AGENDA ITEM 5
July 24, 2007
Public Hearing

MEMORANDUM

TO: County Council

FROM: Michael Faden, Senior Legislative Attorney

SUBJECT: **Public Hearing**: Bill 15-07, Forest Conservation – Religious Institutions

Bill 15-07, Forest Conservation – Religious Institutions, sponsored by the Council President at the request of the County Executive and Councilmember Leventhal, was introduced on June 26, 2007. A Transportation and Environment Committee worksession is tentatively scheduled for July 26 at 9:30 a.m.

Background

Bill 15-07 would reverse an amendment to the County forest conservation law that the Council enacted in 2001 as part of a larger set of amendments in Bill 35-00. Bill 15-07 would revise the law to treat religious institutions like other institutions as defined in the forest conservation law, rather than treating them as if they were governed by the base zone where each is located. Bill 35-00 subjected a religious institution to the same afforestation requirements as the base zone where the institution is located, rather than categorizing a religious institution as an institutional use as defined in the County and state forest conservation laws (see definition, ©2, lines 4-7). In some cases this change would make a significant difference in the amount of afforestation or reforestation required when a particular institution is built. For example, the forest conservation threshold at a site can vary from 20% to 50%, depending on which category applies (see table on ©2).

The County Attorney concluded in 2001[1] and still believes that this apparently disparate treatment of religious institutions may violate both the First Amendment's Free Exercise clause and the federal Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) because in his view[2] it subjects religious institutions to more onerous requirements than other institutions. This conclusion disregards the fact that most if not all similar uses must obtain a special exception, but religious institutions need not. Council staff disagrees with the County Attorney

[1]See Bill 35-00 documents, ©33-37.
[2]Joined by the attorney for an affected church; see Viani memo on ©6-9.

because we believe the 2001 amendment leveled the playing field by effectively treating religious institutions comparably, in the broadest sense, to other institutional uses.

Legal materials

To help analyze the legal issues presented by this bill, this packet contains:

- the 4th Circuit's opinions in the *Renzi* case, where the Court (2-1) upheld the constitutionality of the County zoning law's exemption of private schools on church property from the law's special exception requirement (see ©10-17);
- a case note from the *Harvard Law Review* criticizing the reasoning and result in the *Renzi* case (see ©18-25); and
- a recent article from the *Zoning and Planning Law Report* which carefully analyzes the land use provisions of RLUIPA and the caselaw interpreting it (see ©26-32).

This packet contains:	Circle #
Bill 15-07	1
Legislative Request Report	4
Memo from County Executive	5
Memo from attorney for Parker Memorial Baptist Church	6
Ehlers-Renzi v. Connelly School, 4th Circuit opinion	10
Harvard Law Review case note re *Renzi* case	18
Zoning and Planning Law Report article re RLUIPA	26
Documents from Bill 35-00:	
Memo to Executive from County Attorney	33
Memo from Executive to Council President	34
Memo from Council President to Executive	35
Memo from Sr. Legislative Attorney to Council President	36
Fiscal impact statement	38

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Bill No. 15-07
Concerning: Forest Conservation – Religious Institutions
Revised: 6-20-07 Draft No. 1
Introduced: June 26, 2007
Expires: December 26, 2008
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL
FOR MONTGOMERY COUNTY, MARYLAND

By: Council President at the Request of the County Executive and Councilmember Leventhal

AN ACT to:

(1) further define the application of certain forest conservation requirements to certain religious institutions; and
(2) generally amend the law regarding forest conservation.

By amending
Montgomery County Code
Chapter 22A, Forest Conservation - Trees
Sections 22A-3 and 22A-12

Boldface	*Heading or defined term.*
Underlining	*Added to existing law by original bill.*
[Single boldface brackets]	*Deleted from existing law by original bill.*
Double underlining	*Added by amendment.*
[[Double boldface brackets]]	*Deleted from existing law or the bill by amendment.*
* * *	*Existing law unaffected by bill.*

The County Council for Montgomery County, Maryland approves the following Act:

Sec. 1. Sections 22A-3 and 22A-12 are amended as follows:

22A-3. Definitions

* * *

Institutional development area means land occupied by uses such as schools, colleges and universities, military installations, transportation facilities, utility and sewer projects, government offices and facilities, fire stations, golf courses, recreation areas, parks, and cemeteries. [In this Chapter, *institutional development* does not include a religious institution which is a permitted use in any zone and would not require a special exception.]

* * *

22A-12. Retention, afforestation, and reforestation requirements.

(a) *Table.*

Forest Conservation Threshold and Required Afforestation as a Percentage of Net Tract Area		
Land Use Category [1]	*Forest Conservation Threshold*	*Required Afforestation*
Agricultural and resource areas	50%	20%
Medium-density residential areas	25%	20%
Institutional development areas	20%	15%
High-density residential areas	20%	15%
Mixed-use development areas	15-20%[2]	15%
Planned unit development areas	15-20%[2]	15%
Commercial and industrial use areas	15%	15%

13 [[1] A religious institution must comply with the requirements that apply to the base
14 zone in which it is located.]

15 * * *

16 *Approved:*

17

Marilyn J. Praisner, President, County Council Date

18 *Approved:*

19

Isiah Leggett, County Executive Date

20 *This is a correct copy of Council action.*

21

Linda M. Lauer, Clerk of the Council Date

LEGISLATIVE REQUEST REPORT

Bill 15-07, Forest Conservation – Religious Institutions

DESCRIPTION:	Amends the forest conservation law to treat religious institutions the same as other institutional uses,
PROBLEM:	In 2001, the forest conservation law was amended to remove religious institutions from the "institutional development areas" category. The County Attorney opined at the time that the amendment violated federal law. Council legal staff disagreed.
GOALS AND OBJECTIVES:	To treat religious institutions like other institutional uses..
COORDINATION:	Planning Board
FISCAL IMPACT:	To be requested.
ECONOMIC IMPACT:	To be requested.
EVALUATION:	To be requested.
EXPERIENCE ELSEWHERE:	N/A
SOURCE OF INFORMATION:	Michael Faden, Senior Legislative Attorney, 240-777-7905; Clifford L. Royalty, Chief, Division of Zoning, Land Use, & Economic Development, Office of the County Attorney (240-777-6739)
APPLICATION WITHIN MUNICIPALITIES:	To be determined.
PENALTIES:	N/A

OFFICE OF THE COUNTY EXECUTIVE
ROCKVILLE, MARYLAND 20850

Isiah Leggett
County Executive

MEMORANDUM

May 11, 2007

TO: Marilyn Praisner, Council President

FROM: Isiah Leggett, County Executive

SUBJECT: Amendment to the Forest Conservation Law

I am requesting that you introduce the attached bill that will amend the County's Forest Conservation Law, Chapter 22A of the Code. This bill seeks to conform the County's Forest Conservation Law to the United States Constitution. In this bill, I propose that you delete the provisions of the Forest Conservation Law that specifically require that religious institutions meet a more stringent set of forest conservation and afforestation standards than other private institutions. I believe that the existing standards expressly violate the Religious Land Use and Institutionalized Persons Act of 2000, the First Amendment, and the Fourteenth Amendment's Equal Protection Clause.

Currently, there is a religious institution that is seeking preliminary plan approval from the Planning Board and that is aggrieved by the existing standards. I am hopeful that this bill can be acted on in order to provide a consistent standard for all private institutional facilities and provide relief from what I believe is an unconstitutional provision in our County Code.

If you, or your staff, have any questions, please call Cliff Royalty at (240) 777-6739. Thank you.

IL:vj

Attachment

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OCA OE

16237

McGUIREWOODS

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Direct Fax: 703.512.5235

February 20, 2007

RECEIVED

FEB 21 2007

OFFICE OF THE
COUNTY EXECUTIVE

The Honorable Isiah Leggett
County Executive
Executive Office Building
101 Monroe Street
Rockville, MD 20850

RE: Montgomery County's Forest Conservation Law as applied to Religious Institutions

Dear Mr. Leggett,

Thank you for meeting on Thursday, January 25, 2007, with the Reverend Doctor Guy A. Williams Sr., Philip Perrine and me on behalf of Parker Memorial Baptist Church (the "Church"). Pursuant to our discussion, we are providing this letter to explain the Church's position, concurring with that of the Montgomery County Attorney and the technical staff of the Montgomery County Department of Parks and Planning, that certain provisions of the Montgomery County Forest Conservation Law (the "Forest Conservation Law"), codified at Chapter 22A of the 2004 Montgomery County Code, as amended, violate the Religious and Land Use Institutionalized Persons Act of 2000 ("RLUIPA"). *See* Forest Conservation Law Excerpts, attached as Exhibit "A". As explained in greater detail below, 22A-3's definition of an Institutional Development Area and 22A-12, footnote 1 of the Forest Conservation Law (collectively, the "Exclusionary Provisions") violate RLUIPA because they subject religious institutions to a different and commonly more onerous set of forest conservation standards than those that are applied to other similarly situated secular institutional uses. Based on the guidance of the County Attorney and Planning Board staff, your predecessor, County Executive Douglas M. Duncan, directed County staff to "defer enforcement" of the Exclusionary Provisions.

I. RLUIPA

In 2000, the United States Congress enacted RLUIPA in order to codify existing Free Exercise, Establishment Clause and Equal Protection rights guaranteed by the United States Constitution. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1238 (11th Cir. 2004). RLUIPA has two separate provisions that protect the religious institution's use of land. First, Section 2(a) prohibits governments from imposing a land use regulation that places a substantial burden on religious uses and second, Section 2(b) requires governments to treat religious uses on equal terms with nonreligious assembly uses. Section 2(b) is referred to as the "Equal Terms" provision and provides that that **"[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal**

COUNTY ATTY.

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terms with a nonreligious assembly or institution." RLUIPA, Section 2(b)(1). Courts have interpreted this provision as containing four elements, which if met, constitute an Equal Terms violation: **"1) the plaintiff must be a religious assembly or institution, 2) subject to a land use regulation, that 3) treats the religious assembly on less than equal terms, with 4) a nonreligious assembly or institution."** *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1307-1308 (11th Cir. 2006).

For example, in *Midrash Sephardi,* the Eleventh Circuit invalidated a zoning ordinance that prohibited churches and other religious uses in certain zoning districts where it permitted similarly situated secular uses. The court found that the ordinance was a facial violation of the Equal Terms provision of RLUIPA. The court examined the legislative history of Section (b)(1) and stated that it was intended to prevent jurisdictions from excluding churches from places where they permit theaters, meeting halls and other places where large groups assemble for secure purposes. In *Midrash*, the court invalidated that section of the town's zoning ordinance on the grounds that it treated religious uses differently than similarly situated secular uses.

II. The Forest Conservation Law

Through the Forest Conservation Law, Montgomery County regulates the impact of land use and development on the County's environmental resources, principally existing forests. Generally, the Forest Conservation Law requires that, with certain minor exceptions, all land development activities (including special exceptions uses) be subject to an approved forest conservation plan. *See* Section 22A-11, Exhibit "A". Key regulatory components of the forest conservation plan review are the application of a reforestation requirement to preserve the amount of existing forests and an afforestation requirement to require the establishment of a minimum percentage of forest on properties where such resources are lacking. Generally, the Forest Conservation Law requires the replanting of one-quarter (¼) of an acre of forest land for each acre of existing forest that has been cleared. *Id.* However, where the extent of clearing exceeds the applicable "forest conservation threshold" for a particular property or project the replanting requirement is elevated eight-fold to two (2) acres of replanting for each acre of clearing beyond the forest conservation threshold. *See* Sections 22A-3 and -12(c), Exhibit "A". Thus, the forest conservation threshold is an extremely important point of application in land development. An afforestation requirement is applicable to a property with less than twenty (20%) percent of the net tract area in forest cover and requires the replanting (either on-site or, in some cases, off-site) of new forest cover equivalent to the applicable afforestation requirement. *See* Sections 22A-3 and -12(d), Exhibit "A".

III. The Exclusionary Provisions

Section 22A-12 establishes the applicable forest conservation threshold and afforestation requirements for each project or property by reference to various land use categories set forth in table form. *See* Section 22A-12(a), Exhibit "A". Secular institutional uses such as schools, colleges, recreational facilities, parks, public offices, governmental offices, installations and facilities are classified in the "Institutional Development Area" category. However, the Exclusionary Provisions expressly exclude religious institutions from the Institutional

Development Area category and instead provide that religious institutions must instead meet the requirements of the base zone within which they are located. *See* Sections 22A-3 and -12 footnote 1, Exhibit "A". Thus, through the Exclusionary Provisions, the Forest Conservation Law applies one common set of forest conservation/afforestation standards to all secular institutional uses in the County and a different, variable (and commonly more onerous) standard to religious institutional uses.

Given current land costs and economic realities, these non-profit community serving institutions are commonly required to locate in zones for which the applicable land use category requirements are significantly more onerous that than those of the Institutional Development Area category and yet a similar secular institutional use could locate on the same property with the same zoning classification and be subject to a less onerous regulatory standard. For example, private recreational facilities, movie theaters, town halls, and social clubs, located in the Rural Cluster ("RC") zone are required to meet the twenty (20%) percent forest conservation threshold and fifteen (15%) percent afforestation standard applicable to the Institutional Development Area category, while a religious institution located at that same site is required to meet the fifty (50%) percent forest conservation threshold and twenty (20%) percent afforestation standards applicable to the "Agricultural and Resource Areas" category. *See* Sections 22A-3 and -12, Exhibit "A". As such, a secular institutional use could develop up to eighty (80%) percent of its lot area in the RC Zone and only have to provide one-quarter (¼) acre of planted forest area per each acre of removed forest area. By contrast a religious institution proposing the same scope of development on the same property would be required to replace removed forest area with one-quarter (¼) acre of new forest land for the first fifty (50%) percent of net lot area and, in addition, provide two (2) acres of new forest for each acre removed over fifty (50%) percent. Therefore, the church is required to provide eight (8) times the replacement rate of removed forest area between fifty (50%) percent and eighty (80%) percent of the net lot area than a similarly situated secular use in the RC Zone. This is a significant financial and regulatory burden without a corresponding public policy benefit.

IV. Legislative History of the Exclusionary Provisions

The Exclusionary Provisions were added to the Forest Conservation Law in 2001 through Montgomery County Council Bill 35-00. The legislative history of Bill 35-00 shows that the Office of the County Attorney repeatedly advised that the Exclusionary Provisions could "violate the First Amendment to the United States Constitution" and RLUIPA. *See* Office of the County Attorney Memorandum to the Office of the County Executive, dated January 2, 2001, attached as Exhibit "B". The Montgomery County Department of Parks and Planning agreed with the County Attorney and recommended that "the proposed language should be struck and that religious institutions be added to the institutional development area definition." *See* Montgomery County Planning Board Memorandum to Montgomery County Council, dated March 1, 2001, attached as Exhibit "C".

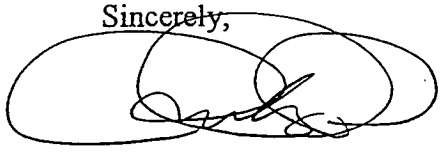
The legislative record for Bill 35-00 does not explain why the County Council chose to ignore the advice of the County Attorney and Planning Board's staff regarding the Exclusionary Provisions, but it does contain a statement by Council Staff dismissing these concerns and taking

the position that because certain private secular institutional uses are required to obtain a special exception while religious institutions are permitted in all zones, the regulatory distinction promulgated in the Exclusionary Provision is not unlawful. *See* County Council Staff Memorandum to County Council, dated June 5, 2001, attached as Exhibit "D". This position is without a sound basis in law or fact for the following reasons: 1) the special exception review process is not a substitute or alternative for the forest conservation plan review process, special exception applications are required to obtain approval of a forest conservation plan prior review by the Board of Appeals (indeed, the special exception process does not provide any mechanism for altering the Forest Conservation requirements and Section 22A-11(c)(2) prohibits the Board of Appeals from approving special exception uses in conflict with the forest conservation plan); 2) special exceptions constitute only a fraction of private secular institutional uses (i.e. farm markets; small group homes; and family and group day care homes do not require a special exception); and 3) public institutional uses (i.e. community centers, libraries, museums, government offices and facilities) do not require special exception approval.

Following the County Council's approval of Bill 35-00, the Office of the County Attorney, in a memorandum dated, August 6, 2001, reiterated its position that the Exclusionary Provisions violated the U.S. Constitution and RLUIPA. *See* Office of the County Attorney Memorandum to the County Executive, dated, August 6, 2001, attached as Exhibit "E". Finally, when Bill 35-00 was sent to the County Executive for approval, the then County Executive, Douglas M. Duncan, directed the Chief Administrative Officer to "defer enforcement of the constitutionally offensive provision of the bill" based on the County Attorney's advice. *See* County Executive Memorandum to the President of the County Council, dated August 6, 2001, attached as Exhibit "F".

The legislative history of Bill 35-00 does not, and cannot, provide any justification as to why religious institutions are held to different and commonly more onerous forest conservation requirements than those which are applied to similarly situated secular institutional uses. Therefore, we respectively request your assistance in seeking the introduction of legislation to repeal the Exclusionary Provisions. Please let me know if you have any questions or if we can provide any additional information regarding our position.

Sincerely,



Mark M. Viani

Enclosures

cc: Reverend Doctor Guy A. Williams, Sr.
Philip Perrine, Perrine Planning & Zoning
Kenneth W. Wire

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LEXSEE 224 F3D 283

BIRGIT EHLERS-RENZI; VINCENT RENZI, Plaintiffs-Appellees, v. CONNELLY SCHOOL OF THE HOLY CHILD, INCORPORATED, Defendant-Appellant. THE AMERICAN JEWISH CONGRESS; THE BECKET FUND FOR RELIGIOUS LIBERTY; THE CONVENTION OF THE PROTESTANT EPISCOPAL CHURCH OF THE DIOCESEOF WASHINGTON; GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS; NATIONAL JEWISH COMMISSIONON LAW AND PUBLIC POLICY; THE ROMAN CATHOLIC ARCHDIOCESE OF WASHINGTON; UNION OF ORTHODOX JEWISH CONGREGATION OF AMERICA; AMERICAN CIVIL LIBERTIES UNION OF MARYLAND; AMERICAN CIVIL LIBERTIES UNION OF THE NATIONAL CAPITAL AREA, Amici Curiae.

No. 99-2352

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

224 F.3d 283; 2000 U.S. App. LEXIS 19840

May 2, 2000, Argued
August 14, 2000, Decided

SUBSEQUENT HISTORY: **[**1]** Certiorari Denied February 26, 2001, Reported at: *2001 U.S. LEXIS 1738.*

PRIOR HISTORY: Appeal from the United States District Court for the District of Maryland, at Greenbelt. J. Frederick Motz, Chief District Judge. (CA-99-1512-JFM).

DISPOSITION: REVERSED

COUNSEL: ARGUED: John G. Roberts, Jr., HOGAN & HARTSON, L.L.P., Washington, D.C., for Appellant.

Vincent D. Renzi, Potomac, Maryland, for Appellees.

ON BRIEF: Gregory G. Garre, HOGAN & HARTSON, L.L.P., Washington, D.C.; William K. Wilburn, Sara Beiro Farabow, SEYFARTH, SHAW, FAIRWEATHER & GERALDSON, Washington, D.C., for Appellant.

Kevin J. Hasson, Eric W. Treene, Roman P. Storzer, THE BECKET FUND FOR RELIGIOUS LIBERTY, Washington, D.C., for Amici Curiae American Jewish Congress, et al.

Arthur B. Spitzer, AMERICAN CIVIL LIBERTIES UNION OF THE NATIONAL CAPITAL AREA, Washington, D.C.; Dwight H. Sullivan, AMERICAN CIVIL LIBERTIES UNION OF MARYLAND, Baltimore, Maryland, for Amici Curiae Unions.

JUDGES: Before WIDENER, MURNAGHAN, and NIEMEYER, Circuit Judges. Judge Niemeyer wrote the opinion, in which Judge Widener joined. Judge Murnaghan wrote a dissenting opinion.

OPINION BY: NIEMEYER

OPINION

[*284] NIEMEYER, Circuit Judge:

Birgit Ehlers-Renzi and her husband, Vincent Renzi, Montgomery County, Maryland, homeowners who live across **[**2]** from a Roman Catholic school which is constructing improvements and additions to the school without obtaining a "special exception," challenge the constitutionality of Montgomery County Zoning Ordinance § 59-G-2.19(c), which exempts such schools from the special exception requirement. The Renzis contend that the ordinance violates the *Establishment Clause of the First Amendment*, as applied to the States through the *Fourteenth Amendment*.

The district court, agreeing with the Renzis, declared the ordinance unconstitutional and enjoined the school from continuing construction, except to complete a parking lot and sediment pond, on which **[*285]** construction had already begun. For the reasons that follow, we reverse.

I

The Connelly School of the Holy Child, Inc. ("Connelly School") operates a non-profit, college-preparatory school for young women in grades 6 through 12, under the auspices of the Roman Catholic Church. In the school, according to its catalog, "Christian values are not only taught in the classroom but put into practice," and students are required to take religion courses and attend masses. Connelly School opened in 1961 and is situated on ten acres of land on Bradley Boulevard **[**3]** in Potomac, Maryland. The school and the land are owned by the Society of the Holy Child Jesus, Inc., a Pennsylvania corporation, which also operates under the auspices of the Roman Catholic Church. The school, which had an enrollment of 413 students during the 1999-2000 academic year, operates from a large main building, two modular classrooms located in trailers, and a home with an attached chapel. The property also includes athletic fields and parking lots.

After initiating a fund-raising campaign and hiring an architectural firm, Connelly School finalized plans to remove two existing structures, as well as the trailers, and to construct a 30,000 square-foot, two-story building to contain classrooms, a library, facilities for music and art programs, and other educational areas. The plans also provide for the construction of additional parking areas.

Before beginning construction, Connelly School informed neighboring landowners that it would not seek a special exception for its construction plans because § 59-G-2.19(c) of the Montgomery County Zoning Ordinance ("Zoning Ordinance") exempts from the special exception requirement parochial schools located on land owned or leased **[**4]** by a church or religious organization. After receiving that notice, the Renzis, who live across the street from Connelly School, requested that Montgomery County determine whether Connelly School was indeed exempt from the requirement to obtain a special exception. When the County ruled that Connelly School was exempt from the special exception requirement, the Renzis filed an administrative appeal with the Montgomery County Board of Appeals. They subsequently withdrew that appeal, however, and instead filed this action for a declaratory judgment and injunctive relief, alleging that the exemption and the school's reliance on the exemption violate the *Establishment Clause of the First Amendment.*

On cross-motions for summary judgment, the district court ruled that Zoning Ordinance § 59-G-2.19(c) violated the *Establishment Clause. See Renzi v. Connelly Sch. of the Holy Child, Inc., 61 F. Supp. 2d 440 (D. Md. 1999).* Applying the test set forth in *Lemon v. Kurtzman, 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971),* the court determined that the exemption in the Zoning Ordinance did not have a secular legislative purpose, rejecting Connelly School's **[**5]** argument that it encouraged the private use of under-utilized public-school facilities, promoted education, and alleviated governmental interference with religion. The court reasoned that even if the exemption did minimize such interference, "that purpose would be constitutionally insufficient" because it is "wholly conjectural and does not relate to any identified risk of 'significant' governmental interference with religious affairs." The district court also ruled that the exemption impermissibly advanced religion because it allowed religious schools to escape the density restrictions in the Zoning Ordinance that were applicable to secular schools and thereby more easily increase their enrollment and fulfill their financial obligations.

This appeal followed.

II

The Montgomery County Zoning Ordinance ordinarily requires private educational **[*286]** institutions and other nonresidential uses in residential areas to obtain a "special exception" before constructing improvements and additions, such as those planned by Connelly School. Zoning Ordinance § 59-C-1.31. To obtain a special exception, a private school is required to file a petition containing specified information, including a statement **[**6]** explaining "in detail how the special exception is proposed to be operated," and supported by a plat, drawings, and a site plan for the proposed construction. *Id.* §§ 59-A4.22(a), 59-G-2.19(b). The petition may be granted only after public notice and hearing, *see id.* § 59-A-4.41(a), during which residents may testify on the petition, and the Board of Appeals may grant a special exception petition only if it finds that the private school's use "will not constitute a nuisance"; that it will be "housed in buildings architecturally compatible with other buildings in the surrounding neighborhood"; that it will not "affect adversely or change the present character or future development of the surrounding residential community"; and that it "can and will be developed in conformity with" various specified requirements, *id.* § 59-G-2.19(a). The Zoning Ordinance provides, in addition, that the special exception use must be inspected annually for compliance with restrictions imposed in connection with the special exception, that the special exception holder must respond to any ongoing complaints of noncompliance, and that the special exception use is subject to revocation. *See id.* **[**7]** § 59-G1.3(a), (b), (e).

The requirement to obtain a special exception, however, does not apply to all nonresidential uses. In particular, Zoning Ordinance § 59-G-2.19(c) provides the following exemption:

> The requirements of this section shall not apply to the use of any lot, lots or tract of land for any private educational institution, or parochial school, which is located in a building or on premises owned or leased by any church or religious organization, the government of the United States, the State of Maryland or any agency thereof, Montgomery County or any incorporated village or town within Montgomery County.

While Zoning Ordinance § 59-G-2.19(c) exempts from the special exception requirement private schools located on property owned or leased either by the national, state, or local government or by a church or religious organization, it is the portion exempting a "parochial school, which is located in a building or on premises owned or leased by any church or religious organization" that the Renzis challenge as improperly establishing religion.

Connelly School argues that the exemption created by Zoning Ordinance § 59-G-2.19(c) represents an appropriate **[**8]** effort by Montgomery County to accommodate religion "by simply excusing religiously-affiliated entities from regulatory burdens placed on others." It maintains that the exemption's purpose is to alleviate government interference with the ability of religious organizations to fulfill their religious missions; that its effect is to "make it easier" for religious organizations to advance religion; and that it avoids the entanglement "that would follow from subjecting religious schools to the special exception process."

The Renzis contend, on the other hand, that Zoning Ordinance § 59-G-2.19(c) evinces no secular legislative purpose and that it does not "remove a burden from the free exercise of religion" as required for Connelly School's "'accommodation of religion' argument." They argue that the exemption also indirectly aids religion. While they acknowledge that such aid is permissible if it arises from a neutral and generally applicable law, they maintain that it is impermissible when it "only benefits religious landowners." Finally, the Renzis argue that Zoning Ordinance § 59-G-2.19(c) fosters excessive government entanglement with religion because it "is likely to cause or intensify **[**9]** political fragmentation and divisiveness along religious lines."

[*287] We are thus confronted with the question of whether exempting a parochial school from the procedures and restrictions otherwise required to obtain a special exception in Montgomery County violates the *Establishment Clause of the First Amendment.*

III

The *Establishment Clause* prohibits Congress and, through the *Fourteenth Amendment*, the States from making any law "respecting an establishment of religion." U.S. Const. amend. I; *see also Cantwell v. Connecticut, 310 U.S. 296, 303-04, 84 L. Ed. 1213, 60 S. Ct. 900 (1940).* "Establishment" connotes "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Comm'n, 397 U.S. 664, 668, 25 L. Ed. 2d 697, 90 S. Ct. 1409 (1970).* But recognizing that "this Nation's history has not been one of entirely sanitized separation between Church and State," the Supreme Court has noted that it "has never been thought either possible or desirable to enforce a regime of total separation." *Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 760, 37 L. Ed. 2d 948, 93 S. Ct. 2955 (1973).* **[**10]** Thus, the principle is "fixed" that a government program or law "which in some manner aids an institution with a religious affiliation" does not, for that reason alone, violate the *Establishment Clause. Mueller v. Allen, 463 U.S. 388, 393, 77 L. Ed. 2d 721, 103 S. Ct. 3062 (1983).*

But the prohibition against the establishment of religion does require government neutrality toward religion and among religions. *See Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 839, 132 L. Ed. 2d 700, 115 S. Ct. 2510 (1995)*; *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 696, 129 L. Ed. 2d 546, 114 S. Ct. 2481 (1994)* (opinion of Souter, J.). And this neutrality may be a "benevolent neutrality." *Walz, 397 U.S. at 669.* Indeed, the government is entitled to accommodate religion without violating the *Establishment Clause*, and at times the government must do so. *See Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 338, 97 L. Ed. 2d 273, 107 S. Ct. 2862 (1987)* (The *Establishment Clause* provides "ample room for accommodation **[**11]** of religion"); *Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144, 94 L. Ed. 2d 190, 107 S. Ct. 1046 (1987)* ("The government may (and sometimes must) accommodate religious practices"); *Lynch v. Donnelly, 465 U.S. 668, 673, 79 L. Ed. 2d 604, 104 S. Ct. 1355 (1984)* (The Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions"). The limits of this accommodation by government are not "co-extensive with the noninterference mandated by the *Free Exercise Clause.*" *Amos, 483 U.S. at 334* (quoting *Walz, 397 U.S. at 673*).

This authorized, and sometimes mandatory, accommodation of religion is a necessary aspect of the *Establishment Clause* jurisprudence because, without it, government would find itself effectively and unconstitutionally promoting the absence of religion over its practice. *See Lynch, 465 U.S. at 673* ("Anything less would re-

quire the 'callous indifference' we have said was never intended by the *Establishment Clause*"); *School Dist. of Abington Township v. Schempp, 374 U.S. 203, 225, 10 L. Ed. 2d 844, 83 S. Ct. 1560 (1963)* ("The State may not **[**12]** establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion"); *Zorach v. Clauson, 343 U.S. 306, 314, 96 L. Ed. 954, 72 S. Ct. 679 (1952)* (To hold that the government may not "respect[] the religious nature of our people and accommodate[] the public service to their spiritual needs" would be to "prefer[] those who believe in no religion over those who do believe").

The line between benevolent neutrality and permissible accommodation, on **[*288]** the one hand, and improper sponsorship or interference, on the other, must be delicately drawn both to protect the free exercise of religion and to prohibit its establishment. In *Lemon v. Kurtzman, 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971)*, the Supreme Court articulated a test for drawing that line, a test that has since been frequently criticized in its application. * *See, e.g.*, Michael W. McConnell, *Religious Freedom at a Crossroads, 59 U. Chi. L. Rev. 115, 118 (1992)* (in the *Lemon* test, "the Court has contrived a formula for interpreting the *Establishment Clause* that contains inconsistencies within a single test"). And **[**13]** while cases since *Lemon* continue to apply and adapt the test to various circumstances, *see, e.g., Mitchell v. Helms, 530 U.S. 793, 147 L. Ed. 2d 660, 120 S. Ct. 2530, 2540 (2000)* (plurality opinion) (recognizing that the *Lemon* test has been "recast" and "modified . . . for purposes of evaluating aid to schools"), it has not been overruled, *see Koenick v. Felton, 190 F.3d 259, 265 (4th Cir. 1999)* ("The general principles we have relied on to evaluate *Establishment Clause* claims have not substantively changed since the *Lemon* line of cases was decided"). Under *Lemon*, for a legislative act to withstand an *Establishment Clause* challenge, (1) it must have a secular legislative purpose; (2) its principal or primary effect must neither advance nor inhibit religion; and (3) it must not foster excessive governmental entanglement with religion. *See 403 U.S. at 612-13*. While the *Lemon* test thus provides "helpful signposts" for analyzing *Establishment Clause* challenges, *Hunt v. McNair, 413 U.S. 734, 741, 37 L. Ed. 2d 923, 93 S. Ct. 2868 (1973)*; *Mueller, 463 U.S. at 394*, the structure for its application **[**14]** to a religious exemption, such as that before us in this case, is more clearly provided by *Amos*, where the Court held that the exemption of religious organizations from the prohibition against religious discrimination in employment of Title VII of the Civil Rights Act of 1964 does not improperly establish religion in violation of the *First Amendment. See Amos, 483 U.S. at 339-40*. Accordingly, we now apply the *Lemon* test as refined in *Amos* to analyze the exemption of religious organizations from the requirements imposed by the Montgomery County Zoning Ordinance.

* This criticism has come even from members of the Supreme Court. *See, e.g., Kiryas Joel, 512 U.S. at 718-19* (O'Connor, J., concurring); *id. at 750-51* (Scalia, J., dissenting, joined by Rehnquist, C.J., and Thomas, J.); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 398-400, 124 L. Ed. 2d 352, 113 S. Ct. 2141 (1993)* (Scalia, J., concurring in the judgment, joined by Thomas, J.); *Wallace v. Jaffree, 472 U.S. 38, 68-69, 86 L. Ed. 2d 29, 105 S. Ct. 2479 (1985)* (O'Connor, J., concurring in the judgment).

[15]** IV

Under the first of *Lemon*'s three prongs, we ask whether Zoning Ordinance § 59-G-2.19(c) has a "secular legislative purpose." *Lemon, 403 U.S. at 612*. And as refined in *Amos* for statutory exemptions, we determine whether the government has "abandoned neutrality and acted with the intent of promoting a particular point of view in religious matters." *Amos, 483 U.S. at 335*. This secular purpose prong presents a "fairly low hurdle," *Barghout v. Bureau of Kosher Meat & Food Control, 66 F.3d 1337, 1345 (4th Cir. 1995)*, which may be cleared by finding "a plausible secular purpose" on the face of the regulation, *Mueller, 463 U.S. at 394-95*.

Connelly School advances several plausible secular purposes revealed by the Montgomery County Zoning Ordinance. It notes that by exempting parochial schools from the special exception procedure, Montgomery County avoids the interference with such schools' religious missions that otherwise might result from subjecting the schools to the scrutiny and procedures that the Zoning Ordinance otherwise would require. Connelly School **[*289]** also notes that by "stepping out of the way of religion, **[**16]** " the County avoids the creation of a forum in which anti-religious animus underlying opposition to a special exception petition might be expressed. These purposes are indeed plausibly evident on the face of the ordinance and have been found valid in analogous contexts by the Supreme Court in *Amos* and by this court in *Forest Hills Early Learning Ctr., Inc. v. Grace Baptist Church, 846 F.2d 260, 263-64 (4th Cir. 1988)* (upholding exemption for religious daycare centers from licensing requirements). *See also Walz, 397 U.S. at 673* ("Grants of exemption historically guard against the danger of hostility toward religion").

In *Amos*, the Supreme Court applied *Lemon*'s first prong to an exemption in Title VII of the Civil Rights Act of 1964 that permitted religious organizations to discriminate in employment on the basis of religion. The

Court found that the exemption served a permissible secular purpose because it "alleviated significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Amos, 483 U.S. at 335*. This same reasoning applies to the exemption contained **[**17]** in Zoning Ordinance § 59-G-2.19(c). This exemption spares Connelly School from the rigorous review of numerous subjective factors that otherwise could interfere with implementation of its mission. The exemption from the special exception requirement relieves Connelly School from having to justify its religious or religion-related needs before civil authorities and convince those authorities that the school's renovations and additions satisfy such subjective requirements as, for example, "architectural[] compatibility" or conformity with "the present character . . . of the community." Would a cross on a building offend citizens in the neighborhood? Would Gothic windows offend a neighborhood that was determined to maintain an American colonial style? Would a chapel or chapel bell or chapel organ offend? The exemption also extricates Montgomery County from the resolution of disputes that could have a religious underpinning. Would citizen challenges actually be cloaking anti-religion or anti-denomination animosity? In short, the low threshold of this first *Lemon* prong is readily cleared by the Zoning Ordinance's plausible purpose of extricating Montgomery County from these involvements **[**18]** in religion.

We reached the same conclusion in *Forest Hills*, in which we upheld an exemption of religious daycare centers from licensing requirements. We concluded that the exemption had the legitimate secular purpose of "avoiding interference with the execution of religious missions in a nonprofit area in which a church operates" and thereby "preventing state interference with church programs that provide education and care for children," even though the instruction at the daycare centers may not have been explicitly religious. *Forest Hills, 846 F.2d at 263-64*.

When confronted with a similar circumstance, the Seventh Circuit reached a similar conclusion in *Cohen v. City of Des Plaines, 8 F.3d 484 (7th Cir. 1993)*, where it rejected a constitutional challenge to a zoning ordinance exempting church daycare centers from the requirement of obtaining a special use permit. Even though the exemption applied to daycare centers operated in churches irrespective of whether they provided religious instruction, the court held that it had "the secular purpose of minimizing governmental meddling in religious affairs notwithstanding that [it] does not explicitly **[**19]** state that [daycare centers] operated in churches in residential areas must give care or instruction defined as 'religious.'" *Cohen, 8 F.3d at 491*.

The Renzis urge that we reject the applicability of these precedents to this case, arguing that Zoning Ordinance § 59-G-2.19(c) reveals no secular purpose on its face because the literal language of the exemption reaches not only parochial schools but also any other private school **[*290]** that happens to be located on land owned by a religious organization. They argue that the breadth of this exemption belies any purpose to extricate Montgomery County from religious matters but rather indicates a purpose to favor religious landowners. In support of this argument, they conjure up hypotheticals involving use of the exemption by secular entities, such as a cosmetology school, that operate on land owned by a church. This argument fails on two levels.

First, it must be recognized that the Renzis are challenging the utilization of the exemption by a Roman Catholic school to construct improvements and additions to a school located on property owned by a corporation operated under the auspices of the Roman Catholic Church. Thus, we **[**20]** do not have before us any of the hypothetical situations advanced by the Renzis. The Renzis respond by noting that they styled their action as a facial challenge and that therefore they may argue the constitutionality of the Zoning Ordinance under any hypothetical set of circumstances. But their standing derives from their status as neighbors challenging the particular improvements and additions being constructed by Connelly School, a religious school operated on property owned by a religious organization. The "traditional rule" is that one "to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the court." *Los Angeles Police Dep't v. United Reported Publishing Corp., 528 U.S. 32, 120 S. Ct. 483, 489, 145 L. Ed. 2d 451 (1999)* (quoting *New York v. Ferber, 458 U.S. 747, 767, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (1982))*; *Tilton v. Richardson, 403 U.S. 672, 682, 29 L. Ed. 2d 790, 91 S. Ct. 2091 (1971)* (plurality opinion) (under the *Establishment Clause*, "we cannot . . . strike down an Act of Congress on the basis of a hypothetical 'profile'" **[**21]** of a party not before the court).

Second, even if we look beyond the scope of the Renzis' challenge against Connelly School in this case, the possibility that the exemption would be applied in a completely areligious setting is remote. The Zoning Ordinance does not exempt landowners but rather school uses. Thus, the ordinance exempts any private school located on property owned by a religious organization. Whether the school is denominated parochial or nonsectarian, the inquiry into the school's operation and its relationship to religion would risk the same religious entanglement. Because of this risk, in *Forest Hills* we expressly disavowed any inquiry into whether the activities

undertaken by religious organizations were actually religious and we rejected the argument that an exemption for a religious organization is valid only if it performs a demonstrably religious function. *See 846 F.2d at 263*; *see also Amos, 483 U.S. at 336* ("It is a significant burden on a religious organization to require it . . . to predict which of its activities a secular court will consider religious"); *Cohen, 8 F.3d at 490* ("It is not up to legislatures **[**22]** (or to courts for that matter) to say what activities are sufficiently 'religious'"). As James Madison put it in his *Memorial and Remonstrance Against Religious Assessments* of 1786, such an inquiry would "imply . . . that the civil magistrate is a competent judge of religious truth," which is "an arrogant pretension." *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* 48 (Neil H. Cogan ed. 1997). Because the exemption applies to any private school located on land owned by a *religious* organization, religion is the defining aspect of the exemption, and we therefore believe that the exemption plausibly aims to alleviate government interference with religion.

At bottom, the exemption at issue in this case frees Connelly School from obtaining a special exception only because the school has a religious connection. The very existence of the school is premised on a religious mission. *See Walz, 397 U.S. at 671* ("To assure future adherents **[*291]** of a particular faith" is "an affirmative if not dominant policy of church schools"). And necessary to the fulfillment of this mission is the existence of facilities which Connelly School deems adequate to **[**23]** carry on its religious instruction. An official of the school stated this explicitly, averring that the school "needs to renovate in order to meet the educational and religious mission of the Roman Catholic Church, the Society [of the Holy Child Jesus], and the School." By removing the requirement to obtain a special exception, Montgomery County not only lifts a burden from the school's exercise of religion but also extricates itself from potential interference with the school's religious mission.

The second prong of the *Lemon* test prompts inquiry into whether the statutory exemption has a "principal or primary effect" that "neither advances nor inhibits religion." *403 U.S. at 612*. The Renzis argue that the exemption impermissibly advances religion by "providing religious organizations an exclusive benefit." While Connelly School acknowledges that Zoning Ordinance § 59-G-2.19(c) "may well indirectly promote the ability of religious organizations to carry out their *own* religious mission through the operation of the schools located on their property," it argues that the *Establishment Clause* only forbids advancement of religion by the government itself.

