

Preservation Law Educational Materials . . .

COURT DECISIONS INVOLVING HISTORIC RELIGIOUS PROPERTIES

Free Exercise Clause

Under the First Amendment to the U.S. Constitution, “Congress shall make no law prohibiting the free exercise of [religion].” The U.S. Supreme Court, in *Employment Division v. Smith*, 494 U.S. 872 (1990), held that except for “neutral laws of general applicability,” government may not “substantially burden” the free exercise of religion unless the burden is the “least restrictive means” of furthering a “compelling governmental interest.” (Historic preservation does not qualify as a compelling governmental interest.)

A. Free Exercise Rights Not Violated

Second Circuit

Rector, Warden & Members of the Vestry of St. Bartholomew’s Church v. City of New York, 728 F. Supp. 958 (S.D.N.Y. 1989), *aff’d*, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). [Leading federal case on the constitutionality of landmark regulation of historic religious properties, and the only federal appellate case to address the issue directly.]

Summary: St. Bartholomew’s sought to demolish landmarked community house to build a 59-story office tower to fund its religious activities. Federal district court and court of appeals both held that landmark designation and denial of demolition permit for historic church building did not unconstitutionally burden the free exercise rights of the church, even though the law substantially limit[ed]” the church’s options “to raise revenue for purposes of expanding religious charitable activities.” Court ruled specifically that historic preservation ordinances are facially neutral laws of general applicability and concluded that church had failed to prove that it could not carry out its mission in its existing facilities.

U.S. District Arizona

Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, No. CV-08-996-PHX-NVW (D. Ariz. Jan. 30, 2009), **2009 U.S. Dist. LEXIS 7225**. [Free exercise challenge to denial of CUP permit to operate church on historic Main Street denied.]

Summary. Denial of conditional use permit (CUP) to operate church in newly acquired property on the City of Yuma’s historic Main Street because operation of a church was “inconsistent with the [city’s] past efforts and future plan to develop Main Street into a tourism, entertainment, and retail corridor” did not violate the First and Fourteenth Amendments to the U.S. Constitution, and the Arizona Religious Freedom Restoration Act, A.R.S. §§ 41-1493 to 41-1493.02. The city’s CUP law was neutral and generally applicable; the city did not discriminate on the basis of

religion; and the church's religious exercise rights were not substantially burdened. *See* RLUIPA below.

District of Columbia

Metropolitan Baptist Church v. District of Columbia Department of Consumer and Regulatory Affairs, 718 A.2d 119 (D.C. App. 1998). [Free exercise challenge to historic designation of church-owned property held not ripe for review.]

Summary. Free exercise challenge to historic designation of five rowhouses dating from the late nineteenth century held not ripe for review under *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). "The church has not shown that historic designation has had a 'direct and immediate' affect upon its rebuilding plans or that it has felt the burdens of the permit process 'in a concrete way' sufficient to overcome the lack of ripeness." Declined to follow Washington Supreme Court case law on the issue of whether designation alone violates the Free Exercise clause. Rather, court followed *St. Bartholomew's Church* (see above) and *Church of St. Paul & St. Andrew v. Barwick*, 496 N.E.2d 183 (N.Y. 1986), stating that it knew of "no subsequent developments in free-exercise jurisprudence to suggest" that these cases should not control.

Connecticut

First Church of Christ v. Ridgefield Historic District Comm'n, 738 A.2d 224 (Conn. Super. Ct. 1998), *aff'd*, 737 A.2d 989 (Conn. App. 1999), *cert. denied*, 737 A.2d 989 (Conn. 1999). [Free exercise clause not implicated.]

Summary. Preservation commission denied permission to install vinyl siding on a historic church. Appeals court affirmed trial court decision, which had rejected First Amendment claim because there was no interference with right to express "religious views, or associate or assemble for that purpose," and First Amendment "cannot be extended . . . to avoid otherwise reasonable and neutral legal obligations imposed by government."

