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Seventh Circuit Court of Appeals Constrains Religious Land Use Challenges to Local Zoning

Since Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA," codified at 42 U.S.C. §§2000cc-2000cc-5), many municipal officials have feared the law would be interpreted to effectively exempt churches and other religious institutions from routine land use regulations, even where the regulations are applied evenhandedly. An August 20, 2003 decision by the United States Court of Appeals for the Seventh Circuit should put many of those fears to rest.

In *Civil Liberties for Urban Believers v. City of Chicago*, ("C.L.U.B."), the court rejected claims by several churches that the City of Chicago's zoning ordinance violated their rights under RLUIPA and the Constitution. In doing so, the court significantly constrained religious land use challenges to local zoning.

Background

Chicago allows churches as permitted uses in residential zones, and as special uses in business and commercial zones. They are not permitted in manufacturing zones. Each of the churches that filed suit in C.L.U.B. originally had difficulty locating suitable sites in residential zones. Prices were too high and land areas too small. They also had trouble winning City approval for special use permits to operate at sites in commercial or business zones, or for rezoning applications to operate at sites in manufacturing areas. Neighbors and aldermen opposed their permit applications, and the Planning and Zoning Department often found that the proposed use did not meet the City's standards.

In the case of one church, an alderman persuaded the City Council

to rezone a commercial property to manufacturing after a church applied for a special use permit for the site. The action effectively barred the church from using that site. Ultimately, all of the churches found sites in Chicago. Nevertheless, they sued to recover the attorney fees and other expenses they incurred in pursuing other sites.

RLUIPA

The churches sued under both RLUIPA's "substantial burden" provision and its "nondiscrimination" provision.

A. Substantial Burden

RLUIPA requires land-use regulations that substantially burden religious exercise to be the least restrictive means of advancing a compelling government interest. The churches argued that any land-use regulation that inhibits or constrains any religious exercise constitutes a substantial burden on such religious exercise. The court rejected this argument saying, "a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable."

Applying this standard, the court found that the churches had failed to establish that the City regulations constituted a substantial burden under RLUIPA. The "costs, procedural requirements, and inherent political aspects" of land use regulation are incidental to all land development. "While they may contribute to the ordinary difficulties associated with location (by any person or entity, religious

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or nonreligious) in a large city, they do not render impracticable the use of real property in Chicago for religious exercise, much less discourage churches from locating or attempting to locate in Chicago."

The court rejected the churches' argument that RLUIPA requires municipalities to exempt churches from land use regulation. "Unfortunately for Appellants, no such free pass for religious land uses masquerades among the legitimate protections RLUIPA affords to religious exercise.

B. Nondiscrimination

The court found that Chicago had resolved the churches' claim under RLUIPA's nondiscrimination provision while this case was pending. That provision prohibits land use regulations that either disfavor religious uses relative to nonreligious uses or unreasonably exclude religious uses from a particular jurisdiction. In response to the suit, Chicago amended its ordinance to require clubs, lodges meeting halls, recreation buildings, and community centers to meet the same requirements applicable to churches.

The churches disputed that the violation could be fixed. RLUIPA has a governmental discretion provision that allows the government to avoid RLUIPA's dictates by changing the policy or practice "that results in a substantial burden on religious exercise." Based on this language, the churches argued that ordinances that discriminate, rather than impose a substantial burden, could not avoid RLUIPA's dictates through legislative fixes. However, the Seventh Circuit interpreted the language more broadly, to also include a policy or practice "that results in discrimination against religious practice." It found that the changes made by Chicago met this standard.

Constitutionality of Ordinance

A. Facial neutrality.

The churches argued that Chicago's ordinance was not facially neutral because it specified that churches must obtain a special use permit to locate in commercial or business districts. The court rejected the challenge, noting that churches were just "one among many and varied religious and nonreligious regulated uses," and that there was no evidence that the ordinance

was adopted for anything but legitimate reasons.

B. Discriminatory Application.

This claim focused on the alderman's conduct. The churches claimed that this conduct was evidence that the ordinance had been discriminatorily applied. However, the court found that even if the alderman's motives for wanting to rezone the property were illicit, the plaintiffs had failed to show that the City Council and Mayor endorsed those motives. "Absent some evidence that the policy-making body . . . approved both the rezoning and the illicit motivation therefor—and Appellants offer none—Chicago cannot be held liable for the Alderman's actions."

C. Freedom of Speech and Assembly.

The court found no violation of the churches' rights to freedom of speech and assembly. It held that the ordinance is content neutral and generally applicable, noting that "to the extent the (zoning code) incidentally regulates speech or assembly within churches, such regulation is motivated not by any disagreement that Chicago might have with the message conveyed by church speech or assembly, but rather by such legitimate, practical considerations as the promotion of harmonious and efficient land use."

The court also found the ordinance narrowly tailored, insofar as the City's substantial interest in regulating land use would be achieved less effectively without it. And the court found ample alternative channels of communication were available, because churches could locate throughout the city—in residential areas by right and in commercial and business zones by special use permit. In light of these findings, the ordinance met the constitutional standards.

D. Equal Protection

The churches sought "heightened scrutiny" review of the City's ordinance and actions on the ground that they restrict a fundamental right—freedom of religion. However, the court found that the city was not regulating the exercise of religion:

Whatever the obstacles that the (zoning code) might present to a church's ability to locate on a specific plot of Chicago land, they in no way regulate the right, let alone interfere with the ability, of an individual to

adhere to the central tenets of his religious beliefs. As the district court aptly noted, the (zoning code's) limitations on church location are "not the regulation of belief, any more than regulating the location of the Chicago Tribune is the regulation of the newspaper's [F]irst [A]mendment-protected product."

Absent a fundamental right, a plaintiff alleging an equal protection claim must show that the governmental action is "wholly impossible to relate to legitimate governmental objectives." The churches could not meet this standard, insofar as *Euclid v. Ambler Realty Co.* has upheld zoning as "a valid exercise of authority." The court found Chicago's zoning rationally related to promoting the public welfare.

E. Due Process

Noting that federal courts are not boards of zoning appeals, the court directed the churches to bring any complaints they may have about the procedures used by Chicago to the state courts, where an adequate remedy was available.

—Dick Lehmann & Matt Weber

City Of Beloit to Purchase Water System

The City of Beloit will purchase the water system that currently serves its city residents for \$20.85 million. This water system is one of two public water systems owned by Wisconsin Power & Light Company (WP&L). WP&L has indicated that it is also interested in selling its water system which serves the City of Ripon.

The Public Service Commission orally approved the sale and purchase on August 20, 2003. This approval allows WP&L to abandon its water service in the Beloit area and allows the City to provide that water service.

The purchase of Beloit's water system was approved by Beloit citizens in a May 28, 2003 referendum by a nine-to-one margin. As a result of the purchase, water rates in Beloit will decrease 10% for two years. The city will also be entitled to a payment in lieu of taxes from the water utility equal to a minimum of \$300,000 per year.

The sale is scheduled to take place in November 2003.

—Lawrie J. Kobza

Public Assembly Permit Requirements Struck Down

Municipal permit policies for public assemblies took a beating in July. Both the Wisconsin Court of Appeals and the United States Court of Appeals for the Seventh Circuit struck down permit policies as unconstitutional.

Municipalities generally may regulate the time, place and manner of public assemblies. However, due to the expressive nature of the activities involved, the municipal regulations must be content neutral, and must be narrowly tailored to serve a significant governmental interest. Moreover, adequate alternative avenues of expression must be available. The public assembly permit policies of Gary, Indiana and Sauk County, Wisconsin failed to meet these constitutional standards.

Gary, Indiana

In *Church of the American Knights of the Ku Klux Klan v. City of Gary*, Appeal No. 02-3541, decided July 2, 2003, the Seventh Circuit found unconstitutional the City of Gary's requirement that the Ku Klux Klan pay the city's cost for policing the Klan's demonstration as a condition of receiving a permit. The ordinance at issue allowed the City to impose such a fee where it "reasonably determined" that an organization applying for a permit has a history of violence or of damaging property. The City found that the Klan met this standard and demanded prepayment of a \$4,935 fee, the cost of overtime pay for assigning 28 police officers to restrain the 50 KKK members expected to attend the rally.

The court found that the fee amounted to a "Heckler's Veto." It noted that the number of police officers assigned to the rally was out of proportion to the number of Klan members expected to attend the rally. Accordingly, the court found that the police presence was not required to control the KKK members themselves. Rather, according to the state police, it was the protestors the Klan rally would attract who tended to pose a threat of violence. The court held that, just as

the government may not bar political speech merely because a speaker's "audience will riot," so, too, "a city cannot in lieu of denying the permit charge the applicant for the expense to the city of reigning in the hecklers." *Slip Op. at 5*.

The court also struck down the City's requirement that assembly organizers apply for a permit at least 45 days before the assembly is held. The court observed that municipalities generally may impose advance-filing periods because a municipality needs some time to decide whether to grant the permit and if so whether to impose conditions on the grant. Nevertheless, the court found 45 days unreasonable.

Sauk County, Wisconsin

Sauk County v. Gumz, Appeal No. 02-0204, decided July 24, 2003, by the Wisconsin Court of Appeals, involved similar issues to those presented in *Ku Klux Klan*. Ben Masel, on behalf of "Weedstock 2000," sought a permit from Sauk County to hold a four day open-air assembly in support of the legalization of hemp and marijuana. The County ordinance required Masel to apply for an assembly permit 60 days before the event, and required the County to process the application within 45 days. The ordinance also required applicants to post a bond to cover clean up costs at the assembly site. Masel challenged these and other provisions of the ordinance.

Masel challenged the bond requirement on much the same grounds that the Ku Klux Klan challenged Gary's requirement that the Klan pay for police protection. That is, Masel argued that the bond requirement amounted to a Heckler's Veto because the Weedstock organizers could be forced to pay for "the community's hostile reaction expressed by throwing things or putting up signs." *Slip Op. at 56*. The Court of Appeals rejected this argument.

The court found that the charges imposed under the County's bond requirement do not vary according

to the public's reaction to an event. The ordinance addresses only "waste material produced or left by the assembly." *Id.* Moreover, "there is no evidence that the County has ever charged an applicant for waste material produced by those opposed to the gathering." Accordingly, the court concluded that the bond requirement did not amount to a Heckler's Veto because it was not triggered by or tied to the public's adverse reaction to the assembly's message.

The County's 60 day advance-filing requirement did not fair as well, despite the County's efforts to defend it. The County argued that applications are processed by a small staff, and reviewed by the law enforcement committee, which meets only once per month. The committee sometimes must ask other county departments to get involved, such as the planning and zoning department, public health department, sheriff's department, and the corporation counsel's office. Accordingly, a 60-day advance filing requirement was necessary to give the County 45 days to complete these administrative processes and the applicant 15 days in which to appeal any decision made by the County.

The court found that the County did not meet its burden. The County failed to show why the law enforcement committee could not meet more often, or why other personnel could not process applications. Similarly, the County had failed to show that other departments needed such a long time to fulfill their roles. The court concluded that the 60 day advance-filing requirement, and the 45-day processing limit, were not narrowly tailored to serve a significant governmental interest. Moreover, after striking these provisions, the court declared the entire ordinance unconstitutional because it lacked a firm deadline by which applications would be processed.

—Matt Weber

Wisconsin Supreme Court Decisions Reinforce Power of PFCs

In four recent decisions, the Wisconsin Supreme Court has bolstered the power of police and fire commissions (PFCs) and the discretion of fire and police chiefs in Wisconsin. This term, the Court affirmed the practice of probationary promotions and held that chiefs and PFCs are allowed to revoke a probationary promotion within the probationary period without a hearing or arbitration. The Court also upheld a PFC rule allowing the use of a hearing examiner in evidentiary hearings. Finally, the Court held that PFC “just cause” hearings are the exclusive process for firefighters and police officers to pursue complaints of employment discrimination.

- ***Kraus v. City of Waukesha Police and Fire Comm’n*, 2003 WI 51.**

In *Kraus*, the plaintiff was promoted from patrol officer to police sergeant on a one-year probationary basis. Before completing the probationary period, Kraus was returned to his former rank for nondisciplinary reasons. Kraus requested a “just cause” hearing under Wis. Stat. § 62.13(5)(em). The PFC denied Kraus’s request and granted the Chief’s recommendation to return Kraus to patrol officer status. Kraus sought a writ of certiorari in the Circuit Court for Waukesha County asking the court to order the PFC to give him a due process hearing prior to returning him to patrol officer status. The court held that, because Kraus’s failure to satisfy probation was due to performance-based reasons, the PFC was not required to afford him such a hearing. Kraus appealed the decision to deny him a hearing.

The Supreme Court held that police chiefs and PFCs have the implied authority under Wis. Stat. § 62.13 to promote on a probationary basis, a practice noted by the Court to be a “common and effective management tool for evaluating candidates.” The Court held that this power is a reasonable means for PFCs to implement their power to appoint. The Court further held that Kraus was not entitled to either a constitutional due process hearing or a § 62.13(5) “just cause” hearing on the decision. The Court rejected Kraus’s due process argument since he had no vested property right in the higher rank. The Court reasoned that Kraus did not have a right to a § 62.13(5) “just cause” hearing, because

that statute only applies to disciplinary actions, and the decision to return Kraus to his previous rank was not related to disciplinary issues.

While the decision affirms the broad authority of chiefs and PFCs to promote on a probationary basis, the court warned that the authority exercised must be reasonable. Accordingly, while the one-year probationary period in *Kraus* was reasonable, a substantially longer or indefinite probationary period that would prevent an officer from ever reaching permanent status likely would be deemed an unreasonable exercise of discretion. The Supreme Court’s decision nevertheless reinforces important powers for chiefs and PFCs.

- ***City of Madison v. Wisconsin Employment Relations Comm’n*, 2003 WI 52.**

City of Madison v. WERC involved a similar factual scenario as *Kraus*, only the issue in this case was whether the decision to revoke a probationary promotion may be subjected to arbitration. In *Madison v. WERC*, a firefighter was promoted to the position of fire apparatus engineer for a one-year probationary period. Eleven months into the probationary period, the fire chief revoked the promotion, and the employee filed a grievance seeking reinstatement to the higher position. The City of Madison declined to arbitrate the grievance.

Having already decided in *Kraus* that police and fire chiefs may promote on a probationary basis and that the decision to revoke such a promotion does not require a “just cause” hearing, the Court turned to the question of whether the decision to revoke the promotion was subject to arbitration under the collective bargaining agreement (CBA). The CBA at issue specifically prohibited arbitration of matters falling within fire chief or PFC authority under Wis. Stat. § 62.13. The Court ruled that the power to appoint and promote staff could not be transferred to an arbitrator because Wis. Stat. § 62.13 “exclusively empower[s]” fire and police chiefs and PFCs to make appointment and promotion decisions. The Court further ruled that the CBA at issue specifically excluded disputes regarding management rights under § 62.13 from arbitration. Thus, since the authority to decide who is

fit for promotion belongs, both by statute and by the terms of the CBA, to the chief and PFC, the decision to revoke the employee’s promotion was not subject to arbitration.

- ***Conway v. Bd. of the Police and Fire Comm’rs of Madison*, 2003 WI 53.**

In *Conway*, a lieutenant in the Madison Fire Department and the union (“plaintiffs”) challenged a rule adopted by the Madison PFC that allowed the Board to use a hearing examiner to conduct initial and evidentiary hearings in disciplinary cases. The rule allowed the hearing examiner to rule on procedural and discovery issues, to set a hearing date and to dismiss a complaint. Plaintiffs sought a declaration that the PFC had exceeded its authority by adopting the rule.

The Supreme Court held that, although the use of a hearing examiner is not expressly authorized by the statute, the rule fell within the Board’s express authority contained in Wis. Stat. § 62.13(5)(g) to promulgate “rules of administration.”

The Court noted that the hearing examiner under the PFC rule merely assists the PFC in its duties. The hearing examiner is required to prepare a detailed report for the Board, and hearings are both videotaped and transcribed in a certified transcript. The hearing examiner’s ability to dismiss a complaint is limited to a non-appearance by the complainant. Ultimately, the PFC is still the final decision-maker, so the use of a hearing examiner by the PFC is permissible.

The holding in *Conway* gives PFCs broad discretion to promulgate administrative rules, provided the PFC does not delegate its statutory powers and remains the ultimate decision-maker. *Conway* also gives PFCs the ability to use hearing examiners to assist in the taking of evidence and other administrative tasks.

- ***City of Madison v. State of Wisconsin Dep’t of Workforce Dev., Equal Rights Div.*, 2003 WI 76.**

Firefighter Charles T. Wagner was terminated after a “just cause” disciplinary hearing pursuant to Wis. Stat. § 62.13(5). Charges had been levied against Wagner by the fire chief after Wagner was convicted of misdemeanor theft. After failing in his

challenge of the PFC order of termination, Wagner filed a complaint with the Equal Rights Division of the Department of Workforce Development (DWD) alleging a discriminatory termination based on conviction record. The City challenged the ability of the DWD to hear the case, asserting that the PFC disciplinary hearing was final and that the DWD did not have jurisdiction to hear Wagner's discrimination claim.