An exemption's **[**24]** effect of simply allowing a religious school to "better . . . advance [its] purposes" does not rise to a constitutionally prohibited magnitude. *Amos, 483 U.S. at 336*; *see also Mueller, 463 U.S. at 393*. An unconstitutional effect occurs when "the *government itself* has advanced religion through its own activities and influence." *Amos, 483 U.S. at 337*. In *Forest Hills*, we applied *Amos* to uphold a law that "adopted a hands-off policy" in order to permit religious organizations "to advance their own teachings." *Forest Hills, 846 F.2d at 263*. Similarly, in this case, Montgomery County has relieved religious schools of the administrative burden of pursuing the special exception procedure. Any advancement of religion that follows would be the result of the religious schools' own acts in light of the exemption, as opposed to Montgomery County's elimination of an otherwise applicable requirement. *See Cohen, 8 F.3d at 492* ("The religious component of child care and education activities in[the city] will come from church members or leaders, not from government officials"); *cf. Mitchell, 120 S. Ct. at 2540* **[**25]** (plurality opinion) (examining, in the context of aid to schools, "whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action"). Thus, when the district court in this case observed that Zoning Ordinance § 59-G-2.19(c) would advantage Connelly School over "non-profit nonsectarian private schools" by exempting Connelly School from density restrictions, it identified a potential benefit resulting from Connelly School's enrollment policy and attraction of students, not from Montgomery County's policy of non-interference. *See Walz, 397 U.S. 664 at 668, 25 L. Ed. 2d 697, 90 S. Ct. 1409* (identifying sponsorship, support, or involvement of the government in religion as the concerns of the *Establishment Clause*). Echoing *Amos*, "we do not see how any advancement of religion" that is achieved by Connelly School "can be fairly attributed to [Montgomery County], as opposed to the Church." *Amos, 483 U.S. at 337*.

Finally, Zoning Ordinance § 59-G-2.19(c) plainly satisfies *Lemon*'s third requirement that it not "foster 'an excessive entanglement with religion.'" *403 U.S. at 613* (quoting *Walz, 397 U.S. at 674*). **[**26]** Indeed, the parties appear to agree that it has a disentangling aspect, avoiding governmental intrusion into matters of religious education. *See Amos, 483 U.S. at 339* ("It cannot be seriously contended that [the challenged act] impermissibly entangles church and state; the statute effectuates a **[*292]** more complete separation of the two and avoids . . . [an] intrusive inquiry into religious belief"); *Cohen, 8 F.3d at 493*. While the Renzis rely on language in *Lemon* to argue that the exemption presents "divisive political potential," *403 U.S. at 622*, the Supreme Court subsequently confined this *Lemon* entanglement test to "cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools," *Mueller, 463 U.S. at 403-04 n.11*.

V

Religion and the State wisely function in different arenas, but the people attending each arena are the same. Keeping religion and State distinct, while at the same time protecting the freedom of the people to act fully in both arenas, requires the State to recognize and even interact with religion, but not to manage or incorporate the religious arena itself [**27] by favoring religion over non-religion, by favoring nonreligion over religion, by favoring one religion over another, or by distinguishing among religions. The State does not engage in any of these establishment activities when it exempts religious institutions from land-use regulations. Rather, such an exemption removes the State from forums in which religious conflict might otherwise require improper State action.

By providing an exemption to parochial schools or to any private school on property owned by a religious organization, Montgomery County has permissibly accommodated religion by allowing these schools to operate or renovate their facilities without obtaining a special exception. We plow no new ground in reaching this conclusion, which follows ineluctably from the holdings in *Amos*, *Forest Hills*, and *Cohen*.

Accordingly, we hold that Zoning Ordinance § 59-G-2.19(c) does not violate the *Establishment Clause of the First Amendment*, and the judgment of the district court is therefore

REVERSED.

DISSENT BY: MURNAGHAN

DISSENT

MURNAGHAN, Circuit Judge, dissenting:

The natural tension that exists between the Establishment and *Free Exercise Clauses of the First Amendment* [**28] requires that delicate lines be drawn. Although I agree with the analytical approach taken by the majority, I disagree with where they have drawn the line in this case. Because I do not agree that Montgomery County Zoning Ordinance § 59-G-2.19(c) is a permissible accommodation of religion, I conclude that it violates the *Establishment Clause of the First Amendment* and, accordingly, I dissent.

Relying on the rationale of *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 97 L. Ed. 2d 273, 107 S. Ct. 2862 (1987)*, the majority concludes that Montgomery County Zoning Ordinance § 59-G-2.19(c) passes the first prong of the test laid out in *Lemon v. Kurtzman, 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971)*, because it has a legitimate secular purpose: to alleviate "significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Amos, 483 U.S. at 335*. Specifically, the majority found that the challenged ordinance "spares Connelly School from the rigorous review of numerous subjective factors that otherwise [**29] could interfere with implementation of its mission." (*224 F.3d 283, 2000 U.S. App. LEXIS 19840*, at *17).

I disagree. Application of the County's special exception procedures to the Connelly School would not significantly interfere with the school's ability to define and carry out its mission. There is no danger that Montgomery County will become involved in regulating the school's *program* of religious education by simply enforcing the generally applicable zoning rules and special exception procedures at issue in [*293] this case. The special exception procedures do not burden the exercise of religion in the same way or to the same degree as did the employee hiring requirements at issue in *Amos* or the daycare program regulations at issue in *Forest Hills Early Learning Center v. Grace Baptist Church, 846 F.2d 260 (4th Cir. 1988)*. There is an important difference between regulations that reach into an organization's program and personnel, on the one hand, and those that only impact the development of its physical facilities, on the other. What goes on within the walls of the church buildings is of far greater significance than the configuration of those buildings. By failing to draw a meaningful line [**30] between "significant" and "incidental" interference with religious institutions, I fear the majority is inappropriately expanding the *Amos* principle and, as a result, traveling down a path that will ultimately render the *Establishment Clause* meaningless.

I find further support for my conclusion that the challenged ordinance does not serve the secular purpose of avoiding governmental interference with the church's mission in the language of the ordinance itself. On its face, County Zoning Ordinance § 59-G-2.19(c) applies not only to religious schools, but also to secular schools operated on property owned or leased by religious institutions. If the ordinance were a legitimate effort to avoid interference with the mission of religious schools, it would not be written so as to extend its benefits to schools that are not engaged in any sort of religious mission. The overinclusive language of the ordinance belies the legislative purpose accepted by the majority. For both of these reasons, therefore, I conclude that County Zoning Ordinance § 59-G-2.19(c) was not enacted with the legitimate secular purpose of avoiding governmental interference with the free exercise of religion.

[**31] In *Amos*, the Supreme Court marked a path for legislative actions which relieve religious institutions from generally applicable regulatory burdens in order to better accommodate the free exercise of religion. This

court followed that path in *Forest Hills* by upholding a legislative exemption in Virginia which relieves religiously affiliated daycare centers from the burdens of licensing requirements applied to secular daycare facilities. In both *Amos* and *Forest Hills*, one can easily discern a genuine effort to allow religious institutions to operate programs and thereby fulfill their missions without significant, substantive interference from the government. In this case, however, I do not see any such genuine effort. Instead, I see something that looks very much like ordinary favoritism for religious property owners in Montgomery County. Because I believe that such favoritism is precisely what the *Establishment Clause* forbids, I would hold that Montgomery County Zoning Ordinance § 59-G-2.19(c) is invalid.

CONSTITUTIONAL LAW — ESTABLISHMENT CLAUSE — FOURTH CIRCUIT UPHOLDS ZONING EXEMPTION FOR RELIGIOUS INSTITUTIONS. — *Ehlers-Renzi v. Connelly School of the Holy Child, Inc.*, 224 F.3d 283 (4th Cir. 2000).

American courts and legislatures face a difficult ongoing negotiation between the separation of church and state mandated by the Establishment Clause[1] and their reluctance to act in ways that might interfere with or burden the mission of religious institutions. One of the challenges for courts, inherent in this tension, is defining the line between impermissible government assistance and neutral nonassistance.[2] Cases that involve exemptions or benefits for religious institutions often implicate this difficult distinction. Recently, in *Ehlers-Renzi v. Connelly School of the Holy Child, Inc.*,[3] the Fourth Circuit held that a zoning exemption favoring religious landowners does not unconstitutionally assist a religious institution. Based on strained reasoning and a misreading of precedent, the court's decision allows the state to endorse religious purposes — and landowners — over secular ones in violation of the Establishment Clause.

The Connelly School of the Holy Child is a private religious school located on ten acres of land in Potomac, Maryland.[4] The school and the land are owned by a religious organization, and the school actively promotes Christian values.[5] Before undertaking a large-scale renovation project, the School informed neighboring landowners that it was exempt from the need to seek permission from the county zoning board.[6] Although the Montgomery County Zoning Ordinance generally requires a special exception for nonresidential construction on residentially zoned land, section 59-G-2.19(c) exempts private or parochial schools situated on land owned or leased by a church or religious organization.[7]

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[1] "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.

[2] On the Establishment Clause, the Supreme Court has recently written: "In the over 50 years since *Everson*, we have consistently struggled to apply these simple words in the context of governmental aid to religious schools. . . . [C]andor compels the acknowledgment that we can only dimly perceive the boundaries of permissible government activity in this sensitive area." Mitchell v. Helms, 120 S. Ct. 2530, 2540 (2000) (plurality opinion) (citations omitted) (internal quotation marks omitted).

[3] 224 F.3d 283 (4th Cir. 2000).

[4] *Id.* at 285.

[5] The Society of the Holy Child Jesus, operating under the auspices of the Roman Catholic Church, owns the school, where "Christian values are not only taught in the classroom but put into practice." Religion classes and attendance at mass are required. *Id.*

[6] *Id.*

[7] *Id.* at 285–86 (citing MONTGOMERY COUNTY, MD., ZONING ORDINANCE, § 59-G-2.19(c) (1994)).

The Renzis, who live across the street from the school, objected to the exemption and filed an action in the United States District Court for the District of Maryland.[8] They sought a declaratory judgment holding that the exemption violates the Establishment Clause, and they requested injunctive relief to prohibit the school from pursuing its construction project.[9] Both parties filed cross-motions for summary judgment.[10] Chief Judge Motz granted the plaintiffs' motion for summary judgment, holding that section 59-G-2.19(c) of the zoning ordinance violates the Establishment Clause.[11] Judge Motz applied the Supreme Court's *Lemon*[12] test for determining whether a government action impermissibly assists religion[13] and concluded that the zoning ordinance "fails to be neutral in a context where neutrality is possible" and that, "[b]y favoring sectarian schools over most other non-profit private educational institutions, it belies any secular purpose and has a principal effect of advancing religion."[14]

The Court of Appeals for the Fourth Circuit reversed. Writing for the panel,[15] Judge Niemeyer also applied the *Lemon* test, but held that the county's religious landowner exemption does not violate the Establishment Clause. Judge Niemeyer acknowledged that the Establishment Clause requires "government neutrality toward religion and among religions,"[16] but termed the exemption a "benevolent neutrality."[17] He explained that the Supreme Court's decision in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*[18] had modified the first prong of the *Lemon* test, which requires the state to demonstrate a valid secular purpose for a given law, by making it easier for the state to demonstrate such a purpose.[19] The court accepted the school's contention that the exemption simply prevents government interference with the school's religious mission and thus determined that the zoning ordinance serves a sufficient

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8 Renzi v. Connelly Sch. of the Holy Child, 61 F. Supp. 2d 440 (D. Md. 1999).

9 *Id.* at 441.

10 *Id.*

11 *Id.* at 448.

12 *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

13 The *Lemon* test has three prongs: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster an 'excessive entanglement with religion.'" *Id.* at 612–13 (citations omitted).

14 *Renzi*, 61 F. Supp. 2d at 444.

15 Judge Widener joined Judge Niemeyer's opinion.

16 *Ehlers-Renzi*, 224 F.3d at 287.

17 *Id.* (quoting *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970)).

18 483 U.S. 327 (1987). *Amos* upheld an exemption for a religious employer from Title VII of the Civil Rights Act of 1964, which generally prohibits employment discrimination. *Id.* at 330.

19 *See Ehlers-Renzi*, 224 F.3d at 288. According to Judge Niemeyer, courts should now inquire only "whether the government 'has abandoned neutrality and acted with the intent of promoting a particular point of view in religious matters.'" *Id.* (quoting *Amos*, 483 U.S. at 335).

secular purpose.[20] Turning to the second prong of the *Lemon* test, the court concluded that the government was not impermissibly advancing or inhibiting religion, but merely relieving the school of an "administrative burden."[21] The court concluded that "[a]ny advancement of religion that follows would be the result of the religious schools' own acts in light of the exemption, as opposed to Montgomery County's elimination of an otherwise applicable requirement."[22] Applying the third prong of the *Lemon* test, Judge Niemeyer held that the exemption does not foster excessive state entanglement with religion, but rather helps the state avoid any such entanglement.[23] The court concluded that the exemption "removes the State from forums in which religious conflict might otherwise require improper State action."[24]

Judge Murnaghan dissented. Although he agreed with the majority's use of the *Lemon* test, he disagreed with where the majority had "drawn the line."[25] Judge Murnaghan distinguished *Amos* by arguing that the zoning exemption was not necessary to protect religious organizations because the need to adhere to zoning laws does not limit such organizations in the same manner that employing someone of a different religion might.[26] In contrast to the case at hand, *Amos* involved a "genuine effort" to help religious institutions fulfill their religious mission without "substantive interference from the government."[27] Judge Murnaghan argued that the majority's expansion of *Amos* threatened to rob the Establishment Clause of all meaning. He concluded that the zoning ordinance was not a permissible accommodation of religion, but rather "something that looks very much like ordinary favoritism for religious property owners" of the kind that "is precisely what the Establishment Clause forbids."[28]

In *Ehlers-Renzi*, the murky contours of the *Lemon* test allowed the majority to treat assistance as nonassistance in order to find that the

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20 *Id.* Ironically, the Court mentioned only one other potential secular purpose: avoiding the "creation of a forum in which anti-religious animus underlying opposition to a special exception petition might be expressed." *Id.*

21 *Ehlers-Renzi*, 224 F.3d at 291.

22 *Id.*

23 *Id.* at 291–92.

24 *Id.* at 292.

25 *Id.* (Murnaghan, J., dissenting).

26 *Id.* at 293. According to Judge Murnaghan, the physical structure of an organization is less important than its staff or program: "What goes on within the walls of the church buildings is of far greater significance than the configuration of those buildings." *Id.* In *Amos*, the exemption went directly to the internal activities of that religious organization; the only people affected were people who chose to work for the religious organization. *Id.* at 293. In *Ehlers-Renzi*, however, it was not the internal activities of the organization that were at issue, but its external buildings. *Id.* at 292–93. Furthermore, buildings can adversely affect people who live in the neighborhood who do not choose to interact in any way with the religious organization.