Kansas

Friends of Bethany, Inc. v. City of Topeka, Case No. 07C1195 (Kans. Dist. Ct. July 21, 2007). [A decision to deny the Cathedral's parking lot project would not rise to the level of a "direct and substantial burden" on religious exercise.] Note: City Council voted to appeal decision.

Summary. In the context of a challenge to the City of Topeka's issuance of a permit to construct a new parking lot on the grounds of a historic resource under the Kansas Historic Preservation Act, the court rejected the claim raised by Grace Cathedral and the Episcopal Diocese of Topeka (Intervenors) that the city was compelled under *Mount St. Scholastica v. City of Achison* (see below) to issue the permit under the Free Exercise Clause because the church's religious rights would not otherwise be substantially burdened. The court wrote: "The simple answer to the inapplicability of these cases and the referenced statutes is that the Free Exercise Clause of the First Amendment has not been shown to apply to the Diocese's and Grace Cathedral's desire to build a parking lot since it is not an activity that substantially burdens the religious beliefs, messages, mission, conduct, or practices of either, but, rather, only a secular preference of the Intervenors is affected." It also stated: "Here, no evidence exists before the Court that would remotely indicate that either the Kansas Historic Preservation Act, or the Act's particular implementation here by the Kansas Historical Society, was grounded other than on the sound premise of securing historic environs for the benefit of future citizens. Accordingly, any consideration of deference to the Diocese or Grace Cathedral because of their status as religious entities would have been wholly improper considerations and would not have been a 'relevant factor' in approving or disapproving the Diocese's requested permit to build a parking lot on the Bethany Place environs."

Michigan

City of Ypsilanti v. First Presbyterian Church, No. 191397 (Mich. App. Feb. 3, 1998) unreported). [Free exercise clause not implicated.]

Summary. Enforcement of Ypsilanti historic district ordinance did not violate Free Exercise Clause of the First Amendment in lawsuit challenging requirement that church maintain 1837 log cabin on church-owned property and challenging the denial of a demolition permit. Alleged “burdens are only incidental effects of the ordinance [that do] not burden [the church] any more than any other citizen.”

New York

Church of St. Paul & St. Andrew v. Barwick, 496 N.E.2d 183 (N.Y. 1986), *cert. denied*, 479 U.S. 985 (1986). [Free exercise challenge to landmark designation of historic church not ripe for review.]

Summary. Landmark designation of historic church alone does not impinge on the religious uses of property and the ultimate effect will not be direct but purely consequential. Burden of proof under New York City’s charitable test “is neither dependant upon nor peculiar to church’s religious character.”

Society for Ethical Culture v. Spatt, 415 N.E.2d 922 (N.Y. 1980). [Free exercise clause not implicated.]

Summary. Society challenged New York City’s landmark designation of its meeting house under the Free Exercise Clause of the U.S. and N.Y. Constitutions (among other claims) on grounds that it was “improper to restrict its ability to develop the property to permit rental to nonreligious tenants. Court ruled that First Amendment not implicated, stating that the constitution “does not entitle [Society] to immunity from reasonable governmental regulations when it acts in purely secular matters.”

Ohio

Diocese of Toledo v. Toledo City-Lucas County Plan Commission, No. 97-3710 (Ohio Ct. Common Pleas Mar. 31, 1998), *rev. on other grounds*, No. L-98-1150 (Ohio App. Mar. 12, 1999)[1999 Ohio App. LEXIS 868](unpublished). [Denial of permission to demolish house for church parking lot is not undue burden on free exercise rights.]

Summary. Trial court upheld decision by Toledo-Lucas County Plan Commissions, denying permission to demolish open gable cottage style house in Toledo’s Old West End Historic District owned by the Catholic Diocese of Toledo. Record failed to establish that denial amounted to an undue burden on the Diocese’s right to freely exercise its religion or that the denial prevented the Diocese from continuing existing charitable or religious activities.

B. Free Exercise Rights Violated

U.S. District of Maryland

Keeler v. Mayor & City Council of Cumberland, Md., 940 F. Supp. 879 (D. Md. 1996). [Historic preservation ordinance is not neutral law of general applicability; free exercise rights violated.]

