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ZONING AND LAND USE PLAINNING

Lawsuits Over Construction of Mikvahs Continue in New York

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Several years ago, a property owner in the Town of Mamakating in upstate Sullivan County, New York, proposed to convert the property, which had been used as a day spa, into a mikvah, which is a bath-like structure used for cleansing, bathing and purification in certain Jewish religious practices. The property was located within an area designated as a Village Center zoning district, and the town's zoning law permitted property in this district to be used for, among other things, "[n]eighborhood places of worship."

The town's building inspector issued a written determination that the proposed use conformed with the definition of a neighborhood place of worship and, therefore, that it was a permitted use. Following approval of the property owner's site plan by the town's planning board, two individuals asked the town's zoning board of appeals (ZBA) to reject the building inspector's determination.

The property owner submitted numerous materials to the ZBA, including letters from religious scholars, seeking to establish that the mikvah constituted a neighborhood place of worship. These materials asserted that a mikvah generally was housed in a standalone building set apart from a synagogue and dedicated solely to religious purposes and that, under Jewish law, a mikvah must be built in a new community even before the construction of a synagogue.

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A rabbi and professor of Jewish history explained that an individual's immersion in the waters of a mikvah was "a basic religious ritual [of Orthodox Jews] for the purpose of restoring spiritual and family purity."

Another rabbi stated that the ritual was "vital to those who observe Jewish laws." The property owner's submissions further indicated that immersion in a mikvah generally was accompanied by the recitation of blessings or prayers.

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The ZBA nevertheless disagreed with the building inspector, concluding that a mikvah did not constitute a neighborhood place of worship and disallowing the property owner's proposed use.

The property owner went to court, seeking, among other things, a declaratory judgment annulling the ZBA's ruling. The Supreme Court, Sullivan County, dismissed the petition, and the property owner appealed to the Appellate Division, Third Department.

In *Matter of Winterton Properties, LLC v. Town of Mamakating Zoning Board of Appeals*, 132 A.D.3d 1141 (3d Dept. 2015), the Third Department reversed the trial court's decision dismissing the part of the property owner's petition seeking to annul the

Downtown of Bloomingburg in Town of Mamakating, Sullivan County, NY

ZBA's determination prohibiting the property owner's proposed development.

The Third Department explained that because the term "neighborhood place of worship" was not defined in the town's zoning law and did not appear elsewhere in the town's ordinances, it had to determine whether the proposed mikvah comported with the dictionary definition of a neighborhood place of worship. The appellate court decided that it did.

Those seeking to build and operate mikvahs and other structures used in religious practices, as well as local government officials considering applications for those projects, should carefully review the wide variety of laws and rules applicable to those applications.

The Third Department reasoned that the dictionary meaning of neighborhood place of worship—and, consequently, the definition of that term under the town's zoning law—was a building or location set aside in a certain area for any form of religious devotion, ritual or service showing reverence, especially for a divine being or supernatural power.

It then held that the "uncontroverted evidence" established that a mikvah comported with the definition of a neighborhood place of worship and, thus, constituted a neighborhood place of worship for purposes of the town's zoning law. Accordingly, the Third Department concluded, the trial court erred in dismissing the property owner's petition to that extent.

Variety of Claims

As property owners seek to construct more mikvahs in New York, litigation seems to be increasing. *See, e.g.,* "A Cemetery or an 'Environmental Train Wreck'? Burial Site Fuels Debate," https://www.nytimes.com/2023/05/11/nyregion/mikvah-cemetery-rockland-county.html?searchResultPosition=1; *Lubavitch of Old Westbury, Inc. v. Incorporated Village of Old Westbury*, No. 2:08-cv-5081 (DRH) (ARL) (E.D.N.Y. Sept. 30, 2021). The lawsuits in these cases often contain allegations that involve limitations on mikvahs, as well as related religious discrimination claims, *see, e.g., Bloomingburg Jewish Education Center v. Village of Bloomingburg*, 111 F. Supp. 3d 459 (S.D.N.Y. 2015), and typically contain causes of action under local zoning laws (as in as *Town of Mamakating*) and under various state and federal laws—and under the U.S. and state constitutions. *See, e.g., Congregation Rabbinical College of Tartikov, Inc. v. Village of Pomona,* 138 F. Supp. 3d 352 (S.D.N.Y. 2015) (asserting, among others, claims under First and Fourteenth Amendments of the U.S. Constitution; Fair Housing Act, 42 U.S.C. §3601 *et seq.*; New York Civil Rights Law § 40-c(1) and (2); and Sections 3, 8, 9 and 11 of the New York State Constitution).

