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Washington Supreme Court Rules Landmark Nomination of Seattle Church Violates Free Exercise of Religion

Reverses Lower Court in *First United Methodist*

The Washington Supreme Court, in a 5-4 decision, has ruled that the City of Seattle violated the free exercise rights of the First United Methodist Church by nominating the church's property for designation as a historic landmark. Expanding on its 1992 decision in First Covenant Church v. City of Seattle, 840 P.2d 174 (1992)[11 PLR 1175](First Covenant II), the Washington Supreme Court concluded that landmark nomination "severely burdens the free exercise of religion because it impedes United Methodist from selling its property and using the proceeds to advance its religious mission." As in many jurisdictions, properties nominated for historic designation in Seattle are subject to interim protection to assure that potential landmarks are not destroyed while the landmark designation process is pending.

The dissent argued that the case was neither justiciable nor ripe for review, emphasizing the speculative posture of this particular controversy (since the CityCat the church's requestChad not yet determined whether to designate the property or what specific controls would attach upon designation). The dissent also admonished the majority for expanding the principles of religious freedom beyond constitutional requirements. According to the dissent, "[w]hile the First Amendment prohibits governmental interference in religion, the majority sanctions religion's isolation from its community."

Significantly, the court declined to rule that all regulation of historic religious property is per se unconstitutional. Limiting its ruling to the facts presented in this particular case, the court found that Seattle's ordinance was unconstitutional, as applied to First United Methodist. (**First United Methodist Church of Seattle v. Hearing Examiner for the Seattle Landmarks Preservation Board**, No. 62805-0 (Wash. Sup. Ct. May 9, 1996).)

This case involves a challenge to the 1985 landmark nomination of the interior and exterior of the First United Methodist Church pursuant to Seattle's Landmarks Preservation Ordinance, SMC 25.12. First United Methodist owns a half-city block in downtown Seattle. The nomination includes only the church building, erected in 1909, which occupies the north portion of the site.

Seattle utilizes a bifurcated approach to landmark protection. First, pursuant to its Landmarks Preservation Ordinance, SMC 25.12, a property may be nominated by the City's Landmarks Preservation Board for designation as a historic landmark. The nomination generally includes a proposed set of controls and incentives which would potentially govern the alteration of a building's significant features.

Once nominated, the City Council then determines whether the property should be designated and if so, what "controls and incentives" would attach. This is accomplished through a "designating ordinance." If the owner and Preservation Board agree on the restrictions then a designating ordinance is enacted. If the owner and Board do not agree, the matter is referred to a hearing examiner, who in turn, issues a recommended decision to the City Council. The Council then decides whether to designate the nominated structure and what controls and incentives would apply.

In this particular instance, the City only accomplished the first step of the designation process. While the Landmarks Board recommended that First United Methodist Church be nominated for designation, the matter was not referred to the Hearing Examiner and the City Council never made a final decision. The City, at the request of First United Methodist, agreed not to pursue landmark designation, pending the outcome of this case.

In its lawsuit against the City, First United Methodist maintained that the application of the Seattle Landmark Ordinances Preservation Ordinance imposed an unconstitutional burden on its right to free exercise of religion. Citing to a declining congregation and the need for extensive repairs, the church argued that "it should be free to designate any portion of its property for commercial use in order to fund religious and social service programs."

The church argued that "it should be free to designate any portion of its property for commercial use in order to fund religious and social service programs."

The trial court, agreeing with First United Methodist, ruled that the Landmarks Preservation Ordinance was unconstitutional. The Washington Court of Appeals, however, modified that ruling, in part, stating that the mere designation of property as a landmark does not interfere with the free exercise of religion. *See First United Methodist Church of Seattle v. Hearing Examiner for the Seattle Landmarks Preservation Board*, 887 P.2d 473 (1995)[14 PLR 1001]. The appeals court further ruled that once the designated property "ceases to be used primarily for religious purposes," the

ordinance may be applied in full. Unhappy with this result, First United Methodist appealed the lower court's ruling to the Washington Supreme Court.

