Third Church: Southern District Interprets Equal Terms Provision of Religious Land Use and Institutionalized Persons Act of 2000

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The authors explore a recent decision by a federal district court in New York and its potential implications on properties owned, used, leased and/or operated by religious institutions.

Recently, the United States District Court for the Southern District of New York (the ''Court'') rendered a decision in *Third Church of Christ, Scientist, of New York v. City of New York*.[1] In *Third Church*, the Court applied the Equal Terms Provision of the Religious Land Use and Institutionalized Persons Act of 2000 (''RLUIPA''),[2] to a lease (the ''Lease'') of a church building at 583 Park Avenue, New York, New York (the ''Property''). The Lease was by the Third Church of Christ, Scientist, of New York (the ''Church'') to a catered event business, the Rose Group, permitting the Rose Group to hold catered social events (''Catering Business'') on the Property. The Court ruled that the City of New York (the ''City'') violated the Equal Terms Provision of RLUIPA because the Church was treated more harshly than other secular groups in applying the Zoning Resolution of the City of New York (''Zoning Resolution'') and did not show a compelling interest in discriminatorily applying the Zoning Resolution.

This article provides a brief overview of the decision and its potential implications on properties owned, used, leased and/or operated by religious institutions.

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Background

The *Third Church* case arose after the City revoked a previously issued permit (*i.e.*, the pre-consideration) that had allowed the Catering Business as an accessory use on the Property.[3] The Church had sought the permit because under the Zoning Resolution of the City of New York (the ''Zoning Resolution''), the only permitted uses for the Property were residences, community facilities and uses that are accessory to residences and community facilities. The City revoked the permit based on a reexamination of the Lease and the relative frequency and intensity of the Catering Business, which found that the Catering Business did not meet the definition of an accessory use.[4]

The City noted that it reexamines its determinations when they are challenged and that when it finds that an erroneous determination has been made, it is obliged to correct the error. The City explained that in this case, the reexamination found that compared to the accessory Catering Business, the primary religious use was

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''virtually non-existent'' and that the Catering Business ''[did] not comport with the Zoning Resolution's requirement that it be 'clearly incidental to, and customarily, found' in connection with the Church.''[5] Consequently, the City argued, it was obligated to revoke the previously issued permit.

The Church alleged that the City's revocation of the permit was a discriminatory application of the Zoning Resolution to the Church, and as such violated both the Substantial Burden Provision and the Equal Terms Provision of RLUIPA.[6] The Substantial Burden Provision provides that no government may impose a substantial burden on the religious exercise of a person or an organization unless the government demonstrates that such burden is in ''furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest.''[7] The Equal Terms Provision provides that ''[n]o government [may] 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.''[8]

In support of its claims, the Church offered, as non-religious comparators, the examples of two restaurant/eating and drinking establishments that were operated at two apartment hotels, each of which was classified and permitted as an accessory use to the apartment hotel. The Church noted that although both of these businesses were operated in violation of the Zoning Resolution (because they were open to the public and not limited to use by residents of the respective buildings), the City had not revoked their permits (as it had with the Church), but rather had issued each with only a Notice of Violation. The City conceded that a ''Notice of Violation is very much removed from a total revocation of permission.''[9]

The Decision

The Court dismissed the Church's Substantial Burden claim, holding that ''a burden on a Church's ability to hold catered social events is not a burden on ''religious exercise'' as contemplated by RLUIPA.'' The Court noted that the Church's Equal Terms Provision claim presented an issue not previously addressed by the Second Circuit Court of Appeals, but which had been addressed by the Third, Seventh and the Eleventh Circuits. The Court concluded that, applying the analyses used by any of these Circuits, the City had violated the Equal Terms Provision by (i) revoking the Church's permit, while only issuing a Notice of Violation to the secular groups, and (ii) not having a compelling governmental interest in its discriminatory application of the Zoning Resolution.

The Court noted that the Circuit Court decisions differed primarily with respect to the standards that each court applied to determine whether the non-religious comparators offered by a plaintiff are appropriate comparators under RLUIPA. The Eleventh Circuit's analysis requires only that the non-religious comparator be an assembly or an institution, and if both the religious and non-religious groups are deemed to be assemblies or institutions, strict scrutiny analysis is applied. The Third Circuit has taken a narrower view, holding that ''a religious plaintiff under the Equal Terms Provision . . . [must] identify a better-treated secular comparator that is similarly situated in regard to the objectives of the challenged regulation.''[10] Similarly, the Seventh Circuit has held that ''a plaintiff need not demonstrate disparate treatment between two institutions similarly situated in all relevant respects.''[11]

Because the Court determined that the City had violated the Equal Terms Provision under each of these analyses, it declined to adopt a single, definitive interpretation of the Equal Terms Provision. The Court noted that the City's decision to revoke the Church's permit was problematic because it suggested that ''smaller religious groups could be treated less favorably under the Zoning Resolution than larger, more popular congregations'' when smaller religious groups ''are no less deserving of protection.''[12] The Court held that the City's action violated the Equal Terms Provision under the Third Circuit's interpretation, because the Church and the apartment hotels all were subject to the Zoning Resolution, but the Church was treated more harshly under the Zoning Resolution than were the secular comparators.