27 *Id.* at 293.

28 *Id.*

government was not acting to establish religion.[29] In particular, the majority's characterization of the zoning ordinance exemption as a benevolent neutrality reveals a flawed application of *Lemon*'s second prong, which examines whether the effect of a law is the impermissible advancement of religion. The exemption favors religion over nonreligion by eliminating the costs of participation in the common zoning process for religious landowners, thus conferring upon them a benefit that secular landowners do not similarly receive. This favoritism allows religious schools to expand at less expense, effectively acting as a government subsidy. Further, the court failed to apply Supreme Court and Fourth Circuit precedent establishing individual choice as the criterion for discerning when such a subsidy is permissible.

The court's argument that upholding the zoning exemption is merely a permissible accommodation of religion and an exercise of benevolent neutrality is difficult to sustain. The court characterized the requirements of the zoning ordinance as a simple procedural or administrative matter. Compliance with the zoning ordinance, however, is not merely procedural or administrative, but rather an onerous burden that every other nonresidential entity in the neighborhood must bear.[30] By eliminating the potentially heavy transaction costs of applying for a special exception and the possibility of a denial, the zoning ordinance — regardless of whether one characterizes it as an exemption or a subsidy — operates directly to benefit religious schools over secular ones.[31]

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[29] Commentators as well as the Supreme Court have observed that cases decided under the *Lemon* test yield arbitrary results. *See, e.g.*, Bowen v. Kendrick, 487 U.S. 589, 615 (1988) (noting the inherent contradiction among the prongs of the *Lemon* test, by which "the very supervision of the aid to assure that it does not further religion renders the statute invalid"); Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 85 (1997) (referring to the *Lemon* test as "the much maligned test for Establishment Clause violations" and stating that "the current status of the *Lemon* test is in doubt"); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 118–19 (1992) (calling the *Lemon* test "aptly named" and asserting that it is inherently contradictory).

[30] Though the zoning ordinance is a burden to individual applicants, the exemption also harms neighbors, who usually have a say in which kinds of structures are erected in their residential neighborhood. Construction in a residential area implicates concerns such as density, traffic, and noise. Ordinarily in Montgomery County, an application for a special exception is accompanied by a public hearing at which neighbors like the Renzis may support or oppose the proposed construction. Renzi v. Connelly Sch. of the Holy Child, 61 F. Supp. 2d 440, 442 n.1 (D. Md. 1999). An exemption allows a builder to proceed unhindered and without neighborhood scrutiny.

[31] The exception requirement may impose a heavy burden on, or even altogether stop, the new construction; thus, an exemption functions as a subsidy and constitutes real action on the part of the state. A hypothetical secular, nonprofit school for homeless children across the street would be forced to bear the transaction costs of a special exception if it wanted to expand. "[T]he general rule is that religious organizations must comply with governmental regulations. To exempt religious organizations from modern regulations, where not reasonably necessary for the protection of doctrinal or organizational freedom, would be the equivalent of a 'subsidy,' and might therefore be thought an establishment of religion." Michael W. McConnell & Richard A. Posner, *An Economic*

Both the Supreme Court and the Fourth Circuit have extensively addressed the constitutionality of subsidies to religious schools. These cases establish a criterion of individual choice by which aid given through generally applicable programs directly to students who then independently choose to attend religious schools does not constitute assistance by the state, but aid given to institutions, particularly on the basis of religion, is considered impermissible assistance.

In a leading Supreme Court case establishing the individual-choice criterion, *Agostini v. Felton*,[32] the Court upheld a neutral, generally applicable aid program that provided remedial teachers to students in private and religious, as well as public, schools. The *Agostini* court modified the second prong, or effects inquiry, of the *Lemon* test to embody three main criteria: whether a law "result[s] in governmental indoctrination; define[s] its recipients by reference to religion; or create[s] an excessive entanglement" with religion.[33] Courts are to decide the first two criteria of the *Agostini* "effects" test according to the principle of neutrality: the impact of government action should be neutral, neither inhibiting nor endorsing religion. In determining neutrality, both of these prongs examine whether religious and educational choices are truly the result of citizens' individual decisions.

The zoning ordinance in *Ehlers-Renzi* violates both of these criteria. Under the first *Agostini* criterion, which determines whether a law leads to government indoctrination, the Court approves aid when it is available to a broad range of citizens without reference to their religion.[34] To determine neutrality, the Court has articulated the individual-choice criterion, asking "whether any governmental aid that goes to a religious institution does so 'only as a result of the genuinely independent and private choices of individuals.'"[35] This test suggests that the zoning ordinance in *Ehlers-Renzi* is impermissible, as the aid is completely unconnected to the individual choices of students or to a neutral basis for granting aid to such students whether or not they at-

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Approach to Issues of Religious Freedom, 56 U. CHI. L. REV. 1, 7–8 (1989). According to McConnell and Posner, therefore, "[e]xemption from burdens and inclusion in benefits are indistinguishable in their economic effects. If all nonprofit institutions except churches are taxed $10 per year, churches are being favored over other nonprofit organizations even though they do not receive a penny from the government." *Id.* at 12.

[32] 521 U.S. 203 (1997).

[33] *Id.* at 234; *see also* Mitchell v. Helms, 120 S. Ct. 2530, 2540 (2000) (plurality opinion) (applying the *Lemon* test as revised in *Agostini*). In *Agostini*, the Court combined what was traditionally the third prong of the *Lemon* test — the inquiry into excessive government entanglement — into one of several factors to be considered in the second prong of the *Lemon* test, the effects inquiry.

[34] *See Mitchell*, 120 S. Ct. at 2541.

[35] *Id.* (quoting *Agostini*, 521 U.S. at 226 (internal quotation marks omitted)).

tend the religious school.[36] The zoning ordinance also fails the second *Agostini* criterion for evaluating the effect of a law: whether the state defines its recipients by reference to religion. The second criterion focuses on whether "the criteria for allocating aid 'create a financial incentive to undertake religious indoctrination.'"[37] It is clear that the exemption in *Ehlers-Renzi* defines its recipients — religious landowners — by reference to their faith and therefore violates the effects prong of the *Lemon* test.

In *Columbia Union College v. Clarke*,[38] the Fourth Circuit held that even funds granted through a generally applicable program constitute state assistance in violation of the Establishment Clause if they are given directly to religious schools.[39] Funding for students who then independently choose to attend religious schools, however, is permissible because it does not involve state assistance to the same extent.[40] The court relied on Supreme Court precedent[41] to breathe life into the seemingly formalistic distinction between giving funds to the school for a particular use and giving it directly to the child by showing that this distinction goes to the question of choice. Under *Clarke*, the court in *Ehlers-Renzi* should have held the zoning exemption unconstitutional because the exemption directly benefited religious schools irrespective of student choice.

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[36] In fact, the zoning ordinance denies some students and potential students — members of the residential neighborhood — the usual opportunity even to speak their mind about the desirability of renovations or expansions to the school and its land.

[37] *Mitchell*, 120 S. Ct. at 2543 (citing *Agostini*, 521 U.S. at 231). The *Agostini* Court stated:

> [The financial incentive to undertake religious indoctrination] is not present . . . where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis. Under such circumstances, the aid is less likely to have the effect of advancing religion.

Agostini, 521 U.S. at 231.

[38] 159 F.3d 151 (4th Cir. 1998).

[39] *Id.* at 161–62.

[40] *Id.* at 160.

[41] The *Clarke* court discussed *Witters v. Washington Department of Services for the Blind*, 471 U.S. 581 (1986), in which the Supreme Court refused to find that the provision of direct funds to a blind student who used them at a parochial school violated the Establishment Clause. *Id.* at 159–60. The *Witters* Court relied on the fact that it was the individual student and his parents who chose religious over secular education and thus endorsed religion. As the Fourth Circuit noted: "[A]lthough state aid 'ultimately flowed to religious institutions' this was 'only as a result of the genuinely independent and private choices of aid recipients.'" *Clarke*, 159 F.3d at 159 (quoting *Witters*, 474 U.S. at 488). The court in *Clarke* also cited *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), for a similar "individual-choice" analysis of government action: "'By according parents freedom to select a school of their choice,' providing [a] sign language interpreter to [a] deaf student attending Catholic school was 'only as a result of the private decision of individual parents . . . [and] cannot be attributed to state decisionmaking.'" *Clarke*, 159 F.3d at 159 (quoting *Zobrest*, 509 U.S. at 10).

Under Supreme Court and Fourth Circuit individual-choice analysis of government action, therefore, *Ehlers-Renzi* should have been decided differently. In *Ehlers-Renzi*, the religious institution directly received the exemption benefit[42] and was, on the basis of religion, the singled-out recipient of the subsidy. There was no direct or even indirect passage of the subsidy through the hands of students and no semblance of individual choice. Furthermore, the subsidy likely had the opposite effect of that intended by the individual-choice criterion — parents who might not have otherwise sent their children to religious schools might have done so, as religious schools are now able to build better facilities than secular schools, which cannot expand as easily or perhaps at all. The exemption benefit affords religious schools a significant competitive advantage.

This problem of incentive in *Ehlers-Renzi* goes to the heart of the individual-choice criterion, which aims to ensure that parents and students do not choose a religious education as a result of government subsidy, but that they do receive whatever neutral aid is available to students from the government whether or not they make this choice.

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[42] Within the exemption framework, the court failed to discuss *Employment Division v. Smith*, 494 U.S. 872 (1990), which pertains directly to religious exemptions. *Smith* involved two members of the Native American Church who lost their jobs because they had ingested peyote as part of a religious ceremony; they were refused unemployment compensation because they had lost their jobs for "misconduct." *Id.* at 874. There was no exemption in Oregon for members of the Native American Church from a general criminal law against the use of peyote. *Id.* at 876. The Court held that a neutral, generally applicable law does not require an exemption to protect free exercise: "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition." *Id.* at 878–79. *Smith* disavowed previous cases in which the Court made inquiries into whether the state has a compelling government interest in incidentally burdening religion through a neutral, generally applicable law. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963). Congress's first response to *Smith*, the Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (1994)), attempted to bring these inquiries back. In *City of Boerne v. Flores*, 521 U.S. 507, 512 (1997), however, the Court held that these inquiries were unnecessary, and struck down RFRA (as applied to states) as unconstitutional because it exceeded Congress's authority. *Id.* at 536.

After *Ehlers-Renzi*, Congress amended RFRA in the Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (to be codified at 42 U.S.C. §§ 1988, 2000bb-2 to -3, 2000cc to 2000cc-5), in another attempt to overrule *Smith*. Whereas *Smith* held that no inquiry is necessary into whether the state has a compelling government interest, *Smith*, 494 U.S. at 882–88, the new act attempts to resurrect this inquiry:

> 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 . . . unless the government demonstrates that imposition of the burden on that person, assembly, or institution —
>
> (A) is in furtherance of a compelling governmental interest; and
>
> (B) is the least restrictive means of furthering that compelling governmental interest.

Religious Land Use and Institutionalized Persons Act of 2000, § 2(a)(1), 114 Stat. at 803 (to be codified at 42 U.S.C. § 2000cc). The Court may overrule the Religious Land Use and Institutionalized Persons Act of 2000 when it next considers the issue.

Giving aid to individuals rather than to religious institutions helps maintain neutrality because it ensures that religious institutions will not have a competitive advantage over secular schools in a way that might give students an incentive to go to religious school. It also leaves the power to determine the purpose of the aid with the government, rather than placing it in the hands of the religious institution. For example, providing a special education teacher represents a form of neutral, secular assistance to particular students who need the government's help. The government, by giving such aid on the basis of student need, maintains neutrality. However, allowing aid to go directly to the religious institution channels funds less carefully and constitutes a lack of government neutrality. In *Ehlers-Renzi*, the school could build an art studio, an advanced computer lab, or additional parking lots, any of which would create incentives for students to attend the school. Alternatively, the school could build rooms for religious teaching, in which case the government would have provided aid specifically for religious teaching but not for secular teaching.[43]

The *Ehlers-Renzi* court misapplied the second prong of the *Lemon* test by holding that the exemption from the zoning ordinance does not have the effect of impermissibly assisting religion. The court defended its overzealous protection of the Connelly School and extricated itself from claims that it was allowing the government to endorse religion by suggesting that it had not assisted religion, but had merely lifted a burden by allowing an exemption. Such a reliance on act/omission rhetoric seems disingenuous. Whether the zoning ordinance is characterized as a subsidy or an exemption, its obvious consequence is that religious institutions benefit as a direct result of state action, while nonreligious institutions do not. Such preferential treatment violates both the letter and spirit of the Establishment Clause.

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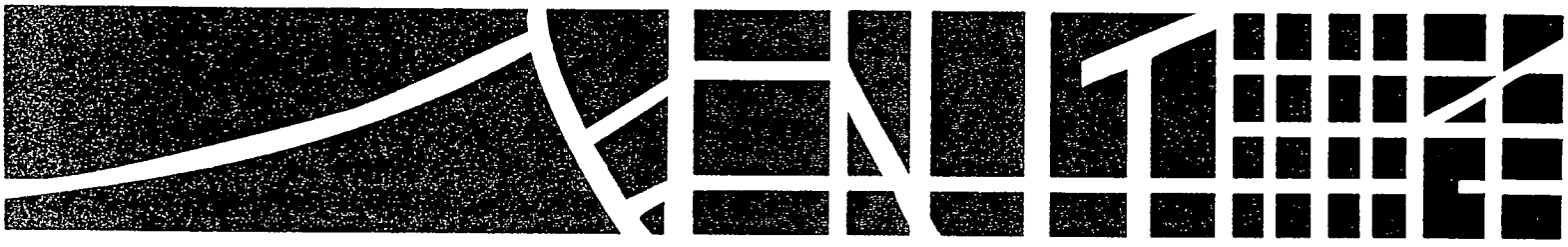
[43] Without the exemption, the Free Exercise Clause remains to protect the Connelly School should it perceive that a hostility to religion inhibits construction. A prophylactic rule such as the court advanced, designed to avoid any regulation of a religious organization, threatens the Establishment Clause. *See* McConnell & Posner, *supra* note 31, at 33 ("An overzealous interpretation of the Free Exercise Clause, under which religious observance receives government benefits or protections not needed to counterbalance measures that can fairly be said to interfere with religion, is likely to promote religious observance, in violation of the Establishment Clause."). Such a rule further threatens to place religion and religious institutions entirely outside the reach of the law, in a society premised on the rule of law:

> Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices .... Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and ... to permit every citizen to become a law unto himself.

