

MORRIS DUFFY ALONSO & FALEY MUNICIPAL LAW UPDATE

THE NEW YORK STATE APPELLATE DIVISION SECOND DEPARTMENT CARVES OUT ANOTHER EXCEPTION TO THE PRIOR WRITTEN NOTICE LAW (New York State Law - Torts)

Gorman v. Town of Huntington, 2007 WL 3209525 (2d Dept. 2007)

New York State Village Law § 6-628 provides that no civil action can be maintained against a village for a defect, obstruction or snow or ice condition on its roads or sidewalks unless written notice relating to the specific location was actually given to the village clerk and the village failed to remove the defect, obstruction or condition within a reasonable time. New York State Town Law § 65-a has similar provisions; however, written notice can be provided to either the town clerk or the town superintendent of highways. In addition, the Town Law provides for a cause of action if a defective or obstructed condition existed for so long that the town should have discovered and remedied the situation. (A town can adopt a local law requiring written prior notice of defective and dangerous conditions on town highways as a prerequisite to the maintenance of any action against the town for damages resulting therefrom).

New York Courts have long recognized only two exceptions to the prior written notice laws: (1) where the locality created the defect or hazard through an affirmative act of negligence; and (2) where a "special use" confers a special benefit upon the locality. If either of these exceptions are not present, courts strictly construe the prior written notice statutes.

For example, there have been cases in which villages have received prior written notice of a defect, but because the notice was provided to a village official other than the village clerk, the case was dismissed.¹

The case of *Gorman v. Town of Huntington* provides another exception, albeit a narrow one, to the strict adherence to the prior written notice statutes by the courts. Plaintiff Norma Gorman tripped and fell on an uneven sidewalk in the town. The defect in the sidewalk, which was in the vicinity of a Roman Catholic Church, had been reported to the town by Reverend Richard Hoerning prior to the date that Gorman fell. Reverend Hoerning, under the

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Conlon v. Village of Pleasantville, 146 A.D.2d 746, 537 N.Y.S.2d 221 (2d Dept. 1989). Files in the office of the Superintendent of Public Works documenting knowledge of defect did not constitute prior written notice; *Farnsworth v. Village of Postam*, 651 N.Y.S.2d 748 (3d Dept. 1997). Report in Village's possession which documented uneven condition of sidewalk was insufficient to constitute prior written notice because it was not provided to Village Clerk. (The Second Department hears appeals of decisions from the Supreme Courts in the counties of Richmond, Kings, Queens, Nassau, Suffolk, Westchester, Dutchess, Orange, Rockland, and Putnam).

advice of an agent of the town, sent his written notice to the Town's Department of Engineering Services (DES). The advice was given because it was actually the DES that kept written notices of defects and was responsible for making repairs.

The town moved for summary judgment and argued that the written notice submitted by Reverend Hoerning was not in compliance with the law because he did not send it to the village clerk or the superintendent of highways. The Appellate Division upheld the lower court's denial of summary judgment for the town holding that, "[t]he Town, having instructed Hoerning to send his written notice of February 19, 2002 to the Director of DES,

cannot now be permitted to use that instruction as a shield against liability,"

The Court held that it would not have reached its decision absent four discrete factors: (1) the assumption of DES of prior written notice record-keeping duties that were otherwise performed by the Town Clerk; (2) the DES' role in investigating and repairing sidewalks rather than those functions being performed by the Highway Department; (3) the instruction a by a Town agent to Reverend Hoerning to send the written notice to DES; and (4) Reverend Hoerning's reliance on the town agent.

**NEW YORK STATE EXECUTIVE LAW CONCERNING
UNLAWFUL DISCRIMINATORY PRACTICES HAS BEEN AMENDED**
(New York State Law - Discrimination)

New York State Executive Law § 296.16

As of November 1, 2007, the status of Youthful Offender and of having a sealed conviction for a violation have been added to the section of the Executive Law that addresses unlawful discriminatory employer practices. Therefore, unless an exception applies, it is unlawful to inquire, via application or otherwise, or to act upon adversely an individual because of a youthful offender adjudication or a conviction for a violation that has been sealed pursuant to section 160.55 of the Criminal Procedure Law. This applies to employment and licensing (also credit or insurance). (Prior to the amendment, this subsection applied, and still does apply, to an individual involved in any un-pending arrest or criminal accusation that was

followed by a termination of that criminal action or proceeding in favor of such individual).

The exceptions to the Executive Law are: Licensing in relation to the regulation of guns, firearms, and other deadly weapons; an application for employment as a police officer or peace officer; and anything else specifically required or permitted by statute. Another exception applies for an application for employment or membership in any law enforcement agency with respect to any arrest or criminal accusation which was followed by a youthful offender adjudication.

