

## Church Wants Judge to Revisit Land-Use Case

Argument Relies on Precedents From Adult-Business Suits

**By Susan McRae**

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LOS ANGELES - Clergy across the nation will be watching closely today as lawyers for the Elsinore Christian Center try to persuade a Los Angeles federal judge to reconsider his finding that a law allowing churches to trump local land-use regulations is unconstitutional.

Saying the law "redefined First Amendment rights," U.S. District Judge Stephen V. Wilson became the first judge in the country to rule that parts of the 3-year-old Religious Land Use and Institutionalized Persons Act are illegal as applied to land-use purposes. *Elsinore Christian Center v. City of Lake Elsinore*, CV01-4842 (C.D. Cal., filed 2001).

The center's lawyers reacted immediately to Wilson's June 23 order, filing motions for reconsideration.

### Constitutionality

Supporting the Elsinore center's fight are lawyers from Washington, D.C.-based Becket Fund for Religious Liberty, which has argued in support of churches in a dozen land-use cases across the country, and the Justice Department, which advocates upholding the law's constitutionality.

The center's lawyer, Richard Tyler of the Alliance Defense Fund in Temecula, said he will argue for reconsideration both on the religious act's constitutionality and on First Amendment principles alone.

As other religious institutions have done in other cases, Tyler said he will cite precedent established for adult-entertainment businesses.

### 'Blatant Discrimination'

"If freedom of speech applies to adult businesses, it must also apply for religious purposes," Tyler said.

"How can a city justify allowing movie theaters, community centers, schools and other types of businesses that provide assembly of people in their city without a conditional-use permit ... and make a church get that permission?" asked Tyler, who has represented the center from the beginning.

"That is just blatant discrimination," he said.

But Laguna Hills lawyer John McClendon, whose firm, Van Blarcom, Liebold, McClendon & Mann, represents Lake Elsinore, called his client "a city that welcomes religious rights."

McClendon said that, in most cases, the city has granted churches' requests for conditional-use permits.

The center sued Lake Elsinore in 2001, after the City Council unanimously denied its request to convert the Food Smarts grocery store, three blocks from the center's present location, into a new church building. The center said it wanted the property because it was larger than the center's present site and had a parking lot.

Lake Elsinore officials cited loss of commercial tax revenue and the lack of any other grocery store in the area to serve downtown low-income and elderly residents.

The case might have ended there were it not for the Religious Land Use and Institutional Persons Act, which, among other things, prohibits imposing a substantial burden on the free exercise of one's religion, except for compelling government reasons.

The law is considered by many experts a replacement to the Religious Freedom Restoration Act, which the U.S. Supreme Court struck down in 1997, ruling 6-3 that provisions of the statute exceeded congressional authority.

In that case, the court found in favor of Boerne, Texas, which had used local historic

preservation laws to prohibit Saint Peter the Apostle Church from renovating its 74-year-old building for its growing congregation.

Now, the new act appears headed for the same fate.

Although Wilson determined that Lake Elsinore had placed a "substantial burden" on the center by not issuing a permit, he ruled that the "substantial burden" section of the law was unconstitutional.

As with the high court's decision in the previous law, Wilson found that the new act outran congressional authority. He said that the act set up churches as a separate class to be treated differently.

No sooner did Wilson issue his order than prayer chains began forming on the Internet in support of an appeal.

Becket Fund for Religious Liberty and the Justice Department also intervened, filing briefs on the center's behalf.

Both parties will argue that the center has jurisdiction to pursue its claim under the Constitution's Commerce Clause.

While Wilson did not consider the constitutionality of this issue, the judge wrote in his order that he was not obligated to do so because the center didn't allege an effect on commerce in its complaint. Whether the statutory or constitutional issue would apply in this case should be considered case by case, Wilson wrote.

In its brief, the Justice Department said that the government takes no position on whether the burden on religion in this lawsuit affects interstate commerce, only that invoking this provision when interstate commerce is affected is constitutional under the Religious Land Use and Institutional Persons Act.

Among lawyers in other cases who will be watching the Elsinore outcome is Patrick Perry of Los Angeles, who represents the Missionaries of Charity, Brothers in a case, also before Wilson. *Missionaries of Charity, Brothers v. Los Angeles*, CV01-08115. (C.D. Cal., filed 2001).

In that case, Wilson has ordered lawyers to submit further briefs on the constitutional questions.

Perry said that he is hoping Wilson will uphold the constitutionality as applied to the Religious Land Use and Institutionalized Persons Act in his client's case because the issues differ significantly.

The Brothers have been living in their present Pico-Union area location for 11 years, ministering to the homeless. The city wants them out because neighbors have complained that the homeless presence impedes their efforts to upgrade the area.

The Elsinore center case, Perry pointed out, deals not with an eviction from an existing location but with a church seeking a new site.

Still, Perry said, the ruling in Elsinore could affect the Brothers, depending on how Wilson views the distinctions between the two cases.

Another high-profile religious land-use case in the Central District involving the Cottonwood Christian Center in Cypress recently settled and will not be affected by Wilson's decision.

In that case, the city of Cypress approved a land-swap deal in March, ending the three-year fight over Cottonwood's efforts to build a new worship center on land sought by the city for a Costco retail outlet.

Had the parties failed to reach an agreement, however, U.S. District Judge David Carter of Santa Ana appeared, from his tentative order, prepared to uphold the constitutionality of the center's claims under the Religious Land Use and Institutionalized Persons Act.

Wilson's decision also could affect a recent lawsuit filed by Hancock Park residents over the city's settlement with a local congregation.

In that case, the city initially denied a permit to members of Congregation Elz Chaim, an Orthodox shul, who wanted to hold services in the residential neighborhood. The city later reached a settlement under the Religious Land Use and Institutionalized Persons Act allowing the congregation to operate at the location under strict conditions that the city said would preserve the neighborhood environment, including limiting the number of congregants and parking spaces.

Instead, the congregation tore down the existing structure and built a much larger one, said a lawyer for the city of Los Angeles. Residents sued both the congregation and the city, claiming the settlement violated their due-process rights. *League of Residential Neighborhood Advocates*

*v. Los Angeles*, CV03-4890 (C.D. Cal., filed July 10, 2003).

Representing the residents is Pennsylvania lawyer Marci A. Hamilton, who successfully argued the Texas case that invalidated the previous religious land-use law.

"It's clearly a violation of federalism and also a violation of the separation of church and state," Hamilton said. "I think the ruling in the city of Lake Elsinore was right on target in terms of constitutionality."

However, Becket Fund spokesman Patrick Korten contends the previous religious land-use law was entirely different from the current one, and he expects advocates of the new law ultimately will prevail.

"Most of the courts around the country that have ruled on the constitutionality of the law have upheld it, including the 9th [U.S.] Circuit [Court of Appeals] in a prisoner case," Korten said.

Only three judges have ruled against the law's constitutionality, including Wilson, who is the only judge to address the land-use portion of the law, Korten said. The other two cases involved prisoners' rights under the law's institutionalized persons section.

"There is little doubt that the small handful of cases that have come out against the constitutionality will be reversed," Korten said.

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