Summary. Federal court overturned city’s denial of demolition permit for historic monastery, ruling that the preservation ordinance at issue was not a “neutral law of general applicability” because it included a system of “individualized exemptions” (vis-à-vis its economic hardship process), and that historic preservation is not a compelling governmental interest. Court applied strict scrutiny without expressly finding that religious exercise was “substantially burdened.” The court concluded that the City’s denial of the Certificate of Appropriateness infringed upon the Church’s free exercise rights based on the church’s assertion, by affidavit, that Roman

Catholic law, teaching and tradition requires it to replace the old Monastery with facilities more appropriate to its liturgical needs. In reaching its decision, the court stated that it could not question the sincerity of the church's beliefs.

U.S. District of Kansas

Mount St. Scholastica v. City of Achison, 482 F. Supp. 2d 1281 (D. Kans. 2007).

Summary. The court ruled that the city's denial of a demolition permit under the Kansas Historic Preservation Act violated the monastic community's free exercise rights. The court applied strict scrutiny on the basis that the law was not neutral because the law's permitting system constituted a system of individualized exemptions. Significantly, the court never addressed whether denial of the permit substantially burdened the owner's free exercise rights because the city did not dispute that the city's actions would burden the plaintiff's religious practices. The court accepted as true the plaintiffs' allegations that denial of the demolition permit burdened its religious practices without analysis. *Compare, Friends of Bethany v. City of Topeka*, discussed above.

Massachusetts

Society of Jesus v. Boston Landmarks Comm'n, 564 N.E.2d 571 (Mass. 1990). [Interior landmark designation of church violates freedom of religion provision in state constitution.]

Washington

Religious entities often cite to a trilogy of Washington in challenging the regulation of their properties. But as with *Society of Jesus*, these cases were decided under the free exercise clause of the state's constitution. The state's provision reads: "Absolute freedom of conscience in all matters of religious sentiment, belief, and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion"

First Covenant Church v. City of Seattle, 787 P.2d 1352 (Wash. 1990), vacated and remanded, 499 U.S. 901 (1991), on remand, 840 P.2d 174 (Wash. 1992). [Landmark designation of church is unconstitutional in Washington.]

Summary. Landmark designation of historic church is unconstitutional, even though the church had no plans for alteration and had never applied for or been denied any permit. The court held, under the Washington Constitution, that the financial burden of a reduced property value, and even the "administrative" burden of having to request approval from a secular governmental authority, was unconstitutional. The court also held that the church was protected under the free speech clause because of the "architectural 'proclamation' of religious belief inherent in [the] Church's exterior."

First United Methodist Church v. Hearing Examiner for the Seattle Landmarks Preservation Board, 916 P.2d 374 (Wash. 1996). [Even nomination of church property for landmark designation is unconstitutional in Washington.]

Summary. The court overturned the city's proposed designation of a 1909 church as a landmark under the state constitution. It reasoned that the mere potential for landmark designation "severely burdens" the church because it could impede the sale of the property to a non-religious owner.

Munns v. Martin, 930 P.2d 318 (Wash. 1997). [Landmark designation of historic school owned by religious entity is also unconstitutional within the state.]

Summary. The court extended its ban on religious landmarks to buildings other than houses of worship, overturning the designation of a 1928 Catholic school in Walla Walla, even though the

city's preservation ordinance does not preclude demolition, but merely authorizes a 14-month delay.

See also, Friends of First United Church v. City of Seattle, No. 55731-9-I (Wash. App. Nov. 21, 2005), 2005 Wash. App. LEXIS 2927, *cert. denied*, 130 Wn. App. 1031, 2005 Wash. App. LEXIS 3377. [City cannot burden church's right to free exercise by preventing it from demolishing its sanctuary for landmark preservation purposes under the state environmental protection act.]