FEDERAL COURT OF APPEALS PROVIDES GUIDELINES IN APPLYING RLUIPA
(Religious Land Use and Institutionalized Persons Act of 2000)
(Federal Law, Zoning and First Amendment Rights)

Day School v. Village of Mamaroneck, 504 F.3d 338 (2d Cir. 2007)

In our judicial system, often after a statute is enacted into law, cases or controversies arise that require the courts to clarify the meaning and application of the statute. Recently, the United States Second Circuit Court of Appeals, which creates precedent for all federal courts within New York State (as well as Connecticut and Vermont), did just that with the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA" [usually pronounced as R-LOOPA]).

RLUIPA, a federal land use statute, states 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 governmental interest."

While RLUIPA seems straight forward on its face, a municipality, when confronted with a person or religious organization that seeks a variance, would need to know what, under the meaning of the law, 1) is a Religious Exercise, 2) a Substantial Burden, 3) a Compelling Governmental Interest, and 4) the Least Restrictive Means.

While no case can address all situations that may arise, the Second Circuit, in *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007), has provided guidance to be used when faced with an RLUIPA situation. The

Westchester Day School, a private school run by members of the Jewish faith, applied to the Village of Mamaroneck Zoning Board of Appeals ("ZBA") for permission to proceed with a \$12 million school building expansion project. The ZBA denied the application in its entirety citing the negative affect the expansion would have on traffic and parking. The Court held that the ZBA's decision in denying the permit was not in conformance with RLUIPA.

Religious Exercise - RLUIPA defines religious exercise as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." The statute goes on to state that "[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose."

Pursuant to the statute, the Second Circuit held that to obtain immunity through RLUIPA, a proposed facility would have to be for a religious purpose and not merely religiously affiliated. For example, if a religious school wanted to build a gymnasium to be used exclusively for sporting activities, a headmaster's residence, or office space, the religious school would not obtain RLUIPA immunity from zoning regulations. In *Westchester Day School*, the trial court found that the entire proposed facility would be used for religious education and practice. Accordingly, the Second Circuit held that RLUIPA applies. Notably, the Second Circuit stated that the line of demarcation of where a school expansion project implicates RLUIPA

would be somewhere in-between full religious use, as in *Westchester Day School*, and no religious use, as in a headmaster's residence. The Court did not, however, note specifically where this line would be drawn.

Substantial Burden - The Second Circuit held that a substantial burden "is akin to significant pressure which directly coerces the religious adherent to conform her behavior accordingly," In *Westchester Day School*, the denial of the school's application coerced the school to continue teaching in inadequate facilities. In making this determination, the Court looked at three factors:

(1) The denial of the application by the school was absolute. If the rejection of the submitted plan left open the possibility of approval of a resubmission with modifications to address the problems cited by the zoning board, there would less likely have been a substantial burden on the school. (Unless the condition required modifications that are economically unfeasible or the board's willingness to consider a modified plan is disingenuous).

(2) There was a close nexus between the coerced conduct and the school's religious exercise. In other words, if the school could have easily rearranged its existing classrooms to meet its religious needs, a rejection of the building plan would not have been a substantial burden. However, where as in *Westchester Day School*, the school had no alternatives or where the alternatives require a substantial delay, uncertainty, or expense, a complete denial of the school's application might be indicative of a substantial burden.

(3) The ZBA's denial of the permit was arbitrary and capricious under New York State law because the decision was not related to the public's health, safety or welfare.

Least Restrictive Means to Further a Compelling State Interest -

Once a religious institution has met its burden and established that its religious exercise had been substantially compromised, the burden of proof shifts to the municipality to prove that it acted in furtherance of a compelling governmental interest and that its action is the least restrictive means of furthering that interest.

The United States Supreme Court has held that compelling state interests are interests in the highest order. They would generally involve impact on public health, safety or welfare. Moreover, in its proof, a municipality must show a compelling interest in imposing the burden on religious exercise in the particular case at hand. Showing a compelling interest as a general principle will not suffice.

In *Westchester Day School*, the Court held that the ZBA did not meet its burden of proving a compelling interest. Moreover, even if the ZBA met its burden, the complete denial of a permit to build was not the least restrictive means to further that interest.

Conclusion

Municipalities should review any applications for land use made by a religious institution on a case by case basis. As noted above, it does not have to approve an application merely because the applicant is a religious institution. However, an arbitrary and capricious denial can quite easily run afoul of RLUIPA. When reviewing a permit application made by a religious institution, a municipality should conduct a careful factual and legal analysis based on the above elements.