

Posted by: **Patty Salkin** | October 23, 2007

Township Open Space Plan is a Land Use Regulation Subject to RLUIPA

Although the Religious Land Use and Institutionalized Person Act (RLUIPA) applies to land use regulations, exactly what constitutes a land use regulation is not defined in the statute. Recent cases from New York and Illinois indicate that courts do not consider eminent domain to be a land use regulation. This month, the District Court of New Jersey held that a township open space plan is a land use regulation within the meaning RLUIPA.

The Albanian Associated Fund, an entity created for the purpose of establishing and maintaining a Mosque as a house of worship, currently supports a congregation located in a building in Paterson, NJ that accommodates 70-100 people. Over the years, the congregation has grown to approximately 200 families, 70% of whom reside in the Township of Wayne. Because the congregation considers the current facilities inadequate for a number of reasons, they entered into a contract to purchase 11 acres in Wayne in a zone where a "house of worship" is permitted as a conditional use. The Township, however, identified this land (and others) as "environmentally sensitive" due to rocky steep slopes. In the past, variance requests for the use of "environmentally sensitive" property by others have been both denied and approved.

In October 2002, the plaintiffs submitted a land development application with a site plan to develop the property as a religious facility. Following discussions with the Township, the application was revised, withdrawn and resubmitted in order to address municipal concerns. In November 2003, about 2½ years after the open space proposal was introduced and while the site plan application was pending, the Township residents approved an open space referendum, providing a funding mechanism for the municipality to begin to purchase property for open space. An Open Space and Recreation Plan was adopted in March 2005, and in January 2006 the plaintiffs learned that the Township intended to acquire the property on which they hoped to site a Mosque via eminent domain. The plaintiffs were offered \$510,000 in compensation for their property, and, according to the Township, they suggested alternate locations where the plaintiffs might want to build their Mosque (but the plaintiffs maintain those locations are not available to them).

The District Court was asked to decide summary judgment motions (which were denied because the Court noted that the parties bitterly dispute the facts and that the trial court will need to make these findings). The issue the District Court did resolve, however, was whether RLUIPA even applied to the facts in this case. The Township attempted to frame their actions as a condemnation proceeding, arguing that RLUIPA does not apply based on cases from other jurisdictions holding that eminent domain is not a land use. The District Court did not offer an opinion as to the applicability of RLUIPA to eminent domain proceedings in the Third Circuit, since they determined that RLUIPA challenge in this case "does not go to the actual taking, but rather to the implementation of the open space plan which is a land use regulation." The opinion further offers some analysis of free exercise jurisprudence in the Circuit.

Now that the Court has determined that RLUIPA does apply, I predict a settlement will likely be in cards. The Township will otherwise have to take a chance that a Court will find the preservation of environmentally sensitive areas a compelling governmental interest and that this is the least restrictive means of dealing with it. Since the facts are in dispute, unless and until it is sorted out by the trial court, the opinion indicates that it is unclear what the true motivations of the Township might be. *Albanian Associated Fund v. Township of Wayne*, 2007 WL 2904194 (D.N.J. 10/1/07).