

Our Core Argument

This case is about a deliberate and unreasonable suppression of religious freedom. There is a group of 1500 parishioners that wants room to do the things that religions do best: Cater to families, provide support and comfort in times of need, form a community of friends, provide a vision of a better life, and give honor to God. That First Amendment right of all Americans is being deliberately and unreasonably suppressed by the City of San Leandro.

The City of San Leandro put this good faith group of citizens through an approval process that was slovenly and ignored basic good planning. What the Church wanted was a reasonable answer to their question about use of the Catalina Court. It was really a denial process, not an approval process, because the City's primary time and effort went into creating a colorable basis to discriminate against the church application at 14600 Catalina Court.

Equal Protection

At its core, this case is about equal protection. Congress understood the power of equal protection to do justice. Congress saw that churches are being subjected to invidious discrimination in many communities across this nation. The part of the RLUIPA statute that really applies Equal Protection standards to municipal religious discrimination reads:

It is unlawful for a "government to impose or implement 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" 42 U.S. C. Section 2000cc(b)(1).

Separate but equal treatment of religious assembly uses is prohibited by the plain words of that statute. That means if a City allows a commercial or entertainment assembly (like a theatrical production, a business training center, or a paint ball arcade) on Catalina Court, then that City must allow a religious assembly of the same magnitude on Catalina Court. If the land use characteristics (such as traffic, parking, design, public safety, noise, etc.) can be objectively measured and mitigated, the City has no authority to apply a different standard to a religious assembly within that building. If the commercial assembly use requires a conditional use permit at Catalina Court, then the City may require a conditional use permit for a religious assembly use at Catalina Court. But equal protection requires that conditions of approval be limited to the same conditions that would reasonably apply to a non-religious assembly of the same magnitude.

San Leandro claims that it is acceptable for religious assembly to be given separate but equal treatment at the locations designated AU Overlay. But in San Leandro that means churches belong down there between them two railroad tracks. Separate but equal never winds up equal, or otherwise why would they need to be separate in the first place?

Evaluation of Unequal Treatment

Congress is not demanding that cities give rezoning on demand - but Congress is demanding that religious assembly be judged by the very same standard as non-religious assembly. In evaluating whether the City of San Leandro is treating religious assembly equally with commercial assembly, and whether the reasons for unequal treatment are compelling, the City Zoning Code is the wrong place to start. That Zoning Code is the instrument of discrimination that is at issue here. After the Church applied in May 2004 the City redefined all non-profit assemblies as appropriate for the AU Overlay District. We are sorry that those many fine non-profit uses (like union halls, lodges, and unprofitable entertainment) have been confined to down by them two railroad tracks with churches.

As an objective standard, The Uniform Building Code applicable in all California cities has a definition of "Assembly Building".

"Assembly Building. A building or a portion of a building used for the gathering together of 50 or more persons at one time for such purposes as deliberation, education, worship, entertainment, amusement, drinking or dining, or waiting for transportation." Uniform Building Code Section 203 A.

This is an objective standard, not a political standard, and it does not discriminate based upon religion. There is a whole set of related regulations in the Uniform Building Code that spell out non-discriminatory standards for safety in all assembly uses. We have no objection to those UBC standards, and the building on Catalina Court already complies with all but the latest nuances of the Building Code. For example, it is fully fire sprinkled.

Compelling State Interest Test

The compelling interest test is the standard specified by Congress in RLUIPA for this court to use, as follows:

"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 governmental interest"

The underlying reason for RLUIPA is that First Amendment rights are being restricted by municipal discrimination. Under the rational basis standard, a city can justify less than equal treatment of religious uses using reasons that are of minor public benefit, and in some cases, reasons which are not the real reasons for its decision. With the compelling interest test, the unequal treatment of a religious use gives rise to a burden upon the City to demonstrate the compelling state interest that justifies the unequal treatment.

Applying the Test:

As a basis for its decision, the City of San Leandro and its officials propose five reasons:

1. Tax base, 2. Economic development, 3. Traffic impact 4. Special Study area, and 5. Hazardous materials dangers.

None of those criteria pass the compelling governmental interest test:

1. Tax base. While slyly excluded from the formal findings, Councilmember Prolo, and numerous speakers throughout the denial process suggested that church would not contribute to the tax base. (I.e.no fiscal benefit). The property tax exemption is a key factor in the animus the City of San Leandro and many governments have toward churches.

In some locations, including San Leandro, the property tax exemption has made churches what is known as a LULU – a Locally Unpopular Land Use. An indicator of the substantial impact of the fiscal reasons is that churches are far more unpopular with government officials than with the populace at large or the neighbors. More sophisticated governments understand the off-setting benefits churches provide to their community, which is why most well planned cities in the Bay Area allow churches in their light industrial zones (e.g, Pleasanton, Livermore, Dublin, Fremont, Concord, etc.). More sophisticated governments understand that there are not enough religious people to have any significant effect on the tax base.