Reynolds v. United States, 98 U.S. 145, 166–67 (1879); *see also Smith*, 494 U.S. at 878–79 ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition.").

ZONING AND PLANNING LAW REPORT



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THE CONSTITUTION, RULIPA AND DISPUTES REGARDING THE ZONING OF RELIGIOUS INSTITUTIONS

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Overview

Unlike most zoning and land use decisions, which are decided with reference to state law, zoning decisions that affect religious institutions (*e.g.*, churches, temples, mosques, home-worship centers) implicate the United States Constitution, most notably the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. Historically, when a municipality denied zoning relief to a religious institution, that decision could be, and occasionally was, challenged by a disappointed applicant under a Free Exercise or Equal Protection theory.

In the wake of Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) this trickle turned into a torrent of litigation. Six years after passage of RLUIPA, municipalities continue to find their zoning and land use decisions under scrutiny by religious institutions, their well-funded allies and, occasionally, the U.S. Department of Justice. This litigation continues to put municipalities at risk for injunctive relief, large monetary damages, and attorney's fees. Reported federal and state court decisions involving RLUIPA claims, as well as accompanying Free Exercise and Equal Protection claims, have also multiplied. Although the United States Supreme Court has yet to hear

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a case involving RLUIPA's land use and zoning provisions,[1] between 2001 and 2007, a majority of the federal appellate circuits have addressed RLUIPA and/or constitutional challenges to a church-related zoning decision.

So, after six years of RLUIPA litigation, have the courts provided enough guidance for municipalities to make informed decisions about their zoning codes and land use decisions? The answer is a qualified "yes." Although the results at the federal district court level have been inconsistent, and have produced some odd interpretations of RLUIPA, federal appellate courts have generally concurred, in substance if not language, in their interpretation of RLUIPA and the relevant constitutional provisions.

The emerging trend is characterized by a rejection of the extreme position taken by church plaintiffs and their allies,[2] *i.e.*, that virtually all municipal restrictions on a church's ability to build what it wants, where it wants, are violations of RLUIPA and/or the Constitution. Rather, while RLUIPA and the litigation it has spurred should cause municipalities to take extra care in their land use decisions when those decisions affect religious institutions, neither RLUIPA nor the Constitution requires that municipalities give up their right to regulate the location and size of religious institutions, so long as those zoning decisions are based upon sound planning and not upon anti-religious bias.

Opportunities for Litigation

Like most other zoning litigation, church-related disputes usually involve an individual's or organization's desire to locate and operate at a site, and a municipality's decision to regulate land use in a contrary manner. In this context, religious institutions have challenged both municipal zoning schemes as a whole, and specific zoning decisions. The two basic types of challenges can be classified as: (i) "facial" challenges to a municipality's overall zoning code, based upon allegations that the municipality's zoning scheme, as a whole, makes it too difficult for the religious institution to find suitable property in the municipality,[3] or that the code favors secular assembly uses over religious uses;[4] and (ii) as-applied challenges to site-specific zoning decisions, including the zoning of particular site or failure to rezone,[5] denial of a special use permit, conditional use permit, or variance,[6] application of building codes and life safety codes to churches,[7] and condemnation of property associated with religious activity.[8]

A Brief History of Land Use Disputes Involving Religious Institutions and the Enactment of RLUIPA

Prior to the enactment of the RLUIPA, and its predecessor, the Religious Freedom Restoration Act of 1993 (RFRA), the majority of religious land use disputes were litigated under either state law or the Free Exercise Clause of the First Amendment. In a series of cases decided in the 1980s, federal courts of appeal generally upheld municipal zoning schemes and individual zoning decisions, even when such regulations deprived religious institutions of their preferred locations.[9]

Under these decisions, the federal courts generally held that laws which prevented individuals from worshiping at their preferred location did not "compel or prohibit" particular religious practices, were not an "undue burden" on the exercise of religion and, therefore, did not violate the Free Exercise Clause. The cases also recognized that municipalities have legitimate reasons for distinguishing between religious institutions and other land uses, and for categorizing religious institutions as a distinct use. This general trend found exception when the plaintiff institution could prove animus on the part of the municipality, or when the religious institution could demonstrate that the land use regulation effectively deprived the institution of the ability to locate anywhere in the municipality.[10] Many courts continue to use these federal appellate decisions as a touchstone for evaluating free exercise claims.

In 1990, the United States Supreme Court decided *Employment Division, Department of Human Resources of Oregon v. Smith.*[11] Although *Smith* was not a land use case, it triggered a series of events that resulted in the passage of RLUIPA 10 years later. *Smith* held that the Free Exercise Clause of the First Amendment does not require municipalities to exempt religious behavior from "neutral and generally applicable laws," such as the unemployment compensation law at issue in *Smith*. Under *Smith*, neutral and generally applicable laws should be evaluated under a rational basis test *even if* the degree of burden placed on the individual's exercise of religion is "substantial."[12]

Three years after *Smith*, in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,*[13] the Supreme Court reiterated the *Smith* rule and expanded on the concepts of "neutrality" and "general applicability." In *City of Hialeah*, the Court found that a law that prohibited certain types of animal sacrifice, while neutral on its face, had the object and effect of discriminating against a particular religious (Santeria) and its religious practices and, therefore, violated the Free Exercise Clause.[14]

Although *City of Hialeah* demonstrated that plaintiffs still could prevail in Free Exercise litigation in the wake of *Smith*, the *Smith* decision was viewed by many in the religious community as hostile to religious freedom. In the wake of *Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 ("RFRA"). As discussed in RFRA's legislative history, it was enacted with the specific idea to return Free Exercise jurisprudence to, what Congress believed, was the pre-*Smith* constitutional standard. In simple terms, RFRA was designed to return the focus of the Free Exercise Clause jurisprudence to the *substantial burden on the worshiper*, rather than the "object" of the ordinance or intent of the municipality.

RFRA was not limited to land use decisions, but its constitutionality was tested in a land use case. In *City of*

Boerne v. Flores,[15] a religious organization challenged the city's landmarks preservation ordinance, which prevented the organization from expanding its historic church building. In holding RFRA unconstitutional, the court found that no provision of the Constitution empowered Congress to pass such sweeping legislation. The court noted that under § 5 of the Fourteenth Amendment, Congress has the power to "enforce" the Constitution. This enforcement may take the form of a statutory scheme that does not mirror the constitutional standard. For example, the Voting Rights Act of 1965, and subsequent amendments, go beyond the strict bounds of the Fifteenth Amendment but essentially enforce the Fifteenth Amendment by rooting out unconstitutional conduct. However, as Justice Kennedy curtly wrote, "legislation which alters the meaning of the [constitution] cannot be said to be enforcing the [constitution]."[16]

As described in City of *Boerne*, RFRA was not a statute that "enforced" the Free Exercise Clause. The problem with RFRA was two-fold. First, by deviating from the constitutional standard and substituting a "substantial burden" test for the test articulated in *Smith*, RFRA outlawed a wide variety of state and local laws that were, in fact, constitutional. Second, the legislative record behind RFRA did not show a pattern of wide-ranging constitutional violations and, therefore, did not demonstrate the necessity for such sweeping "remedial" or "prophylactic" legislation. Based on these flaws, the Supreme Court concluded that RFRA did not enforce the Constitution; rather, Congress had attempted to re-write the Free Exercise Clause. On this basis, the Court declared RFRA unconstitutional as beyond Congress power to legislate.[17]

Just as Congress responded to *Smith* by passing the RFRA, Congress responded to *City of Boerne* by passing RLUIPA in 2000. RLUIPA's supporters and advocates (including the Department of Justice) maintain that RLUIPA cured the constitutional problems inherent in RFRA by more closely hewing to, if not mirroring, the constitutional Free Exercise standards, as articulated in *Smith* and *City of Hialeah*. To date, every appellate court that has reviewed a constitutional challenge to RLUIPA has found the law authorized by § 5 of the Fourteenth Amendment as a proper "enforcement" of the Free Exercise Clause (and/or the Equal Protection Clause). However, for reasons discussed below, the constitutionality of RLUIPA is still an open question and the law may ultimately suffer the same fate as its predecessor.

RLUIPA, the Free Exercise Clause, and the Equal Protection Clause

Paradoxically, the enactment of RLUIPA has led to not only RLUIPA-based lawsuits, it has revived challenges to municipal zoning decisions based upon the Free Exercise and Equal Protection clauses.

With respect to land use and zoning claims, RLUIPA has two main sections, each of which roughly tracks a provision of the Constitution. We say "roughly" tracks because there is debate over whether RLUIPA merely mirrors the constitutional protections or, like RFRA, goes significantly beyond the protections afforded by the Constitution. This creates a paradox for religious institutions and courts interpreting RLUIPA: the more protection RLUIPA provides to religious institutions, the more it deviates from the Constitution, and the greater the chance that it will be held unconstitutional, as RFRA was. In acknowledgement of this potential problem, some courts have grafted onto RLUIPA the parallel Free Exercise and Equal Protection standards, even when the language of the statute itself suggests otherwise.[18] In contrast, those who advocate an expansive reading of RLUIPA often justify the law by a generous, and questionable, reasoning of the underlying constitutional provisions. Thus, it is impossible to discuss RLUIPA without, in tandem, discussing the Free Exercise and Equal Protection clauses.

The Free Exercise Clause and RLUIPA's "Substantial Burden" Test

As discussed above, in *Smith*, the Supreme Court held that the Free Exercise Clause does *not* require municipalities to exempt religious behavior from neutral and generally applicable laws. Under the *Smith* rule, neutral and generally applicable laws should be evaluated under a rational basis test *even if* the burden placed on the individual's exercise of religion is substantial. However, *Smith* also made reference to a municipality's use of "individualized government

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assessment[s]"[19] and noted that a municipality may not "refuse to extend that system to cases of religious hardship."[20] *Smith* also suggested that a law that unduly burdens the exercise of religion is subject to strict scrutiny if the law is *not* neutral or *not* generally applicable.

In *City of Hialeah*, the Supreme Court reiterated the *Smith* rule and found a municipal law regulating animal sacrifice to be neutral as written, but, in practice, to "target" particular religious conduct. Thus, the law was viewed as discriminating on the basis of religion and was struck down as a violation of the Free Exercise Clause.[21] More recently, in *Locke v. Davey*,[22] the Supreme Court held even non-neutral laws (*e.g.*, laws that distinguish between religious and non-religious activity) should be evaluated under the rational basis test, unless the plaintiff can show, by reference to the "history," "text," or "operation" of the law, that the law was passed with "animus toward religion." In *Locke*, the Supreme Court upheld a Washington State law that provides college scholarships to all academically gifted students except those pursuing a degree in devotional theology. The court found that the statute's religious/secular distinction was not motivated by animus toward religion but by legitimate concerns regarding state funding of religious institutions.

When a church plaintiff makes a Free Exercise challenge to a municipal ordinance or zoning decision, the *Smith*, *Lukumi* and *Locke* rules ought to apply. In such a case, the plaintiff is required to prove that a zoning ordinance that limits or prevents development of a religious institution is a product of animus on the part of the municipality toward a specific religion or religion in general. Courts have generally held that a Free Exercise violation occurs only when the plaintiff can demonstrate that the zoning ordinance or zoning decision was designed to target an institution *because of* its religious practices or beliefs. As a corollary, when a municipality's zoning ordinance, or its denial of zoning relief, is motivated by *legitimate* land use concerns, the denial does not violate the church's Free Exercise rights. This is true even if the zoning ordinance in question was enacted to address land use issues associated with a particular religious institution.[23]

Plaintiffs, however, often seize on the reference in *Smith* the use of heightened scrutiny in conjunction with "individualized assessments" and argue that *any* use individualized assessments by a municipality, *e.g.*, the requirement of special or conditional use permits, triggers strict scrutiny. According to this theory, *Smith* holds that the *mere use* of a "system of individualized assessments" coupled with a burden on religious exercise triggers strict scrutiny, and especially so with respect to the evaluation of zoning and land use applications where decision-making is inherently discretionary and, therefore, provides the opportunity for subtle and undetectable anti-religious bias in municipal zoning decisions. In early RLUIPA litigation, a few district courts adopted this interpretation of the Free Exercise clause and applied strict scrutiny to zoning decisions.[24]

Municipal defendants have countered that strict scrutiny is required only when a scheme calling for "individualized assessments" is "not open" to churches or is applied in a discriminatory fashion. Most courts have, sensibly, held that this reading of *Smith* is correct, and that, under the constitutional standard, strict scrutiny only applies when the "system of individualized assessments" is, *in practice*, utilized in a discriminatory manner.[25]

Section (a) of RLUIPA[26] is generally referred to as RLUIPA's "substantial burden" provision. It prohibits a municipality from imposing or implementing a "land use regulation" (further defined as a "zoning or landmark law or the application of such law") in a manner that imposes a "substantial burden" on "religious exercise." The term "substantial burden" is not defined, but "religious exercise" is defined to include "the use, building, or conversion of real property for the purpose of religious exercise."[27]

RLUIPA's "substantial burden" test appears to deviate from the Free Exercise Clause, as the Supreme Court interpreted that provision in *Smith*. That is, RLUIPA's "substantial burden" provision provides more protection to religious institutions than the Constitution itself because RLUIPA focuses on the degree of burden rather than the neutrality of the law. As discussed above, RLUIPA's supporters, including the Department of Justice, have asserted that because zoning ordinances often employ a "system of individualized assessments," RLUIPA merely mirrors *Smith*. The question of whether or not RLUIPA's "substantial burden" provision is constitutional (*i.e.*, whether it deviates too far from the constitutional standard) is an important one. For now, however, the constitutional question has taken a back seat. Indeed, some courts use the working assumption that RLUIPA's "substantial burden" provision and the Free Exercise Clause are equivalent.[28]

Rather than the constitutional question, most courts have focused on a statutory question: in the zoning and land use context, what constitutes a "substantial burden" on "religious exercise"? Fortunately for municipalities, the majority of courts answering this question have rejected church-plaintiffs' arguments that virtually any denial of zoning approval is a "substantial burden" on their religious exercise. Rather, federal appellate courts have generally held that a church's inability to locate, expand, or develop accessory facilities at a particular location is not a "substantial burden" on its exercise of religion.