Summary. Friends argued that under the State Environmental Policy Act (SEPA), the church should have considered alternatives that did not involve destruction of the historic church sanctuary. In view of the Washington Supreme Court holding that that application of the Landmarks Preservation Ordinance (LPO) burdened the church's free exercise rights, the court concluded that the city could not force the church to consider alternatives to demolition of the sanctuary without implicating the state's free exercise clause and that the city's EIS was adequate in the other respects. "Since FUMC cannot be required to maintain the sanctuary for purposes of landmark preservation, it also cannot be required to consider alternatives that, if imposed, would violate FUMC's constitutional rights."

Religious Land use and Institutionalized Person's Act (RLUIPA)

Statute Not Violated

U.S. District Arizona

Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, No. CV-08-996-PHX-NVW (D. Ariz. Jan. 30, 2009), **2009 U.S. Dist. LEXIS 7225**. Denial of conditional use permit to operate church in newly acquired property on the City of Yuma's historic Main Street because operation of a church was thus "inconsistent with the [city's] past efforts and future plan to develop Main Street into a tourism, entertainment, and retail corridor" did not violate RLUIPA.

Summary. The federal district court upheld the city's denial of application of conditional use permit to operate church on its historic Main Street because it would prevent the issuance of liquor licenses and would therefore interfere with its decade-long plan and investment of significant sums of money to develop Main Street into a tourism, entertainment, and retail corridor with a special emphasis on historic preservation. The court found that the church's religious exercise was not substantially burdened in violation of RLUIPA where "[n]othing suggests that the [city] would have denied the church a permit to located elsewhere in its Old Town District or elsewhere in the city and the church had failed to show that "suitable properties" did not exist outside of Main Street. It also found that RLUIPA's equal terms provision was not violated where the ordinance on its face and as applied established that the city was guided by neutral and generally applicable principles such as "the neutral desire to redevelop the Old Town District in general, and Main Street in particular as a tourism, entertainment, and retail area."

U.S. Central District Illinois

Trinity Evangelical Lutheran Church v. City of Peoria, Case No. 07-cv-1029 (C.D. Illinois Mar. 31, 2009), **2009 U.S. Dist. LEXIS 35955**. Landmark designation of church-owned apartment building and denial of certificate of appropriateness to demolish building did not result in substantial burden on religious exercise and therefore did not violate RLUIPA.

Summary. The federal district court denied the church's motion for summary judgment on its claim that designation and denial of apartment building violated RLUIPA as a substantial burden on religious exercise because it prevented the church from constructing a "religious life center"

on the site of the building. The court stated that application of the city's preservation ordinance affected "only one building and one location on the Church campus" and in "no way prevent[ed] the Church from continuing its religious ministries." Although the court recognized that the church was burdened by limitations on the uses for the landmarked building, the manner in which the building could be renovated, and increased financial costs if the church elects to renovate the building, it concluded that application of the city's preservation ordinance did not "bear[] [a] direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable" and thus did "not place a substantial burden on the Church's activities."

U.S. Eastern District Michigan

Episcopal Student Foundation v. City of Ann Arbor, 341 F. Supp. 2d 691 (E.D. Mich. 2004).

Defendants' decision to deny Plaintiff's permit application constituted an individualized assessment under a land use regulation regarding Plaintiff's proposed use of the property for jurisdictional purposes. However, historic commission's denial of permit application to demolish its existing building and construct a new one in its place did not rise to the level of a "substantial burden" and therefore did not violate RLUIPA.

Summary. The city's denial of the Foundation's application to demolish its existing facility did not substantially burden its free exercise of religion where the city did not force it to choose between pursuing its religious beliefs and incurring criminal penalties or forgoing government benefits or prevent it from engaging in religious worship, or other religious activities. Despite the Foundation's claim that its only feasible choice was to demolish its current structure and build a new facility in its place, the court found that solutions to its problems appeared to be within its "control;" that it presently offered or participated in many, if not all, of the religious activities which it cited in support of its substantial burden; and that although it may incur additional financial burdens, those burdens were not "substantial."