One of the most frequent claims asserted by parties seeking to build a mikvah is brought under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §2000cc *et seq*. The decision by the U.S. District Court for the District of Connecticut in *Chabad Lubavitch of Litchfield County, Inc. v. Borough of Litchfield*, No. 3:09-CV-1419 (JCH) (D. Conn. Nov. 2, 2017), on remand from *Chabad Lubavitch Litchfield County, Inc. v. Litchfield Historic District*, 768 F.3d 183 (2d Cir. 2014), illustrates how courts in the Second Circuit analyze RLUIPA claims involving the construction of mikvahs and other religious land uses.

RLUIPA

The case arose after the Historic District Commission of the Borough of Litchfield (the Commission) denied an application from Chabad Lubavitch of Litchfield County, Inc. (the Chabad) for a certificate of appropriateness (the Certificate) permitting the Chabad to construct an addition to an existing building in an area zoned "Business Historic" that would result in a structure containing four stories and a sloped roof attic.

The proposed structure would have one story located entirely below grade, another story partially above and partially below-grade, and two stories and a partial attic entirely above grade. Among other things, the lowest level of the building would contain a mikvah and restrooms associated with the mikvah.

The Chabad alleged in the lawsuit it filed that the Commission's denial substantially burdened its religious exercise, in violation of RLUIPA's "substantial burden" provision. The defendants—the Commission and the Borough of Litchfield—denied the allegation.

In its decision, the district court explained that RLUIPA provides that "[n]o 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." Under the statute, the district court continued, the Chabad had the burden of proving that the defendants' conduct imposed a "substantial burden" on its "religious exercise."

The court also pointed out that RLUIPA contains a jurisdictional prerequisite that could be satisfied by the Chabad showing, among other things, that "the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes… individualized assessments of the proposed uses for the property involved." The court found that these requirements were satisfied in this case because the Connecticut Historic District statute was a land use regulation and the approval process for certificates of approval was an "individualized assessment" for purposes of RLUIPA.

The court then examined whether the Chabad had demonstrated by a preponderance of the evidence that the Commission's decision substantially burdened the Chabad's religious exercise, and it found that it did.

The Third Department then held that the "uncontroverted evidence" established that a mikvah comported with the definition of a neighborhood place of worship and, thus, constituted a neighborhood place of worship for purposes of the town's zoning law.

As the court noted, it had to consider a number of factors to decide whether the denial substantially burdened the Chabad's religious exercise, including:

- Whether the denial was conditional;
- If the denial was conditional, whether the conditions attendant to the Commission's denial of the Chabad's application themselves imposed a substantial burden on the Chabad's religious exercise;
- Whether feasible alternatives existed for the Chabad to exercise its faith;
- Whether the Chabad reasonably believed it would be permitted to undertake its proposed modifications when it purchased the property in the historic district;
- Whether the proposed modifications shared a "close nexus" with and would be consistent with accommodating the Chabad's religious exercise; and
- The arbitrariness of the Commission's denial.

The court then decided that the denial was conditional in that the Commission indicated that the Chabad would be approved for an addition of the same size as the original structure, but nothing more.

Next, the court ruled that the Chabad was substantially burdened by the Commission's conditional denial based primarily on the Commission's contention that the first floor the Chabad sought to construct could not be larger than the total square footage permitted by the conditional denial. After concluding that the Commission was responsible for that burden, the court found that the area surrounding the Chabad's property militated in favor of the Chabad "having a reasonable belief" that its addition would have been approved.

The court also decided that viable alternative properties were not available because the Chabad's options were limited by its "size demands" and its need to be located in the center of downtown Litchfield.

Finally, the court ruled that the size upon which the Commission settled—an addition equal in footprint to the existing structure—was arbitrary. The Commission acted arbitrarily in denying the Chabad's application, the court concluded, because it was acting pursuant to a land use regime that gave the Commission "essentially standardless discretion."

Accordingly, the court issued a mandatory injunction ordering the Commission to approve the Chabad's application for a certificate of appropriateness based on its conclusion that the Commission's denial substantially burdened the Chabad's religious exercise without a compelling governmental interest exercised in the least restrictive means, in violation of RLUIPA.

Conclusion

Religious exercise is subject to federal and state protections, and religious land uses are protected by federal and state laws. Accordingly, those seeking to build and operate mikvahs and other structures used in religious practices, as well as local government officials considering applications for those projects, should carefully review the wide variety of laws and rules applicable to those applications.

When these factors are all fairly considered, the parties should be able to reach a satisfactory consensus and conceivably avoid troublesome, expensive and time-consuming litigation.