The Court concluded that even under the Eleventh Circuit's interpretation, the City would be found to be in violation of the Equal Terms Provision. The Court noted that because the Church and the two apartment hotels all met the definition of an institution or an assembly, the apartment hotels were proper comparators. Therefore, under the Eleventh Circuit's interpretation, the strict scrutiny standard would be applied, requiring the City to show a compelling interest in its discriminatory application of the Zoning Resolution to the Church. The Court held that under the strict scrutiny standard, the lack of complaints against the comparators and the potential for larger events to be held at the Church were not compelling interests that would justify revocation of the permit.

Based on the foregoing analysis, the Court concluded that the City's treatment of the Church on terms that were less favorable than those accorded to larger, secular institutions, and the City's revocation of the permit ''while simultaneously allowing other, neighboring, non-religious groups to conduct the identical use'' violated ''the plain language of the statute.''[13]

Potential Implications

Although the Court did not adopt a bright-line standard to follow in claims arising under the Equal Terms Provision of RLUIPA, the *Third Church* decision clearly demonstrates that the courts will require a governmental agency to show a compelling govern-

mental interest when it discriminatorily applies regulations, codes and/or law to a religious institution, regardless of the size of the institution. To a certain degree, the *Third Church* decision leaves certain questions unanswered, as the case did not present a set of facts upon which the Court could provide clear answers, standards and guidance.

For example, although the Court dismissed the Church's Substantial Burden claim based on its finding that a burden on the Church's ability to hold social events is not a burden on religious exercise, the Court did not address the issue of whether the Church's inability to hold social events might be a burden on the Church's religious exercise if the deprivation of revenues generated through such events threatened the Church's ability to fund ongoing operations.[14] Conversely, the Court's dismissal of the Substantial Burden claim may suggest that the refusal by governmental agencies to permit non-religious activities by religious institutions does not constitute a substantial burden on their exercise of religion merely because such refusal results in financial hardship to the religious institutions.

It should be noted that the *Third Church* decision hinged entirely on the fact that the City only issued a Notice of Violation to both apartment hotels, whereas it revoked the Church's permit. If the City had issued an order to the apartment hotels that would have been equivalent to the revocation issued to the Church, or if the City issued only a Notice of Violation to the Church, this case would likely have been decided differently.

Lastly, it is unclear how much weight the Court gave to the fact that one of the comparators was located in a commercial district, with a land use purpose that is generally separate and distinct from that of residential districts, in rendering its decision. The Court appears to have focused on the existing uses of each of the comparators (apartment hotel with restaurant/catering hall as accessory uses) to find that the apartment hotels were appropriate comparators. These appear to be open questions that are likely to be addressed in future decisions.[15]

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[1] Third Church of Christ, Scientist, of New York v. City of New York, No. 07 Civ. 10962, 2008 WL 5102466 (SDNY).

[2] 42 U.S.C.A. § 2000cc (2002).

[3] The DOB previously had permitted the Church to lease the Property to the Rose Group after finding that catered events under the Lease complied with the 'Accessory Social Hall' requirement.

[4] Section 12-10 of the Zoning Resolution of the City of New York defines accessory use as a use that is ''clearly incidental to, and customarily found in connection with'' a principal use.

[5] Third Church of Christ, Scientist, of New York v. City of New York, No. 07 Civ. 10962, 2008 WL 5102466 (SDNY), at 10-11,13.

[6] Under RLUIPA, a plaintiff can make claims under the Substantial Burden Provision, the Equal Terms Provision, or both. 42 U.S.C.A. § 2000cc.

[7] 42 U.S.C.A. § 2000cc(a).

[8] 42 U.S.C.A. § 2000cc(b).

[9] *Third Church*, at 14 (Internal quotations removed).

[10] *Third Church*, at 21.

[11] *Third Church*, at 23 (citing *Vision Church v. Village of Long Grove*, 468 F.3d 975, 1003 (7th Cir. 2006)).

[12] *Third Church*, at 26.

[13] Third Church, at 33.

[14] The Court did recognize that the Church faced irreparable harm, in that it might be forced to sell the Property, if the Court denied its motion for a permanent injunction.

[15] These open questions may be addressed through other future litigations and/or through an appeal to the Second Circuit Court of Appeals. The City filed a Notice of Appeal on December 8, 2008 in accordance with Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure.