

CITY OF GREEN BAY

TO: Chris Wery
FROM: Jon Nitti
DATE: 3/25/08
RE: Constitutional Rights of Religiously Affiliated Homeless Shelters to Operate Despite Municipal Ordinances

You have requested that I render my opinion about constitutional rights of religiously affiliated homeless shelters to operate despite municipal ordinances, such as our current requirement that homeless shelter land uses obtain City approval through Conditional Use Permits. I must first preface my opinion with an admonition that the applicable law in this instance is very complex and not amenable to a simple “yes” or “no” answer. Moreover, any conclusion is hugely dependent on the facts in each case. With this caveat, my opinion follows.

The United States Code provides for the “Protection of land use as religious exercise” as part in parcel of the Religious Land Use and Institutionalization Persons Act of 2000. See 42 U.S.C. §2000cc. That specific Code sets forth the following general rule: “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.” 42 U.S.C. §2000cc (a)(1)(A)&(B). This general rule applies in any case which “the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.” 42 U.S.C. §2000cc (a)(2)(C). Furthermore, “no government shall impose or implement a land use regulation that—(A) totally excludes religious assemblies from a jurisdiction; or (B) unreasonably limits religious assemblies, institutions, or structure within a jurisdiction.” 42 U.S.C. §2000cc (b)(3)(A)&(B).

The facts of a Federal 2nd Circuit Court of Appeals case, Presbyterian Church v. New York, were remarkably similar to the inquiry at hand. See Presbyterian Church v. New York, 293 F.3d 570, 572 (2nd Cir. 2002). In Presbyterian Church, a number of homeless in New York City had traditionally chosen to sleep on outdoor property owned by the Presbyterian Church or on public sidewalks adjacent to the Church property. See id. In February of 1999, the Church officially designated two areas of their outdoor property for the homeless to sleep overnight. See id. In November of 2001, the City of New York notified the Church that it would no longer allow the homeless to sleep overnight on Church property and subsequently forcibly removed the homeless from the property. See id. The Church filed suit and appeals ensued.

The 2nd Circuit Court of Appeals held that the City of New York may not prevent invited homeless people from sleeping on outdoor property owned by the Presbyterian Church due to the protections afforded under the Free Exercise Clause in the First Amendment to the United States Constitution, but may prevent the homeless from sleeping on public sidewalks adjacent to the Church’s property. See id. at 576. The Court reasoned: “Government enforcement of laws or policies that substantially burden the exercise of sincerely held religious beliefs is subject to strict scrutiny.” Id. at 574. They continued: “To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests.” Id. Moreover, “An individual claiming violation of free exercise

rights need only demonstrate that the beliefs professed are ‘sincerely held’ and in the individual’s ‘own scheme of things, religious.’” Id. Nevertheless, the Court posited: “Where the government seeks to enforce a law that is neutral and of general applicability, however, then it need only demonstrate a rational basis for its enforcement, even if enforcement of the law incidentally burdens religious practices.” Id. Here, the Court recognized that the Presbyterian Church “sincerely held” the religious belief that it was their duty to assist and minister to the homeless and such belief was afforded First Amendment protection. See id at 575. They likewise found that the City of New York’s actions in dispersing the homeless on Church property had substantially burdened the Church’s protected religious activity and dismissed the City’s arguments that the Church was operating as a non-licensed homeless shelter and as such, constituted a public nuisance. See id at 575-6. The Court never reached the City’s zoning regulation argument that the homeless shelter constituted an impermissible accessory use, as it was untimely presented. See id at 576.

Notwithstanding 42 U.S.C. §2000cc and Presbyterian Church v. New York, it appears that, in certain circumstances, municipal housing, building, and fire prevention codes can supercede State and Federal religious protection. See Peace Lutheran Church and Academy v. Village of Sussex, 246 Wis. 2d 502, 520, 631 N.W.2d 229, 238 (Wis. Ct. App. 2001). In Peace Lutheran, a church had undertaken several renovations and expansions over the course of years and each time was granted variances from requiring them to retrofit a sprinkler system in their original building, which had been constructed prior to the passage of the ordinance mandating sprinklers. See id at 506 and 231. In 1999, a school building was constructed with an integrated sprinkler system and it was attached to the original building by a breezeway. See id. As a condition of approval for the construction of the school, the Village required the retrofitting of a sprinkler system in the original building. See id at 507 and 231. The Church filed for and was denied a variance by the Village. The Church appealed several times arguing that requiring a sprinkler system denied its members the freedoms of worship and conscience guaranteed by the Wisconsin Constitution. See id at 510 and 233.

The Court of Appeals acknowledged that Wisconsin’s Constitution offers more expansive protections for freedom of conscience (religion) than even those offered by the Free Exercise Clause of the First Amendment to the U.S. Constitution. See id at 513 and 235. In light of this, the Court felt it was incumbent upon them to apply the compelling state interest/least restrictive alternative test in reviewing the Church’s claim, which is delineated as follows: “Under this analysis, the challenger carries the burden to prove: (1) that he or she has a sincerely held religious belief, (2) that is burdened by application of the state law at issue. Upon such proof, the burden shifts to the State to prove: (3) that the law is based on a compelling state interest, (4) which cannot be served by a less restrictive alternative.” Id at 514 and 213. In applying this test, the Court held that the Village’s refusal to grant a variance from the requirement under the Village fire protection code that it install automatic fire sprinkler system in the church building did not violate the provision of the State Constitution guaranteeing freedom of worship and liberty of conscience, that the Church failed to establish that a sincerely held religious belief would be substantially burdened through installation of the system, and that the code requirement advanced a compelling village interest in saving lives and preserving property, one which could not be served by a less restrictive alternative. See id at 515-518 and 236-237.

Indubitably, 42 U.S.C. §2000cc severely limits a municipality from imposing land use (zoning) regulations on properties intended for religious purposes. See 42 U.S.C. §2000cc. Moreover, as previously stated, this rule applies in any case which “the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.” 42 U.S.C. §2000cc (a)(2)(C). The City of Green Bay currently has a conditional use requirement on homeless shelter land uses that necessitates that the City issue a conditional use permit (CUP) before such a use can be undertaken. See GBMC 13-602. By its very definition therefore, the CUP creates a “substantial burden” on those who wish to operate a homeless shelter in Green Bay since its issuance is by no means assured. See 42 U.S.C. §2000cc (a)(1). However, it is not the conditionality of the homeless shelter use by itself that creates the conflict. Instead, it is the combination of the conditionality of the homeless shelter use coupled with the religious affiliation with its operation. In other words, there would be no

issue if the homeless shelter was run solely by a purely secular entity. At any rate, I believe that the City of Green Bay's conditional use permit requirement as applied to a religiously affiliated homeless shelter on private property is exactly the kind of land use or zoning requirement that 42 U.S.C. §2000cc was promulgated to prevent.

Even so, a land use (zoning) regulation such as the City of Green Bay's in this instance, may be constitutionally permissible if it: "(A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §2000cc (a)(1)(A)&(B). What this actually means is supremely difficult to predict. We must look to the case law to help guide us. Although non-binding in Wisconsin's Federal 7th Circuit, the Presbyterian Church v. New York ruling provides us with a great deal of guidance in a factually analogous situation. To reiterate, the 2nd Circuit Court of Appeals held that the City of New York may not prevent invited homeless people from sleeping on outdoor property owned by the Presbyterian Church due to the protections afforded under the Free Exercise Clause in the First Amendment to the United States Constitution, but may prevent the homeless from sleeping on public sidewalks adjacent to the Church's property. See Presbyterian Church, 293 F.3d at 576.

At minimum, this case provides insight into the thinking of a Federal Circuit Court of Appeals and its conviction that a religiously affiliated homeless shelter shall absolutely be afforded First Amendment protection. More importantly, it highlights that "a compelling governmental interest" must be substantial and legitimate. Certainly, simply disliking the homeless, a homeless shelter, or its director will not suffice. Furthermore, Green Bay's CUP requirement must be the least restrictive means of furthering our, as of yet, nebulous compelling governmental interest.

A potential argument could be made that Green Bay's CUP requirement for homeless shelters "is neutral and of general applicability" and therefore, the City need only "demonstrate a rational basis for its enforcement, even if enforcement of the law incidentally burdens religious practices." Presbyterian Church, 293 F.3d at 574. Determining exactly what this means is a similarly daunting task. It is true that the City's CUP requirement for homeless shelters is applied equally across the board whether the affected shelter is secular or non-secular in nature. On the other hand, the Presbyterian Church ruling simultaneously causes great pause. If the Court ruled that the City of New York did not demonstrate that its policies constituted a "neutral law of general applicability" particularly for a church's outdoor facilities for the homeless, Green Bay may face an even greater challenge successfully making the same argument.

Even if our CUP requirement as applied to a non-secular homeless shelter is unconstitutional, I do not believe that the same can be said for the application of many of our municipal housing, building, and fire prevention codes. See Peace Lutheran Church, 246 Wis. 2d at 520, 631 N.W.2d at 238. It seems to me that a viable argument can be made that these types of codes more legitimately further the compelling governmental interests of protecting citizens' health, welfare, and property. See id at 515-518 and 236-237. Assuming that these interests cannot be served by less restrictive alternatives, these codes may be enforced against secular and non-secular homeless shelters alike. See id at 514 and 213. Of course, any determination should be done on a case-by-case basis and every action is subject to court review.

Ultimately, no guarantees are forthcoming from this author that a court will not rule against Green Bay's conditional use requirement as applied to religiously affiliated homeless shelters on private property. If I were to hazard a guess, I would say that I have reservations as to its constitutionality in this context. I am much more comfortable with the enforcement of housing, building, and fire prevention codes on the structures housing religiously affiliated homeless shelters, particularly when done to protect the public health and welfare.