The Supreme Court held that the DWD did not have jurisdiction to hear the discrimination complaint because the PFC "just cause" hearing and subsequent appeals are the exclusive procedure for addressing allegations of discriminatory practices in police and fire departments. The Court specifically noted that the PFC procedure adequately protects police officers and firefighters from discrimination, because Wis. Stat. § 62.13(5)(em) specifically requires that an adverse employment action not be taken for a discriminatory purpose; the PFC's review of the employment decision requires the Commission to determine that the employment action is "fair and without discrimination." § 62.13(5)(em)6. Accordingly, the DWD complaint procedure may not be used by firefighters and police officers with discrimination complaints.

The Court's ruling assures municipalities and PFCs that once the "just cause" hearing process is exhausted, the decision of the PFC cannot be collaterally attacked through the DWD process. Officers and firefighters will not have a second opportunity to pursue their allegations of discriminatory conduct by bringing a subsequent suit with the DWD.

Clearly, the Wisconsin Supreme Court, in its recent opinions, has upheld the broad authority and discretion of PFCs. The Court endorsed the practice of probationary promotions, allowing a return to former rank without a hearing or arbitration. The Court affirmed a PFC rule to utilize a hearing examiner. Finally, the Court ruled that the PFC "just cause" hearing is the exclusive procedure for firefighters and police officers with discrimination complaints.

—Jennifer S. Mirus &
Steven C. Zach

Bill to Create Metropolitan Service Districts to Be Proposed

Co-sponsors are being sought for a bill which would allow the creation of Metropolitan Service Districts. The primary sponsors of the proposed bill (currently LRB-0216/3) will be Rep. Huber (Dem.) and Rep. Lehman (Rep.) The proposed bill was developed with the assistance of the League of Municipalities, the Alliance of Cities and the Wisconsin Towns Association.

The proposed bill allows for the creation of Metropolitan Service Districts (MSDs) consisting of two or more municipalities which would provide at least two different services. One of the services provided must be economic development; land use planning; fire and emergency medical services; parks and recreation; zoning; mass transit; highway maintenance services; police; recycling; yard waste and garbage collection; or libraries.

The procedure for creating a service district begins with adoption of an enabling resolution by at least two municipalities within an urbanized area, declaring the intent to create a district and declaring which services the district will provide. (Urbanized areas are to be designated by the regional planning commission or the county.) Other municipalities within the urbanized area may opt out of becoming part of the district; if the municipality does not opt out, it becomes part of the district.

Before a MSD is created, municipalities that will be members of the district must adopt a resolution or ordinance containing an agreement that must address specified issues, including: the number of members of the district commission; an apportionment plan for electing commission members; and a list of issues and actions subject to review by a veto panel. A veto panel, consisting of the chief executive officer of each member municipality, may veto certain MSD actions listed in the agreement. If at least 50% of the veto panel members object to an action of the MSD, the action is vetoed. However; the veto may be overridden by $\frac{2}{3}$ of all MSD members. If there are unresolved issues concerning the creation, operation, and dissolution of a MSD, those issues are subject to arbitration.

A MSD would be a separate unit of government, independent of the state and member municipalities. A MSD would be governed by an elected commission and it would have broad authority to carry out its governmental service functions. The proposed bill sets forth details on how these functions would be carried out.

In order to fund these services, a MSD would be authorized to levy a tax on the taxable personal and real property in the district. If a district provides a service to less than all its member municipalities, the provision of that service is not funded by the property tax but is funded by a fee imposed on the municipalities receiving the service. Under certain conditions, the MSD could also impose a room tax or an impact fee. The MSD would also be able to issue general obligation bonds for capital improvements.

A municipality that becomes a member of a MSD must transfer to the district real property and certain personal property relating to the service to be provided by the district. The district must also employ all municipal employees who provided the services that the district will provide if the employees were included in a collective bargaining unit.

If an MSD is formed, town territory that is part of the MSD may not be annexed by a city or village within the same district unless the annexation is requested by a property owner and approved by the town board. A town wholly or partially within a MSD that provides zoning and planning services for the town may utilize tax incremental financing in the part of the town subject to those services if the town enters into a revenue sharing agreement with each member municipality in the MSD.

—Lawrie J. Kobza

MUNICIPAL LAW NEWSLETTER

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If you have a particular topic you would like to see covered, or if you have a question on any article in this newsletter, feel free to contact any of the Boardman attorneys listed below who are contributing to this newsletter.

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