Courts have ruled that the adverse impact on the tax base is not a legitimate reason to deny a proposed religious assembly *Guru Nanak Sikh Society v. County of Sutter* 456 F.3d 978 at 987 (9th Cir. 2006). But, if the rational basis test is used, the city just finds some other argument (like economic development) to justify their discrimination against churches, even when the major reason is tax base. The actual fiscal impact of the property tax exemption for the Catalina Court site on the City of San Leandro is about \$6,500 per year (San Leandro gets about 12% of property taxes). That is not a compelling reason to suppress religious assembly. More frighteningly, the fiscal strategy of suppressing religious assembly only works if systematic discrimination succeeds in forcing churches into lower value locations or out of the community. Maybe that is why the City of San Leandro wants churches down there between them two railroad tracks next to the heavy industry. That rationale does not even pass the separate but equal test.

2. Economic Development. The City wants to promote private, high tech uses like software companies at this general area within the City (i.e. economic development.) But if a use is such that its presence does not significantly inhibit the ability of a high tech (or other politically favored use) to be conducted in the building next door, then the fact that that this property owner happens to use the facility for religious assembly is not a compelling reason to prohibit churches. In fact, virtually all of the adjacent property owners signed letters urging the City to approve the church application. Moreover, the building would be equally lost to high tech uses if it were used for commercial entertainment or real estate offices. We do worry about the free speech rights of union halls which along with churches have been relegated to the spot down between them two railroad tracks, along with the other disfavored uses.

3. Traffic Impact. The City pretends there would be traffic problems because 14600 Catalina Court is supposedly located more than a quarter mile from an arterial street. If there were a compelling state interest lurking behind that deliberately overbroad and imprecise criteria, then it would be that traffic access at some locations is not adequate to handle a large assemblage. The City's failure to process a conditional use permit allows the City to deny the Church's application based upon an imaginary traffic problem. If the court orders the City to process a conditional use permit, the quantity of church traffic at Catalina Court will not turn out to create a compelling traffic problem, or any traffic problem at all. The traffic access to Catalina Court is superb and the traffic demand is at off peak hours.

4. Special Study Area. 14600 Catalina Court is located in a special study area. If Special Study area means that an area has some special planning considerations that need to be looked at, then by all means, those issues should be looked at. But, the burden is upon the City to demonstrate what it is about that study area which makes a religious assembly incompatible with existing or desired uses in the area. The fact that religious assembly is the purpose of the assembly, does not create a compelling state interest in its denial unless all assembly uses are prohibited. Equal treatment would then require the banishment of many existing employers from that area. Nor is that fact that a church is not a high tech software company a compelling state interest, unless the City can demonstrate that the mere presence of the church in that area would significantly discourage high tech software companies from locating in adjacent buildings. There are too many cities in which churches coexist successfully with high tech businesses for that concern to be rational or credible. If the City does not know what it wants to happen in a special study area, that confusion cannot be permitted as an open ended "compelling state interest" justifying separate but unequal treatment of religious assembly v. commercial assembly in the study area.

5. Public Health and Safety. The City knew that an astute judge might well apply the compelling state interest test mandated by RLUIPA. For that reason, the Staff Report reached out to find a public health and safety issue. Saying the magic words "public health and safety" and "hazardous materials" is not enough to pass the compelling state interest test without strict judicial scrutiny of the actual facts. In cynically proffering the threat that there are businesses with approved hazmat plans within ¼ mile, the City planners inadvertently blundered into the Building and Fire Codes in which the standards are written, objective, fairly administered, and publicly known. It turns out that not a single one of the 196 properties rezoned to AU Overlay is more than ¼ mile from a business with a hazmat plan. Then the City cynically says in its brief (at Defendants Memorandum of Points and Authorities, p.20) that it can just waive that urgent criteria for the separate but equal properties down by them two railroad tracks. This completely undercuts the City's argument, because if separating assembly uses from hazmat plans is compelling on Catalina Court, then such separation would also be compelling down by them two railroad tracks. And, there is un-contradicted evidence in the administrative record from Paul Gannt, an expert in the field, that there is no serious health and safety concern with the kinds of uses actually surrounding 14600 Catalina Court.

None of the reasons put forth by the City pass the "compelling state interest" test. In fact, they were they narrowly tailored (after the initial application) to maximize interference with religious assembly, rather than to minimize interference with religious assembly.

Conclusion

Religious assembly like any other assembly use, should be judged by its external impacts. All assembly uses must comply with generally applicable Building Code regulations for internal safety. We have no objection to proceeding with a conditional use permit provided the criteria applied are the same criteria used to evaluate a commercial assembly of the same magnitude. In fact, that is what we are asking the court to order.