Although the appellate courts have not agreed on a single definition of "substantial burden,"[29] the varying nuances of defining "substantial burden" is less important than the general consensus on the outcomes in RLUIPA litigation. This consensus begins with the idea that RLUIPA is not a "free pass" that allows religious institutions to escape the difficulties that many land owners face in finding suitable (or affordable) land and in obtaining zoning approval.[30] Nor

is RLUIPA a guaranty that a religious institution will be able to locate or expand at its favored site, even when denial of that site will cause inconvenience, disappointment, or a loss of congregants.[31] Rather, courts have been focusing on objective questions such as: the amount of land in the city of town potentially available religious use, the ability of the religious institution to find other suitable locations, and the size of the facility that the municipality is willing to allow as compared to what is reasonably necessary for the institution's purposes.

However, when denial of zoning relief is accompanied by a set of facts that demonstrate bad faith on the part of the municipality, *e.g.*, because the municipality's reasons for denial appear disingenuous, illogical, or unsupported by planning principles, courts have found a RLUIPA "substantial burden" violation.[32] In essence, these decisions combine RLUIPA's focus on the burden to the religious institution with the Free Exercise Clause's focus on municipal conduct that is unexplainable by sound planning principles and, therefore, supports a strong inference that a particular religion or religious institution was "targeted" by the municipality. These cases are also marked by municipal decision making that can best be characterized as giving the applicant the "run around."[33] Although a secular applicant would be unlikely to obtain federal relief for such municipal decision-making (except, perhaps, under a "class of one" theory), RLUIPA's "substantial burden" provision has, functionally, provided an avenue of relief for religious institutions where municipal zoning decisions are not wholly irrational (in the constitutional sense), but, nevertheless, lack common sense or a sound planning justification.

The Equal Protection Clause and RLUIPA's "Equal Terms" Test

Recently, religious institutions have been relying on the Equal Protection Clause and the corresponding section of RLUIPA as an alternative constitutional theory. The Equal Protection Clause of the Fourteenth Amendment generally prohibits municipalities from treating similar types of institutions differently, unless the municipality has a rational reason for this difference in treatment. For example, traditionally, many municipal zoning codes classified "Churches" or "Religious Institutions" as a distinct use and had a different set of zoning criteria for non-religious assembly uses, such as meeting halls and private clubs.

In recent cases, religious institutions have argued that there is no reason to distinguish between religious and secular assembly uses, and that the Equal Protection Clause mandates identical treatment of churches and equivalent secular assembly uses.[34] Two crucial questions in any Equal Protection case are: (i) are the uses or situations being compared "similarly situated," and (ii) if so, what is the level of scrutiny applied to the divergent classifications? With respect to the first question, secular assembly uses are not necessarily similarly situated to religious assembly uses and courts take a hard look at the allegedly similar use before reaching the conclusion that the two uses are equivalent.[35] With respect to the second question, religious institutions are generally not entitled to heighten scrutiny for Equal Protection purposes.[36]

RLUIPA complicates the matter by establishing a standard that may or may not parallel the Constitutional standard. Section (b)(1) of RLUIPA[37] is generally referred to as the "equal terms" provision. It prohibits a municipality from imposing or implementing 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." As with the "substantial burden" provision, there is an argument that the "equal terms" provision deviates too far from the constitutional standard embodied in the Equal Protection Clause, as the statutory scheme replaces the Constitution's rational basis test with either strict scrutiny or strict liability. Supporters of RLUIPA argue that this provision is designed to mirror both the Equal Protection Clause and the rule in *City of Cleburne, Texas v. Cleburne Living Center, Inc.*,[38] by requiring that religious institutions be given the same zoning prerogatives as non-religious assemblies or institutions, such as meeting halls, community centers, and country clubs.

There are two problems with the theory that RLUIPA's "equal terms" provision "enforces" the Equal Protection Clause. First, as interpreted by the Supreme Court, the Equal Protection Clause itself does *not* subject religious/secular distinctions to heighten scrutiny. Indeed, in *Locke v. Davey*, the court held that claims of this nature should first be decided with respect to the Free Exercise Clause and, if the Equal Protection Clause is later invoked, mere rational basis scrutiny is the applicable standard.[39] Second, on its face, the "equal terms" provision establishes a strict liability standard for differences in the treatment of religious and secular assembly uses. If applied literally, this standard would be more onerous for municipalities than even strict scrutiny.

Courts typically address this problem by ignoring the "equal terms" provision as written and, instead, treating it as a strict scrutiny statute that can be met by a compelling governmental interest.[40] Arguably, even this modified formulation deviates from the constitutional standard (*i.e.* rational basis) so that RLUIPA's "equal terms" provision cannot be said to "enforce" the Equal Protection Clause. To date, this argument has, however, been rejected.[41] Indeed, as with the relationship between RLUIPA's "substantial burden" provision and the Free Exercise Clause, courts often conflate the RLUIPA's "equal terms" provision with the Equal Protection Clause and, occasionally, the Free Exercise Clause.[42]

In practice, courts have applied the "equal terms" provision aggressively when no obvious distinctions exists between the allegedly comparable secular and religious uses.

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One appellate court found a violation of RLUIPA's "equal terms" provision where the municipal zoning codes distinguished between religious institutions and secular assembly uses, such as "private clubs," "social clubs," or "community centers." The court considered these secular uses to be functionally identical to churches but for the religious content of the topics under discussion.[43] Another court used the "equal terms" provision to invalidate an ordinance that limited home worship when similar secular meetings (such as Boy Scout meetings) were are not equally regulated.[44] However, courts recognize that when a church-plaintiff asserts that a secular applicant has received preferred treatment, to prove an "equal terms" violation, the plaintiff must demonstrate that the two applicants were "similarly situated" in all relevant respects.[45] Thus, where real differences between applicants are present, a municipality need not approve a church's zoning application merely because it has approved the application of a secular assembly use.[46]

In light of these cases, municipalities need to reevaluate their zoning codes and determine whether distinctions between religious assembly uses and comparable secular assembly uses are rooted in sound planning principles. Indeed, some municipalities have eliminated "Religious Institution" or "Church" as a distinct zoning category and have opted for the neutral term "Assembly Use."[47] This type of re-codification may not be absolutely necessary, but it does provide a safe harbor against an "equal terms" claim. With respect to as-applied challenges (*e.g.*, to the issue or non-issue of special use permits, re-zonings, or variances), municipalities should be careful to apply the same neutral criteria to religious and secular assembly alike.

Conclusion

Undoubtedly, RLUIPA has increased court scrutiny of church-related zoning decisions and has forced municipalities to re-evaluate some of their traditional planning presumptions regarding the zoning of religious institutions. RLUIPA has not, however, robbed municipalities of their ability to regulate religious land use, even when the municipality denies zoning approval for a church's preferred site. Rather, when municipal decisions are backed by solid planning analysis, municipalities can still be confident that courts will uphold their zoning decisions.

NOTES

1. In Cutter v. Wilkinson, 544 U.S. 709, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005), the Supreme Court affirmed the constitutionality of RLUIPA as it governs the treatment of institutionalized persons (i.e. prisoners).
2. Several think tanks and interest groups, who provide advice and litigation support to religious institutions involved in land use litigation, have emerged in recent years. These include, the Becket Fund for Religious Liberty (www.rluipa.com) and the Pacific Justice Institute (www.pacificjustice.org). These groups often file amicus briefs in support of church plaintiffs. In turn, municipalities defending their zoning codes and land use decisions have found allies in the National League of Cities, the International Municipal Lawyers Association, the American Planning Association, the National Trust for Historic Preservation, and various state-based municipal organizations. To the extent that the U.S. Department of Justice has intervened in these cases, it has been to defend the constitutionality of RLUIPA and, occasionally, to side with the plaintiffs on issues of statutory interpretation.
3. See, e.g., Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752 (7th Cir. 2003).
4. See, e.g., Konikov v. Orange County, Fla., 410 F.3d 1317 (11th Cir. 2005); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214 (11th Cir. 2004), cert. denied, 543 U.S. 1146, 125 S. Ct. 1295, 161 L. Ed. 2d 106 (2005); Sts. Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895 (7th Cir. 2005).
5. See, e.g., Sts. Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895 (7th Cir. 2005); San Jose Christian College v. City of Morgan Hill, 360 F.3d 1024, 185 Ed. Law Rep. 845 (9th Cir. 2004).
6. See, e.g., Vision Church, United Methodist v. Village of Long Grove, 468 F.3d 975 (7th Cir. 2006); Grace United Methodist Church v. City Of Cheyenne, 451 F.3d 643, 65 Fed. R. Serv. 3d 248 (10th Cir. 2006); Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County, 450 F.3d 1295 (11th Cir. 2006); Westchester Day School v. Village of Mamaroneck, 386 F.3d 183 (2d Cir. 2004).
7. See, e.g., Peace Lutheran Church and Academy v. Village of Sussex, 246 Wis. 2d 502, 2001 WI App 139, 631 N.W.2d 229 (Ct. App. 2001).
8. See, e.g., St. John's United Church of Christ v. City of Chicago, 401 F. Supp. 2d 887 (N.D. Ill. 2005).
9. See, e.g., Christian Gospel Church, Inc. v. City and County of San Francisco, 896 F.2d 1221 (9th Cir. 1990); Messiah Baptist Church v. County of Jefferson, State of Colo., 859 F.2d 820 (10th Cir. 1988); Grosz v. City of Miami Beach, Florida, 721 F.2d 729 (11th Cir. 1983); Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio, 699 F.2d 303 (6th Cir. 1983). See also Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville, 90 Cal. App. 2d 656, 203 P.2d 823 (4th Dist. 1949).
10. See, e.g., Islamic Center of Mississippi, Inc. v. City of Starkville, Miss., 840 F.2d 293, 45 Ed. Law Rep. 27 (5th Cir. 1988).
11. Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990).
12. 494 U.S. at 878-880.
13. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993).
14. Church of the Lukumi Babalu Aye, Inc. at 508 U.S. at 533-45.
15. City of Boerne v. Flores, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997).
16. 521 U.S. at 519.
17. 521 U.S. at at 529-36.
18. See Town of Surfside, 366 F.3d at 1231-32.
19. 494 U.S. at 884.
20. 494 U.S. at 884.
21. 508 U.S. at 545.

22. Locke v. Davey, 540 U.S. 712, 124 S. Ct. 1307, 158 L. Ed. 2d 1, 185 Ed. Law Rep. 30 (2004).
23. See Village of Long Grove, 438 F.3d at 998; C.L.U.B., 342 F.3d at 763; City of Morgan Hill, 360 F.3d at 1030-32.
24. See, e.g., Hale O Kaula Church v. Maui Planning Com'n, 229 F. Supp. 2d 1056, 1072-1073 (D. Haw. 2002) (mere use of scheme employing special use permits triggers strict scrutiny, per Smith) and Cottonwood Christian Center v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1222 – 1223 (C.D. Cal. 2002) (same).
25. Grace United Methodist Church, 451 F.3d at 650-54 (discussing the debate surrounding the use of "individualized assessments"); C.L.U.B., 342 F.3d at 764-65 (no strict scrutiny unless churches are denied opportunity for exemptions); Rector, Wardens, and Members of Vestry of St. Bartholomew's Church v. City of New York, 914 F.2d 348, 354 (2d Cir. 1990) (use of individualized assessments as part of landmarking scheme did not trigger strict scrutiny).
26. 42 U.S.C.A. § 2000cc(a).
27. 42 U.S.C.A. § 2000cc5(7)(B).
28. See Village of Long Grove, 468 F.3d at 996-97.
29. See Guru Nanak Sikh Soc. of Yuba City v. County of Sutter, 456 F.3d 978 (9th Cir. 2006) (comparing 9th Cir. and 7th. Cir definitions of "substantial burden").
30. See C.L.U.B., 342 F.3d at 761-62.
31. See, e.g., Village of Long Grove, 438 F.3d at 999-1000; C.L.U.B., 342 F.3d at 761-62; Town of Surfside, 366 F.3d at 1227-28; City of Morgan Hill, 360 F.3d at 1035-36; Grace United Methodist Church, 451 F.3d at 663-64 (upholding jury finding that desire to operate accessory day care center was not the "exercise of religion"); Village of Mamaroneck, 386 F.3d at 188-89. But see Westchester Day School v. Village of Mamaroneck, 417 F. Supp. 2d 477, 207 Ed. Law Rep. 129 (S.D. N.Y. 2006) (on remand, District Court found that denial of proposed religious school expansion was a substantial burden on the exercise of religion) on appeal 06-1464 (2nd Cir.).
32. See Sts. Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895 (7th Cir. 2005); Guru Nanak Sikh Soc. of Yuba City v. County of Sutter, 456 F.3d 978 (9th Cir. 2006).
33. City of New Berlin, 396 F.3d at 899-90 (city could provide no legitimate planning or zoning reason for its denial of a Special Use Permit and appeared to be giving the church "the runaround."); County of Sutter, 456 F.3d at 988-989 (finding a "substantial burden" when the county's reasons for denial of conditional use permit were overbroad and "church readily agreed to every mitigation measure suggested by the Planning Division" but was turned down by the county without explanation).
34. See, e.g., C.L.U.B., 342 F.2d at 766; Congregation Kol Ami, 309 F.3d at 133-37.
35. See Congregation Kol Ami, 309 F.3d at 137-41.
36. See C.L.U.B., 342 F.3d at 766; see also Locke, 540 U.S. at 721 n.3 (if a law is challenged under the Free Exercise Clause and found constitutional, then rational basis necessarily applies to any Equal Protection challenge).
37. 42 U.S.C.A. § 2000cc(b)(1).
38. City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).
39. 540 U.S. at 721 n.3.
40. See, e.g., Town of Surfside, 366 F.3d at 1239-43.
41. See, e.g., Town of Surfside, 366 F.3d at 1236-40.
42. See, e.g., Primera Iglesia, 450 F.3d at 1308 (identifying three distinct kinds of Equal Terms statutory violations based upon "a review of our case law construing the Equal Terms provision and reviewing closely related Supreme Court precedent arising under the Free Exercise Clause.").
43. See Town of Surfside, 366 F.3d at 1231-34.
44. See Konikov, 410 F.3d at 1327-28.
45. See, e.g., Primera Iglesia Bautista, 450 F.3d at 1311.
46. See, e.g., Village of Long Grove, 468 F.3d at 1001 (no violation of Equal Protection Clause or "equal terms" provision with respect to Village's zoning decisions regarding the plaintiff church as compared to Village's more favorable treatment of a neighboring public school).
47. See, e.g., Village of Long Grove, 468 F.3d at 983-84, 999.