The Court's Decision

In a 5-4 decision, the Supreme Court of Washington reversed the Court of Appeals and ruled that the Landmarks Preservation Ordinance "[i]mposed an unconstitutional burden on United Methodist's free exercise of religion." The court explained, in an opinion written by Chief Justice Durham, that the City's attempt to designate the church as a landmark through its Landmarks Preservation Ordinance violates the First Amendment to the United States Constitution and Article 1 of the Washington State Constitution, "because it impedes United Methodist from selling its property and using the proceeds to advance its religious mission."

The state high court ruled that the landmark nomination violated the federal and state constitutions because it impeded the church "from selling its property and using the proceeds to advance its religious mission."

In reaching its decision, the court first determined that the case was ripe for review even though the City had only nominated and not yet designated the church property as a historic landmark. Citing Seattle's interim control provision, which requires the approval of the Landmark Preservation Board before making significant changes to the structure, the court stated that the City "has prevented United Methodist from either remodeling its sanctuary or selling the church property."

In ruling against the City on the ripeness issue, the court stressed that the City had *prevented* First United Methodist from effecting changes to the church for 10 years. The court apparently attached little if any significance to the fact that the nomination had been pending in this particular case for so many years at the church's own request, and that the church had never sought the approval of the Landmarks Preservation Board for any specific change during this period.

In discussing the constitutionality of Seattle's Landmark Preservation Ordinance, the court initially reviewed its prior rulings in *First Covenant Church of Seattle*, 787 P.2d 1352 (1990)[9 PLR 1039],*(First Covenant I*) and *First Covenant Church v. City of Seattle*, 840 P.2d 174 (Wash. 1992)[11 PLR 1175](*First Covenant II*). Applying a strict scrutiny analysis, the *First Covenant* court had declared the Seattle Landmark Preservation Ordinance, and a separate designating ordinance, to be unconstitutional as applied, because the church in that case had established that the ordinances burdened the free exercise of religion and the City had failed to prove that it had a compelling interest in historic preservation to justify that burden.

Although the designating ordinance at issue in *First Covenant* included a liturgical exception, the Washington Supreme Court explained that the exception did not

alleviate constitutional concerns, because governmental approval would still be required, thereby imposing an administrative burden on the church. The court also found that the ordinances imposed an impermissible financial burden on First Covenant, by reducing the property's value by half. The court, while conceding that "not all financial burdens have a coercive effect on the practice of religion," stated that "gross financial burdens violate the right to free exercise."

Turning to the present case, the Washington Supreme Court initially faulted the appeals court for failing to apply a strict scrutiny analysis. According to the court, "[t]he Court of Appeals . . . did not inquire into whether United Methodist succeeded in showing a burden on free exercise." Rather, the high court observed that the appeals court had concluded "that the City *could* designate the church a landmark, as long as it refrained from imposing controls `until the structure ceases to be used primarily for religious purposes.'" Objecting to this ruling, the Supreme Court stated that the standard of "primarily for religious purposes" is "wholly amorphous" because the burden would then fall on the church to prove what is a religious purpose. Quoting from the Christian Legal Society, which participated in the case as *amicus curiae* on behalf of the church, the court explained:

> The burden will fall to the church to prove that its building is being used primarily for religious purposes, which will be open to interpretation. If the congregation decided that the building should be operated exclusively as a soup kitchen, would that be cessation of religious purpose? Suppose that the congregation rented the building to community groups each night of the week, so that the total number of hours for such "secular" use exceeded the number of hours spent in worship? Is that a cessation of primary use for religious purpose?

The lower court had concluded that the City could designate the church, so long as it refrained from imposing controls "until the structure ceases to be used primarily for religious purposes."

The Washington Supreme Court observed that the standard articulated by the Court of Appeals C"primarily for religious purposes," raises some of the same concerns associated with the liturgical exception at issue in *First Covenant II*. According to the high court, the appeals court's decision "implicitly requires United Methodist to garner City approval for extensive renovations having a debatable religious purpose," and that, in turn, will foster further litigation.

The Washington Supreme Court found "even more troubling" the suggestion by the Court of Appeals that landmark restrictions could be reinstated if First United Methodist "tries to sell" the church. Persuaded by the church's statement that its survival depends on its ability "to sell its sanctuary for demolition and commercial redevelopment, and that it "is not claiming a right to maximize reve-

nue for the purpose of commercial gain, but only for the purpose of furthering its Christian mission," the high court concluded that First Amendment rights do "not cease if United Methodist sells its property." According to the court:

> If United Methodist decides to sell its property in order to respond to the needs of its congregation, it has a right to do so without landmark restrictions creating administrative or financial burdens. The free exercise clause prevents government from engaging in landmark preservation when it has a coercive effect on religion. This protection does not cease if United Methodist sells its property.

While ruling in favor of First United Methodist in this particular case, the court declined to rule that all landmark preservation of churches is unconstitutional. According to the court, it is still necessary to show individual hardship from landmark designation. The court observed that it had used an "as applied" analysis in *First Covenant II* and remarked, somewhat ironically, that a facial ruling could work a hardship on religious institutions *desiring* landmark status.

The court declined, however, to rule that all landmark preservation of churches is unconstitutional—it is still necessary to show individual hardship.

In conclusion, the Washington Supreme Court stated that First United Methodist had demonstrated that the nomination of its church for landmark designation "severely burdens free exercise of religion because it impedes United Methodist from selling its property and using the proceeds to advance its religious mission." Accordingly, the court declared that "the City's attempts to designate United Methodist a landmark violate the First Amendment to the United States Constitution and article I of the Washington State Constitution."

Dissenting Opinion. Four justices dissented with the court's ruling in this case. In an opinion penned by Justice Dolliver (the same justice who authored the dissenting opinion in *First Covenant II*), the dissent argued that the case was neither justiciable nor ripe for review and criticized the majority for expanding the principles of religious freedom beyond constitutional requirements.

Specifically, the dissent reasoned that the church had failed to present a justiciable controversy because no final action had occurred or been applied. According to the dissent, "a more striking example than the present case of an advisory opinion is difficult to envision."

The dissent also observed that the majority's determination of justiciability was inconsistent with prior rulings, including *First Covenant I*, in which the majority had "determined that the church presented a justiciable controversy in claiming landmark designation, and the restrictions of the designating ordinance substantially limited the church's religious expression by interfering with its ability to alter or sell the property."

Apart from the question of justiciability, the dissent also maintained that the case was premature

because the City had not reached a definitive position on an issue inflicting injury. According to the dissent, "the majority describes the nomination of the church as final because it imposes certain restrictions." However, explained the dissent, finality requires the administrative decision maker to reach "a definitive position on the issue that inflicts an actual, concrete injury," (quoting from *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1980).) The dissent observed that in this particular case, the nomination "is not final" and the "possibility of nomination" has not "produced any actual, concrete injury."

Finally, the dissent expressed its concern over the majority's ultimate ruling that the nomination of historic property violates the First Amendment. The dissent stated:

> By permitting this case to go forward, the majority has greatly and unjustifiably expanded the principles of religious freedom that First United Methodist Church of Seattle claims threatened. *First Covenant I* and *II* prevent a city from imposing specific landmark controls on a place of worship upon a showing of a burden on religion. The present decision prevents a city from even discussing nomination of a place of worship, much less nominating, designating, or enacting controls over a church. While the First Amendment prohibits governmental interference in religion, the majority sanctions religion's isolation from its community.

Analysis. In its most recent ruling on the issue of the constitutionality of landmarking and regulating historic religious property, the Washington Supreme Court has declared that the *mere* nomination of historic religious property may infringe on the free exercise of religion, even when the nomination imposes no legal restraints on the property owner. The state court reasoned that landmark nomination, in effect, places a cloud on the ability of a church to maximize its revenues through the sale of its property and therefore may interfere with a church's religious mission. In other words, the court stated that the First Amendment guarantees a religious property owner the right to sell its property unencumbered even by *potential* landmark restrictions. Under the court's analysis, a religious property owner has a constitutional right to maximize its revenue to support its religious activities.

In contrast to the Second Circuit's ruling in St. Barts, the Washington court suggests that the First Amendment guarantees a religious property owner the right to maximize its revenue to support its religious activities.

The end result of this remarkable decision is to sanction the demolition of historic religious properties for purely economic reasons. As the Washington Court of Appeals pointed out in its decision on this issue, it allows "the scenario prevented in *St. Bartholomew's*: demolition of the church in favor of a high-rise building." *See First United Methodist Church of Seattle v.*

Hearing Examiner for the Seattle Landmarks Preservation Board, 887 P.2d 473 (Wash. App. 1995),n.4. In *Rector, Warden, & Members of the Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1103 (1991)[9 PLR 1103](*St. Bartholomew's*), the Second Circuit determined that an ordinance similar to that of Seattle's was a neutral law of general applicability and that the same burdens identified in *First Covenant* and again in *First United Methodist* did not trigger the compelling interest test. Significantly the Second Circuit in *St. Bartholomew's* concluded that a first amendment violation would not occur absent a showing of "discriminatory motive, coercion in religious practice, or the church's inability to carry out its religious mission in its existing facilities." *See also*, *Lyng v. Northwest Cemetery Protective Ass'n*, 485 U.S. 439 (1988)[7 PLR 2001 (1988)](government must "coerce" an individual into violating his or her religion or "penalize" religious individuals).

The Washington Court's decision in *First United Methodist* is also in conflict with the decision by the New York Court of Appeals in *Church of St. Paul & St. Andrew v. Barwick*, 505 N.Y.S.2d 24, *cert. denied*, 107 S.Ct. 574 (1986)[5 PLR 3017]. In a case very similar to that presented by First United Methodist, New York's highest court dismissed a First Amendment challenge to New York City's Landmark Ordinance on ripeness grounds. The New York court reasoned that the constitutional issue presented by the Church of St. Paul & St. Andrew was not ripe for review because the church had only challenged the historic designation in the abstract and had never sought approval by the Landmark Preservation Commission for any specific construction plans.

In understanding the relationship between historic preservation laws and First Amendment rights, it is important to note that several of the underlying principles articulated by the Washington Supreme Court in both *First Covenant I* and *II* and *First United Methodist*C particularly that preservation laws are not neutral laws of general applicability, and that preservation laws impermissibly burden the free exercise of religionC are also not consistent with other case law on this issue. A number of U.S. Supreme Court decisions have viewed other types of regulatory measures as constitutionally neutral, and held that complying with administrative governmental procedures do not impose unconstitutional burdens on a religious property owner's First Amendment rights. *See, e.g.*, *Jimmy Swaggert Ministries v. Board of Equalization*, 494 U.S. 378 (1990) and *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1989).

[Robert D. Tobin, Esq., represented the City of Seattle; George M. Hartung, Esq., of Misterek & Woo, Seattle, represented the First United Methodist Church; Steven T. McFarland, Esq., of Annandale, Virginia, represented *amicus curiae* Christian Legal Society; Elizabeth Merritt, Esq., of Washington, D.C. represented *amicus curiae* National Trust for Historic Preservation.

Cases Relevant to the Protection of Historic Religious Properties

Set forth below is a summary of cases interpreting the First Amendment of the U.S. Constitution. These cases either involve a historic preservation controversy or address issues relevant to claims raised by religious property owners in challenging the application of historic preservation laws.

FIRST AMENDMENT TO THE U.S. CONSTITUTION:

> Congress shall make no law respecting an establishment of religion [establishment clause] or prohibiting the free exercise thereof [free exercise clause].

The First Amendment is binding on all states through the Fourteenth Amendment.

FREE EXERCISE CLAUSE

Except for "neutral laws of general applicability," government may not "substantially burden" the free exercise of religion unless the burden is the "least restrictive means" of furthering a "compelling governmental interest." (Historic preservation does not qualify as a compelling governmental interest.) With respect to neutral laws of general applicability, the U.S. Supreme Court has held that even a substantial burden on the free exercise of religion may be justified, if the burden is the result of implementing a neutral, generally applicable law. *Employment Division v. Smith*, 494 U.S. 872 (1990) upholding a law banning the use of peyote, even though it had the effect of penalizing a religious practice).

A. Preservation-Related Cases

Rector, Warden & Members of the Vestry of St. Bartholomew's Church v. City of New York, 728 F. Supp. 958 (S.D.N.Y. 1989), *aff'd*, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). [Leading federal case on the constitutionality of landmark designations for historic religious properties, and the only federal appellate case to address the issue directly.]

Summary: Church sought to demolish 1926 community house in order to build a 47-story office tower to fund its religious activities. Federal district court and court of appeals both held that landmark designation and denial of demolition permit for historic church building did not impose substantial burden on free exercise rights of church and therefore action was constitutionally valid. Court ruled specifically that historic preservation ordinances are facially neutral laws of general applicability.

First Church of Christ v. Ridgefield Historic District Comm'n, 738 A.2d 224 (Conn. Super. Ct. 1998), *aff'd*,

737 A.2d 989 (Conn. App. 1999), *cert. denied*, 737 A.2d 989 (Conn. 1999). [Free exercise clause not implicated.]

Summary. Preservation commission denied permission to install vinyl siding on a historic church. Appeals court affirmed trial court decision, which had rejected First Amendment claim because there was no interference with right to express "religious views, or associate or assemble for that purpose," and First Amendment "cannot be extended . . . to avoid otherwise reasonable and neutral legal obligations imposed by government."

City of Ypsilanti v. First Presbyterian Church, No. 191397 (Mich. App. Feb. 3, 1998) unreported). [Free exercise clause not implicated.]

Summary. Enforcement of Ypsilanti historic district ordinance did not violate Free Exercise Clause of the First Amendment in lawsuit challenging requirement that church maintain 1837 log cabin on church-owned property and challenging the denial of a demolition permit. Alleged "burdens are only incidental effects of the ordinance [that do] not burden [the church] any more than any other citizen."

Society for Ethical Culture v. Spatt, 415 N.E.2d 922 (N.Y. 1980). [Free exercise clause not implicated.]

Summary. Society challenged New York City's landmark designation of its meeting house under the Free Exercise Clause of the U.S. and N.Y. Constitutions (among other claims) on grounds that it was "improper to restrict its ability to develop the property to permit rental to nonreligious tenants. Court ruled that First Amendment not implicated, stating that the constitution "does not entitle [Society] to immunity from reasonable governmental regulations when it acts in purely secular matters."

Diocese of Toledo v. Toledo City-Lucas County Plan Commission, No. 97-3710 (Ohio Ct. Common Pleas Mar. 31, 1998), *rev. on other grounds*, No. L-98-1150 (Ohio App. Mar. 12, 1999)[1999 Ohio App. LEXIS 868](unpublished). [Denial of permission to demolish house for church parking lot is not undue burden on free exercise rights.]

Summary. Trial court upheld decision by Toledo-Lucas County Plan Commissions, denying permission to demolish open gable cottage style house in Toledo's Old West End Historic District owned by the Catholic Diocese of Toledo. Record failed to establish that denial amounted to an undue burden on the Diocese's right to freely exercise its religion or that the denial prevented the Diocese from continuing existing charitable or religious activities.

Metropolitan Baptist Church v. District of Columbia Department of Consumer and Regulatory Affairs, 718 A.2d 119 (D.C. App. 1998). [Free exercise challenge to historic designation of church-owned property held not ripe for review.]

Summary. Free exercise challenge to historic designation of five rowhouses dating from the late nineteenth century held not ripe for review under *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). "The church has not shown that historic designation has had a `direct and immediate' affect upon its rebuilding plans or that it has felt the burdens of the permit process `in a concrete way' sufficient to overcome the lack of ripeness." De-

clined to follow Washington Supreme Court case law on the issue of whether designation alone violates the Free Exercise clause. Court opted to follow *Rector of St. Bartholomew's Church v. City of New York,* 914 F.2d 348 (2d Cir. 1990), and *Church of St. Paul & St. Andrew v. Barwick,* 496 N.E.2d 183 (N.Y. 1986), stating that it knew of "no subsequent developments in free-exercise jurisprudence to suggest" that these cases should not control.

Church of St. Paul & St. Andrew v. Barwick, 496 N.E.2d 183 (N.Y. 1986), *cert. denied*, 479 U.S. 985 (1986). [Free exercise challenge to landmark designation of historic church not ripe for review.]

Summary. Landmark designation of historic church alone does not impinge on the religious uses of property and the ultimate effect will not be direct but purely consequential. Burden of proof under New York City's charitable test "is neither dependant upon nor peculiar to church's religious character."

Compare

Keeler v. Mayor & City Council of Cumberland, Md., 940 F. Supp. 879 (D. Md. 1996). [Historic preservation ordinance is not neutral law of general applicability; free exercise rights violated.]

