantial burdens where compliance with the statute itself violates the person's religious beliefs and noncompliance may subject him to criminal sanctions or the loss of a significant government privilege or benefit." See Wisconsin v Yoder, 406 US205, 92 SCt 1526, 32 LEd2d 15 (1972) (compulsory high school attendance law contrary to Almish religious beliefs); Sherbert, 374 US 398, 83 SCt 1790 (denial of unemployment benefits to Seventh Day Adventist who refused to work on Saturday Sabbath). On the other hand, courts have been far more reluctant to find a violation where compliance with the challenged regulation makes the practice of one's religion more difficult or expensive, but the regulation is not inherently inconsistent with the litigant's beliefs. See Braunfield v Brown, 366 US 599, 81 SCt 1144 6LEd2d 563 (1961) (Sunday closing law made Orthodox Jewish merchants' religious observance more expensive). (Emphasis added). 341 FSupp2d at 701-702.

In Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v City of Lakewood, Ohio, 699 F2d 303 (6 Cir, 1983), the Sixth Circuit considered the "substantial burden" standard in the context of land use regulation. The Sixth Circuit rejected the plaintiff congregation's challenge to the defendant's zoning ordinance, which operated to prohibit the building of a church upon land owned by the congregation and allowed only approximately 10% of the city's land to be developable for a church. In doing so, the court rejected the plaintiff's claim that it incurred a substantial burden because the lands in the commercial zoning district (the zoning district in which churches were permitted uses) were more expensive and less suited to worship, noting that although the "lots available to the congregation may not meet its budget or satisfy its taste", the Free Exercise Clause "does not require the city to make all land or even the cheapest or most beautiful available to churches." 699 F2d at 307. The court summarized its rejection of the claim of "substantial burden" as follows:

"[The ordinance] does not pressure the congregation to abandon its religious beliefs through financial or criminal penalties. Neither does the ordinance tax the congregation's exercise of its religion. Despite the ordinance's financial and aesthetical imposition on the congregation, we hold that the congregation's freedom of religion . . . has not been infringed." 699 F2d at 307-308.

The Seventh Circuit in Civil Liberties For Urban Believers v City of Chicago, supra, (also discussed in Defendants' aforementioned Brief) described the severity of burden that must be established to find a "substantial burden" on religious exercise under RLUIPA as follows:

"Application of the substantial burden provision to a regulation prohibiting or constraining any religious exercise, including the use of property for religious purposes, would render meaningless the word 'substantial' because the slightest obstacle to religious exercise incidental to the regulation of land use - however minor the burden it were to impose - could then constitute a burden sufficient to trigger RLUIPA's requirement that the regulation advance a compelling government interest by the least restrictive means. We therefore hold that, in the context of RLUIPA's broad definition of religious exercise, a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary and fundamental responsibility for rendering religious exercise - including the use of real property for the purpose thereof within the regulated jurisdiction generally - effectively impracticable. (Emphasis added). 342 F2d at 761.

The Ninth Circuit in Christian Gospel Church, Inc. v City of San Francisco, 896 F2d 1221 (9 Cir, 1990), concluded that there was no substantial burden imposed on a church that was denied a use permit to worship in a home in a residential neighborhood. The plaintiff in that case sought to move its activity to a new site and claimed a free exercise violation when a zoning decision made the preferred site unavailable. The Ninth Circuit rejected this claim and indicated its view that "[t]he burden on religious practice is not great when the government action does not restrict

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current religious practice but rather prevents a change in religious practice." 896 F2d at 1224. The court indicated that concerns of "convenience and expense, requiring [the plaintiff] to find another home or another form of worship" were "minimal" burdens on religious practice. 896 F2d at 1224.

Similarly, in Messiah Baptist Church v County of Jefferson, 859 F2d 820 (10 Cir, 1988), cert. denied, 490 U.S. 1005 (1989), the defendant county denied the plaintiff church zoning approvals needed to construct a facility for worship services, administrative offices, classrooms, recreation purposes, parking and an amphitheater on property it owned in an agricultural district. Despite the plaintiff's preference to use its own land for its facility, the Tenth Circuit held that the additional expense that the church would incur to find another site for its facility did not impose an impermissible burden on religious exercise. 859 F2d at 825.

In Westchester Day School v Village of Mamaroneck, 386 F3d 183 (2 Cir, 2004), the Second Circuit reversed the ruling of the trial court at 280 FSupp2d 230 (S.D.N.Y., 2003), one of the principle cases relied upon by Plaintiff in its brief.[4] In Westchester, the plaintiff religious school applied for a zoning permit to allow construction of an additional school building along with renovations and improvements to the existing facilities. The defendant denied the application, citing the potential for increased intensity of use due to increased enrollment at the school, traffic concerns relating to increased volume and the effect on nearby intersections and insufficient provisions for parking. The plaintiff challenged the denial as violative of RLUIPA and moved for

[4]See PLAINTIFF'S SUPPORTING BRIEF IN RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, pp 14-15.

partial summary judgment. The trial court granted summary judgment in favor of the plaintiff, finding that although much of the project concerned expansion of secular functions of the school, these improvements were necessary for the support of the religious operations, and therefore not allowing the modifications would "burden the quality of religious education". 280 FSupp2d at 241.

On September 27, 2004, (subsequent to Plaintiff's Brief in the within matter) the Second Circuit reversed, ruling that the record did not support the trial court's finding that the denial was "complete" and thus there was insufficient support for summary judgment on the issue of "substantial burden". While the ruling on the denial was sufficient in itself to reverse the summary judgment, the Second Circuit also commented upon the standard for substantial burden since the issue would "arise in the court's future consideration of the case". 386 F3d at 189. The Second Circuit rejected the trial court's reasoning that any program of the school to improve its facilities in a manner that would improve the students' overall educational experience would be protected by RLUIPA. The Second Circuit indicated:

> "According to this logic, any improvement or enlargement proposed by a religious school to its secular and accessory facilities would be immune from regulation or rejection by a zoning board so long as the proposed improvement would enhance the overall experience of the students. Thus if two identically situated schools submitted functionally identical applications to a zoning board to rebuild and enlarge their gymnasium facilities, one being a religious school, the other a secular school, according to standards applied by the district court, the zoning board would be free to reject the application of the secular school but not that of the religious school, assuming the gymnasium would improve the experience of the students in the religious school." 386 F3d at 189.

The Second Circuit did not rule on the proper standard, but remanded the issue to the trial court with the observation that "if RLUIPA means what the district court believes it does, a serious question arises whether it goes beyond the proper function of protecting the free exercise of religion into the constitutionally impermissible zone of entwining government with religion in a manner that prefers religion over irreligion and confers special benefits on it." 386 F3d at 190.

In Vineyard Christian Fellowship of Evanston v City of Evanston, 250 FSupp2d 961 (N.D. Ill., 2003), a case "conceptually similar" to the within case and the Episcopal Student Foundation case discussed below, the plaintiff church owned a facility that it used to host concerts, large group meetings, educational events and liturgical dance presentations, but was not permitted under local zoning to use the facility for its worship services. The district court rejected the plaintiff's claim that this limitation imposed a "substantial burden" violative of RLUIPA even though the court acknowledged that the church had incurred substantial expense in renting a place to worship, that it would be difficult to find available land in the defendant city to buy property for a church and that the plaintiff had made a significant unsuccessful effort to find such land. Reviewing applicable case law, including Lakewood discussed above, the court stated:

> "The court does not turn a blind eye to the practical consequences of this ruling. Vineyard's evidence leaves no doubt that its inability to worship at the subject property has been costly and that the church would benefit from owning and administering the facility in which its congregation worships. In light of the case law, however, the court concludes that these monetary and logistical burdens do not rise to the level of a substantial burden on Vineyard's constitutional free exercise rights." 250 FSupp2d at 987.

Finally, Amici Curiae wish to bring to this Court's attention the recent ruling in Episcopal Student Foundation v City of Ann Arbor, (op cit). Because of the similarity of the issues of fact and law to the within case, Amici Curiae believe the court's detailed analysis of RLUIPA and the plaintiff's claims may be of interest to this Court.

Plaintiff Episcopal Student Foundation (d/b/a Canterbury House) is a non-profit corporation and instrumentality of the Episcopal Church serving students at the University of Michigan and other Ann Arbor residents. Canterbury House filed suit when the Ann Arbor Historic District Association denied its application to demolish its existing worship facility and replace it with a new, larger building. Canterbury House alleged in pertinent part that the denial of its application imposed a "substantial burden" on its religious exercise in violation of RLUIPA.

In support of its claim of a "substantial burden", Canterbury House argued that in recent years it had experienced significant growth in its membership and had outgrown its current facility as a result. Canterbury House claimed that it could no longer accomplish its religious mission and create a spiritual community for its members. Difficulties with the existing facility cited by Canterbury House in support of this conclusion included the following:

1. Canterbury House was unable at times to accommodate at one time all of the individuals who wished to attend worship services.

2. The existing facility had a small and outdated kitchen and no dining area, thereby making Canterbury House unable to fulfill its religious mission to help the hungry by preparing and serving meals at the facility.

3. The existing facility had no space for a student lounge.

4. The existing facility had no dedicated space for meditation. 341 FSupp2d at 693-694.

While finding that the denial of Canterbury House's application constituted an "individualized assessment" of land use regulation under RLUIPA, the court rejected the proposition that the denial constituted a "substantial burden" on its religious exercise in violation of RLUIPA.

After reviewing pertinent case law, including Lakewood and Vineyard, the court rejected the plaintiff's various grounds for alleging a "substantial burden" of religious exercise. With respect to the plaintiff's claim that its small, outdated kitchen and lack of a dining area precluded it from fulfilling its religious mission to help the hungry by preparing and serving meals at its facility, the court noted that plaintiff's members were currently preparing and serving meals at many different local churches and stated:

> "Although it may be 'incredibly beneficial' if Canterbury House were able to offer its own kitchen and dining room for such services, there is no indication that Canterbury House cannot continue to feed the hungry at such alternate locations, and thus fulfill its religious mission. See Daytona Rescue Mission, Inc. v City of Daytona Beach, 885 FSupp 1554, 1560 (M.D. Fla. 1995) (Denial of special use permit did not substantially burden plaintiff's free exercise where plaintiff failed to show that city code prevented it from running shelter or food programs anywhere in Daytona Beach)." 341 FSupp2d at 705.

Regarding plaintiff's claims of "substantial burden" based on the existing facility's lack of a student lounge or a dedicated space for meditation, the court stated:

> "Likewise, the evidence in the record indicates that Canterbury House currently offers meditation, prayer and study groups for its members . . . The Court is not convinced that a lack of a designated meditation space or student lounge imposes a substantial burden on Canterbury House or its members." (Emphasis in original). 341 FSupp2d at 705-706.[5]

[5]While the court suggested that the plaintiff's space difficulties might be eliminated if it ceased to lease out the second floor of its facility and questioned the plaintiff's claim that this was not a feasible option, the court "put aside" this possible

Regarding the plaintiff's complaint that it had outgrown its existing facility and was unable at times to accommodate at one time all of the individuals who wished to attend worship services, the court stated:

> "Finally, although Canterbury House may incur additional financial burdens, such as rental expenses to accommodate its entire congregation on occasion, or if it seeks additional growth, such financial burdens are not "substantial" under the RLUIPA. See Vineyard Christian Fellowship of Evanston, Inc. v City of Evanston, 250 FSupp2d 961, 986 (holding zoning ordinance that prohibited religious institution from conducting worship services in district where it owned land did not substantially burden plaintiff's free exercise, despite the fact that the "congregation is forced to spend a considerable amount of money to rent space where worship services may be held."); Lakewood, 699 F2d at 307 (no infringement on religious exercise where plaintiff was not prevented from practicing its faith in other venues throughout the city, even though ordinance prohibited plaintiff from building church on land it owned). Similarly, even though Canterbury House complains that other suitable land in the vicinity is too costly, or that others outbid Canterbury House when such land becomes available, those burdens do not render the city's permit denial actionable under the RLUIPA." 341 FSupp2d at 706.

In summary, while the courts have uniformly found a "substantial burden" on religious exercise where compliance with the challenged law or practice violates a person's religious beliefs and may subject him/her to criminal sanction or the loss of a significant governmental privilege or benefit, they have been reluctant to find a "substantial burden" from a law or practice that only causes greater expense or difficulty in one's religious practice or which renders a specific site unavailable for religious use

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"second floor option" and still found that a "substantial burden" had not been established. 341 FSupp2d at 704.

or expansion. It is in the context of these holdings that Plaintiff's claim of a "substantial burden" violative of RLUIPA must be examined.

II. PLAINTIFF IS UNLIKELY TO DEMONSTRATE THAT THE DENIAL OF A SPECIAL USE PERMIT TO ALLOW PLAINTIFF TO INCREASE THE TOTAL BUILDING AREA UPON ITS SIX ACRE PARCEL ABOVE 25,000 SQUARE FEET (FROM 10,925 SQUARE FEET TO 45,925 SQUARE FEET) IMPOSED A SUBSTANTIAL BURDEN ON RELIGIOUS EXERCISE.

42 U.S.C. § 2000cc-2(b) provides:

"(b) Burden of persuasion.

> If a plaintiff provides prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of Section 2000cc of this title [RLUIPA], the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion." (Emphasis added).

Thus, the burden of persuasion rests on the Plaintiff in the within case to establish that the denial of its special use permit application created a legally cognizable substantial burden on its religious exercise.

While Amici Curiae will not presume to predict the proofs Plaintiff will present to this Court to support its claim of a substantial burden on religious exercise, Amici Curiae do note the very high standard that must be met and question Plaintiff's ability to meet it. The denial of Plaintiff's special use permit application to construct an additional 35,000 square foot building on its subject six acre parcel (thereby allowing a total building area of 45,920 square feet on the parcel) was based on the reasonable determination of the Defendant Township Board that so much building area on such a

relatively small parcel would be out of character with the surrounding area and therefore not meet the Zoning Ordinance's standards for special use permit approval. This denial did not require Plaintiff to violate its religious beliefs or cause the loss of a significant government privilege or benefit, the traditional test for finding a "substantial burden" on religious exercise. Plaintiff was simply prevented from having as much building area on its subject parcel as it would like (i.e., from more than quadrupling the building area on its parcel). To the extent this denial can be shown to impose inconvenience or financial burdens on Plaintiff, such hardship does not rise to the level of constituting a "substantial burden" on religious exercise as that standard has been applied in past judicial decisions. Such difficulties have not and do not, in the words of the Seventh Circuit in Civil Liberties For Urban Believers quoted previously, render religious exercise "effectively impracticable". Amici Curiae believe any attempt by Plaintiff at trial to establish otherwise must fail.

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CONCLUSION

Amici Curiae believe it of critical importance to municipalities throughout Michigan and elsewhere that Plaintiff's claim that the denial of its special use permit application imposed a substantial burden on its religious exercise in violation of RLUIPA be evaluated in light of the judicial principles discussed above. Amici Curiae are confident that such an evaluation will find Plaintiff's claim to be without merit.

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Dated: February 3, 2005

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