Churches might have few protections from legislation

January 16, 2014
by Randy Bright

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I wrote the following article in October of 2008 as the City of Tulsa was beginning its PlaniTulsa comprehensive planning. At that time I was predicting that the city would eventually adopt a form-based zoning code, which is now happening. My prediction was to warn churches about the dangers this would impose on churches. Here is what I wrote:

In one of my conversations with John Fregonese regarding the importance of our city's churches, he said that the Religious Land Use Act should serve to protect church's rights.

RLUIPA, or the Religious Land Use and Institutionalized Persons Act, was enacted in 2000 after an earlier law, the Religious Freedom Restoration Act (RFRA) of 1993, was declared unconstitutional by the 1997 Supreme Court case of City of Boerne v. Flores.

In that case, the city had refused a permit for the expansion of a church in an historic district, and the Court ruled Congress was only empowered to enforce the Fourteenth Amendment (due process and equal protection of the law), and that specific treatment of religion had not been identified in the RFRA.

The RLUIPA was more specific, stating that "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, including a religious assembly or institution, 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 interest."

As such, The RLUIPA prohibits a church from receiving less favorable treatment than other institutions. It also prohibits banning churches from any jurisdiction, or from imposing unreasonable requirements on churches.

The constitutionality of the land use portion of the RLUIPA has still not been confirmed by the Supreme Court, but it has been upheld by the U.S. Court of Appeals for the Seventh Circuit and by the majority of the lower district courts.

In a summer 2008 issue of the Tulane Environmental Law Journal, an article regarding the legal concerns of the RLUIPA in regard to megachurches brought up two major concerns.

The first was "what is a religious exercise?" This question arises most often from the trend that larger churches, and even some moderately sized churches, bring activities other than worship, fellowship or religious education to their facilities. Some examples of other activities might include coffee shops, restaurants, book stores, schools or fitness centers.

The RLUIPA says that it is "only the use, building or conversion for religious purposes that is protected and not other uses or portions of the same property," so it is questionable that the RLUIPA would help a large percentage of churches in situations where the church building is being used for activities that are not strictly religious.

The key to acceptance by the courts must be that the church sincerely believes that the activity is a religious exercise, even though that activity is not central to their own beliefs.

If an activity is accepted, then the second concern regards whether or not the government is imposing a "substantial burden" on the church. More specifically, is the government forcing a church to act in a way that is contrary to their sincerely held beliefs. This could mean compelling a church into an action contrary to their beliefs, or an inaction that prohibits them from acting upon their sincerely held beliefs.

Substantial burden does not include mere inconveniences to the church.

In a court case regarding a church that was denied a permit to build a school (Westchester Day School v. Village of Mamaroneck), the court found that the regulations must "put…undue pressure on adherents to alter their behavior and to violate their beliefs in order to obtain government benefits".

In regards to New Urbanism (or form-based codes), as cities become saturated with buildings and land shortages become the norm, churches that build new facilities will almost certainly be forced to build much smaller facilities within neighborhoods or in the third floor of a twenty story building.

My question would be, how can the RLUIPA protect them against a system like that? Will it be reasonable for a church to sue a city because there was no land of sufficient size available to them at a reasonable price? Will the courts hold that it is merely an inconvenience that land costs were high because they were high for everyone else as well?

The RLUIPA was written without any consideration for the consequences of New Urbanism, and as such will be a paper tiger.

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Randy W. Bright, AIA, NCARB, is an architect who specializes in church and church-related projects. You may contact him at 918-582-3972, rwbrightchurcharch@sbcglobal.net or www.churcharchitect.net.

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