Summary. Federal court overturned city's denial of demolition permit for historic monastery, ruling that the preservation ordinance at issue was not a "neutral law of general applicability" because it included a system of "individualized exemptions" (e.g. for economic hardship), and that historic preservation is not a compelling governmental interest. This decision is considered extreme and anomalous. Under the court's reasoning, zoning and other land use laws allowing variances would also fall under the "individualized exemptions" exception.

Washington State Cases. Washington State has rejected the federal constitutional cases involving landmark designation of religious properties, and instead has consistently prohibited local governments from even considering landmark designation of religious properties without consent, based on an unusual state constitutional provision:

> "Absolute freedom of conscience in all matters of religious sentiment, belief, and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion . . . ."

First Covenant Church v. City of Seattle, 787 P.2d 1352 (Wash. 1990), *vacated and remanded*, 499 U.S. 901 (1991), *on remand*, 840 P.2d 174 (Wash. 1992). [Landmark designation of church is unconstitutional in Washington.]

Summary. The Washington Supreme Court held unconstitutional the landmark designation of a historic church, even though the church had no plans for alteration and had never applied for or been denied any permit. The U.S. Supreme Court summarily vacated the decision on the same day it denied review in the *St. Bartholomew's* case. On remand, the Washington Supreme Court essentially reinstated its decision based on the state constitution, holding that the financial burden of a reduced property value, and even the "administrative" burden of having to request

approval from a secular governmental authority, was unconstitutional. The court also held that the church was protected under the free speech clause because of the "architectural `proclamation' of religious belief inherent in [the] Church's exterior."

First United Methodist Church v. Hearing Examiner for the Seattle Landmarks Preservation Board, 916 P.2d 374 (Wash. 1996). [Even nomination of church property for landmark designation is unconstitutional in Washington.]

Summary. In a still more extreme case, the court overturned the proposed landmark designation of a 1909 church, even though the city had merely nominated but not yet designated the church, and no restrictions applied to the property. The court held that the mere potential for landmark designation "severely burdens" the church because it could impede the sale of the property to a non-religious owner.

Munns v. Martin, 930 P.2d 318 (Wash. 1997). [Landmark designation of historic school owned by religious entity is also unconstitutional within the state.]

Summary. In a more recent case, the Washington Supreme Court extended its ban on religious landmarks to buildings other than houses of worship, overturning the designation of a 1928 Catholic school in Walla Walla, even though the city's preservation ordinance does not preclude demolition, but merely authorizes a 14-month delay.

See also ***Society of Jesus v. Boston Landmarks Comm'n***, 564 N.E.2d 571 (Mass. 1990). [Interior landmark designation of church violates freedom of religion provision in state constitution.]

B. Other Relevant Supreme Court and Federal Court of Appeals Cases (analyzing "substantial burden" under free exercise clause)

Jimmy Swaggart Ministeries v. Board of Education, 493 U.S. 378, 384-85 (1990)(administrative and record-keeping burdens of sales and use taxes "do not rise to a constitutionally significant level.").

Tony & Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 304-05 (1985)("The Establishment Clause does not exempt religious organizations from such secular government activity as fire inspections and building and zoning regulations . . . ." Record-keeping and "paperwork" requirements of Fair Labor Standards Act did not substantially burden religious institutions.).

Hernandez v. Commissioner, 490 U.S. 680, 699 (1989)(disallowance of tax deduction for "auditing" costs, which reduced the amount of income members could spend on religious activities, did not constitute a substantial burden).

Christian Gospel Church v. San Francisco, 896 F.2d 1221 (9th Cir.), *cert. denied*, 498 U.S. 999 (1990)(worship in a particular building was not essential to religious beliefs).

Messiah Baptist Church v. County of Jefferson, 859 F.2d 820, 825 (10th Cir. 1988), *cert. denied*, 490 U.S. 1005 (1989) (building a church on a particular site was not a religious tenet of the congregation.)

Lakewood Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303 (6th Cir.), *cert. denied*, 464 U.S. 815 (1983)(religious institutions not exempt from residential zoning requirement; building and owning a church is a desirable accessory of worship, not a fundamental tenet of church's religious beliefs).

Congregation Beth Yitcok v. Town of Ramapo, 593 F. Supp. 655 (S.D.N.Y. 1984)(occupancy requirements apply equally to religious and secular buildings).