RECENT CASES

Supreme Court of New Hampshire holds that storage unit structures within 100-foot wetlands buffer zone will not harm wetlands and variance should be granted.

The Town Planning Board approved the applicant's site plan in March 2000 to build a self-storage facility within 100 feet of a wetland located on the property. Three years later, the Town enacted a wetlands protection ordinance which prohibited development within the 100 feet buffer of wetlands. Since the applicant had not yet begun development, he requested a variance from the new restrictions which the Zoning Board of Adjustment denied. The trial court reversed and ordered the ZBA to grant the variance. The Town appealed.

The state's highest court affirmed. An applicant seeking a variance in New Hampshire must satisfy five elements from *Garrison v. Town of Henniker*, 907 A.2d 948 (N.H. 2006) – (1) the variance will not be contrary to the public interest, (2) special conditions exist such that a literal enforcement of the ordinance will result in unnecessary hardship, (3) the variance is consistent with the spirit of the ordinance, (4) substantial justice is done, and (5) granting the variance will not diminish the value of surrounding properties. The Town argued that the applicant had not satisfied four of the criteria, but the court examined all five elements and concluded that the evidence supported the trial court's findings. The variance would not alter the character of the neighborhood because there was already a fire station, a gas station, and a telephone company in the area. The wetlands on the property was a "special condition" and the applicant established that "substantial justice" would be done because there was uncontroverted evidence that the project would not harm the wetlands, no abutters opposed the project, and the project was an otherwise permitted use in the district. (*Malachy Glen Associates, Inc. v. Town of Chichester*, 2007 WL 817286 (N.H. 2007).)

OFFICE OF THE COUNTY ATTORNEY

Douglas M. Duncan
County Executive

Charles W. Thompson, Jr.
County Attorney

PRIVILEGED AND CONFIDENTIAL

MEMORANDUM

August 6, 2001

To: Douglas M. Duncan
County Executive

From: Charles W. Thompson, Jr.
County Attorney

Re: Bill No. 35-00, Forest Conservation - Amendments

I am writing to advise you that a provision contained within § 22A-12 of Bill No. 35-00 is probably unconstitutional and violates federal law.

As we advised in a previous opinion to Deborah Snead dated January 2, 2001, which is included in the Council packet at circle 35, Bill No. 35-00 divides the County into land use categories within which a certain percentage of "afforestation" must be maintained. *See § 22A-12.* Presently, churches and religious schools are included within the "institutional development areas" category. By definition, that category includes schools, government offices, recreation areas, and parks. *See § 22A-3; Md. Code Ann., Nat. Res. I. § 5601(r) (1997).* Under the Bill, religious institutions, an undefined term that presumably includes churches and religious schools, would be removed from the "institutional development areas" category and required to comply with the forestation "requirements that apply to the base zone in which" they are located. *See § 22A-12.* The requirements of the base zone are sometimes more stringent than those applicable to the "institutional development areas." Therefore, the proposed language could be construed as subjecting religious institutions to more onerous requirements than other institutions. The First Amendment to the United States Constitution and a recently enacted federal law, the Religious Land Use and Institutionalized Persons Act of 2000, do not allow such disparate treatment of religious institutions. I doubt that the provision in § 22A-12 that removes religious institutions from the institutional development category will withstand judicial scrutiny. The Maryland-National Capital Park and Planning Commission's staff agreed with our assessment and recommended that the provision be stricken. (See Memorandum Dated March 1, 2001, from Cathy Conlon to Montgomery County Council, p. 7).

In order to avoid these constitutional and statutory prohibitions, we should include religious institutions in the "institutional development areas" category.

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Bill 35-00

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OFFICE OF THE COUNTY EXECUTIVE
ROCKVILLE, MARYLAND 20850

Douglas M. Duncan
County Executive

MEMORANDUM

August 6, 2001

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RECEIVED COUNCIL

TO: Blair Ewing, President
Montgomery County Council

FROM: Douglas M. Duncan, County Executive

SUBJECT: Bill 35-00, *Forest Conservation – Amendments*

You have delivered Bill 35-00 to me for approval or disapproval under Section 208 of the County Charter. This bill revises standards to require greater forest conservation, strengthens requirements for forest planting to increase the success of reforestation, authorizes forest mitigation banking, and makes other changes to County law governing forest conservation requirements. I believe that these are laudable goals, and I have therefore decided to sign the bill and return it to you so that it can become law.

I note, however, that the County Attorney continues to voice serious concerns about the validity of a provision contained within Section 22A-12 of the bill. As set forth in the attached memorandum from Mr. Thompson, part of the bill could be construed as subjecting religious institutions to more onerous requirements in violation of both the First Amendment to the United States Constitution and a recently enacted federal law, the Religious Land Use and Institutionalized Persons Act of 2000. Mr. Thompson expresses doubt that the provision will withstand judicial scrutiny. In fact, both the County Attorney's Office and staff at the Maryland-National Capital Park and Planning Commission had previously recommended to the Council that the provision be stricken.

In light of the above, I have instructed the Chief Administrative Officer to direct Executive staff to defer enforcement of the constitutionally offensive provision of the bill. This action will allow the County to increase the effectiveness and the efficiency of implementing our forest conservation program while avoiding the potential legal challenges that could place at risk the goals of the program.

DMD:jp

Attachment

cc: Mr. Bruce Romer
Charles W. Thompson, Jr., Esquire

MONTGOMERY COUNTY COUNCIL
ROCKVILLE, MARYLAND

OFFICE OF THE COUNCIL PRESIDENT

MEMORANDUM

November 27, 2001

TO: Douglas M. Duncan, County Executive

FROM: Blair Ewing, Council President

SUBJECT: Bill 35-00, *Forest Conservation – Amendments*

In your August 6 memo on the subject bill, you noted that you had signed the bill but did not intend to enforce one provision that, in the view of the County Attorney, might not withstand judicial scrutiny.

In the attached memo the Council's Senior Legislative Attorney concludes that the County Executive does not have the authority to decide which parts of County laws he will or will not comply with and enforce. The Council strongly supports this conclusion.

As the memo makes clear, having signed the bill into law, you must enforce it. If you wish to seek further clarification of the legal issues, there are means for you to do so. But under the County Charter and Maryland caselaw you are required to enforce the law in its entirety. The Council fully expects that you will do so.

Attachment

c: Councilmembers
County Attorney
Senior Legislative Attorney

STELLA B. WERNER COUNCIL OFFICE BUILDING, 100 MARYLAND AVENUE, ROCKVILLE, MARYLAND 20850
240/777-7900 TTY 240/777-7914 FAX 240/777-7989
WWW.CO.MO.MD.US/COUNCIL

MEMORANDUM

November 13, 2001

TO: Council President Ewing

FROM: Michael Faden, Senior Legislative Attorney

SUBJECT: Executive's authority to enforce laws selectively

On August 6, 2001, the County Executive signed Bill 35-00, *Forest Conservation - Amendments,* into law but sent you the attached memorandum. In that memo he purported to instruct the Chief Administrative Officer to "direct Executive staff to defer enforcement of the constitutionally offensive portion of the bill", namely the footnote in Section 22A-12 which would require religious institutions to comply with the forest conservation threshold and afforestation requirements of the base zone where the institution is located. The Executive's action reflected the County Attorney's advice, attached to his memo, that the cited provision "is probably unconstitutional and violates federal law." You asked whether the Executive has the authority to decide which parts of County laws he will or will not comply with and enforce. The answer is no; under the County Charter the Executive does not have that authority.[1]

As you know, the County Charter in §101 vests in the County Council "all legislative powers" which the County may exercise under the state Constitution and laws. The Executive is denied any "legislative power except the power to make rules and regulations expressly delegated by a law enacted by the Council or by this Charter." Rather, in §201, the Executive is directed to "faithfully execute the laws."

As the Maryland Court of Appeals held in the landmark case of *County Executive of Prince George's County v. Doe,* (291 Md. 676, 436 A.2d 459 (1981)):

> The County Executive is bound by the Charter to direct, supervise and control the implementation of the Council's allocation of duties and functions to these agencies as part of his responsibility to faithfully execute the laws enacted by the County Council. The vesting of this power in the County Executive does not, however, constitute a grant of unbridled authority permitting him to usurp, nullify or supersede, at his pleasure, functions and duties committed by law to other executive branch officers, or to refuse to

[1]Somewhat ironically, the Executive's directive will have little if any effect because the provision at issue is primarily administered by the Planning Board, which is not subject to the Executive's control.

observe existing laws enacted by the Council. In other words, although the County Executive's authority over the executive branch of the county government is supreme in the sense that there is no higher executive authority, he may not ordinarily dictate the actions and preempt the discretion of other county executive officers, acting within the scope of the powers, duties and authority conferred upon them by ordinance lawfully enacted by the Council. *291 Md. 676 at 684.*

The Court of Appeals inserted the following footnote after the previous paragraph:

The County Executive may, of course, exercise his executive veto power over ordinances passed by the Council with which he is not in agreement. *291 Md. 676 at 685 n. 4.*

As the County Attorney's memo indicates, while Bill 35-00 was pending the Council was advised that the County Attorney's Office believed the amendment originally proposed by the Planning Board might have constitutional difficulties. The Council was also advised that Council staff disagreed with that assessment. We did so because most similar institutional uses must obtain a special exception while religious institutions need not: thus, the religious institutions benefited from, rather than being burdened by, any disparity in the previous law, and the bill made the applicable standard more neutral for all parties rather than more onerous for them (thus avoiding other constitutional issues). The Transportation and Environment Committee and the Council considered both views and retained the provision as introduced.[2]

The County Attorney may argue that the Executive cannot be made to enforce what he believes is an unconstitutional law. If the Executive is sincerely worried about the constitutionality of this part of the forest conservation law, the best alternative open to him (having signed the bill into law) is to seek further clarification of the legal issues, either by an Attorney General's opinion or through a declaratory judgment action filed in either the County Circuit Court or the US District Court.[3] Or, as a federal court noted in *Coast Alliance v. Babbitt* (6 F. Supp. 2d 29, D.D.C. 1998): "If following that plain language, an agency cannot carry out Congress' intent, then the remedy is not to distort or ignore Congress' words, but rather to ask Congress to address the problem." What the Executive cannot do, as the Court of Appeals emphasized in *Doe*, is simply pick and choose what parts of a law to comply with -- a law the Council enacted after hearing both sides of this legal issue.[4]

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[2]The County Attorney's original memo was sent in January and Council staff pointed out our disagreement in a March memo to the Committee; however, the County Attorney's Office remained silent through 3 Committee and 2 Council worksessions and never raised the issue again until August, after the Council had enacted the bill.

[3]Since the official County policy is the law enacted by the Council, the County Attorney is institutionally obligated to defend that law, and would be constrained from taking an opposing position in a declaratory judgment action, if any reasonable case can be maintained for the law's validity. As a spokeswoman for US Attorney General Ashcroft recently said in a similar situation regarding a federal minority contracting law, "When there is a good faith argument to be made in defense of a statute, he will make it." A Justice Department colleague added: "John Ashcroft is fulfilling his responsibility as Attorney General...He understands the difference between a legislator and being in the Executive branch." If in any legal action the Executive decides to assert a different position, he would have to retain special or private counsel to represent him.

[4]This memo does not discuss what legal remedies are available to the Council or a private party if the Executive or a County official under his direction affirmatively refuses to enforce the law as written.

BILL 15-07

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OFFICE OF MANAGEMENT AND BUDGET

Isiah Leggett
County Executive

MEMORANDUM

Joseph F. Beach
Director

July 13, 2007

TO: Marilyn J. Praisner, Council President

FROM: Joseph F. Beach, Director, Office of Management and Budget

SUBJECT: Bill 15-07, Forest Conservation – Religious Institutions

The purpose of this memorandum is to transmit a fiscal impact statement to the Council on the subject legislation.

LEGISLATION SUMMARY

The proposed legislation would overturn an amendment to the County forest conservation law that the Council enacted in 2001 as part of a larger set of amendments in Bill 35-00. Bill 15-07 would modify the law to treat religious institutions like other institutions as defined in the forest conservation law, rather than treating them as if they were governed by the base zone where each is located.

Bill 35-00 subjects a religious institution to the same afforestation requirements as the base zone where the institution is located, rather than categorizing a religious institution as an institutional use as defined in the County and State forest conservation laws.

FISCAL SUMMARY

The proposed legislation will have no fiscal impact on the County.

Stan Edwards with the Department of Environmental Protection contributed to and concurred with this analysis.

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cc: Timothy L. Firestine, CAO
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