Faith Assembly of God v. State Building Code Comm'n, 416 N.E.2d 288 (Mass. App. 1981)(building code regulations apply equally to religious and secular buildings).

ESTABLISHMENT CLAUSE

Requires government neutrality towards religion, separation of church and state. Governmental decisions cannot be delegated to or shared with religious institutions. Under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the "*Lemon* test," the challenged governmental action must:

(1) serve a secular govermental purpose;
(2) have a primary effect that neither advances nor inhibits religion; and
(3) avoid fostering excessive state entanglement with religion.

A. Preservation-Related Cases

East Bay Asian Local Development Corp. v. State of California, No. 95AS02560 (Cal. Super. Ct. Sacramento June 5, 1996), *rev'd*, 81 Cal.2d 908 (Cal. App. 3d Dist. 1999), *aff'd*, 13 P.3d 1122 (Cal. 2000), *cert. denied,* 121 S. Ct. 1735 (2001). [Self-proclaimed religious property exemption upheld against Establishment Clause challenge.]

Summary. An amendment to California enabling law for historic preservation (A.B.133) allows religiously affiliated organizations to exempt their non-commercial property from landmark designation, by declaring, in a public forum, that the organization would suffer substantial hardship from designation. The California Supreme Court upheld the amendment as a permissible accommodation of religion on the basis that historic preservation laws may potentially infringe on free exercise rights and the government was not affirmatively promoting religion. The court reasoned that the government was simply allowing religious organizations to advance their own religious interests.

Rector, Warden and Members of the Vestry of St. Bartholomew's Church v. City of New York, 728 F. Supp. 958 (S.D.N.Y. 1989), *aff'd on other grounds*, 914 F.2d 348 (2d Cir. 1990). [Establishment clause claim rejected by federal district court; issue not raised on appeal to the Second Circuit.]

Summary. Federal district court rejected argument that economic hardship inquiry under New York City's landmark preservation ordinance "require[d] an intrusive examination into the financial and internal workings of the Church," resulting in excessive entanglement under the Establishment Clause. The court found that "doctrine has no application, where, as here, the government must make an inquiry into church finances for the limited

purpose of determining the validity of a church's claim of financial hardship."

Alger v. City of Chicago, 748 F. Supp. 617 (N.D. Ill. 1990). [Establishment Clause claim not addressed because plaintiffs lacked standing.]

Summary. Preservation advocates and parishioners of the 1911 Saint Mary's of the Angels Church threatened by demolition, challenged a provision in Chicago's landmark preservation ordinance prohibiting designation of historic religious properties without owner's consent as Establishment Clause violation. Federal district court ruled that the plaintiffs lacked standing to challenge the provision on the grounds that an alleged threat of demolition was not sufficiently imminent to constitute an "injury-in-fact." The court, therefore, dismissed the case without addressing the Establishment Clause claim.

B. Other Relevant Cases

Boyajian v. Gatzunis, 212 F.3d 1 (1st Cir. 2000), *cert. denied*, 121 S. Ct. 756 (2001). [State and local law prohibiting local governments from excluding religious uses from residential districts upheld against Establishment Clause claim.]

Summary. Church of the Latter Day Saints constructed 69,000-square-foot temple in residential Belmont, a suburb of Boston. Neighboring property owners challenged town's approval of temple, arguing that a state law precluding local governments from excluding religious uses in any zoning district and an implementing town ordinance, violated the Establishment Clause. The First Circuit rejected the claim, finding that both laws amounted to permissible accommodations of religion, because they served the proper secular purpose of preventing discrimination against religion and did not constitutionally advance religion.

Ehlers-Renzi v. Connelly School of the Holy Child, Inc., 224 F.3d 283 (4th Cir. 2000), *cert. denied*, 121 S. Ct. 1192 (2001). [Parochial school exemption from special exception requirements upheld against Establishment Clause claim.]

Summary. Catholic girls school invoked exemption from general requirement that it obtain special exception approval to expand school in residential area. Neighboring property owners challenged exemption as violation of Establishment Clause. Federal district court found Establishment Clause violation, but the Fourth Circuit reversed. The Court of Appeals concluded that the exemption amounted to a permissible accommodation of religion.