

## ZONING AND LAND USE PLANNING

Circuit Spotlights RLUIPA's Reach,  
'De Facto' Finality

By John C. Armentano

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Recently, both the New York Appellate Division and the U.S. Court of Appeals for the Second Circuit considered the plight of Ateres Bais Yaakov Academy of Rockland (ABY) regarding its failed attempt in 2018 to purchase Grace Baptist Church property in Clarkstown, New York, and establish a Jewish all-girls school.

The courts issued seemingly contradictory decisions that juxtaposed ABY's lack of standing to compel an agency to issue a formal determination, which frustrated its attempts to acquire the Clarkstown property, with the ripeness of claims ABY asserted under the federal Religious Land Use and Institutionalized Persons Act (RLUIPA), even though the agency never issued a formal determination.

The Second Circuit's decision is the more noteworthy of the two decisions. The Second Circuit reversed the U.S. District Court for the Southern District of New York and held that the lower court improperly dismissed ABY's RLUIPA religious discrimination claims. The decision illustrates RLUIPA's long reach and the concept of *de*

*facto* finality, and may change how municipalities approach land use disputes.

#### ABY's Land Purchase Falls Through

ABY is a New York State chartered education corporation that provides secular and Orthodox Jewish religious instruction to girls in grades pre-K through 12. In October 2018, ABY contracted with Grace Baptist Church to purchase the Clarkstown property, for \$4.3 million, to operate an Orthodox Jewish school.

After executing the contract, ABY sought financing. In addition to a lender committing to loan \$5 million, the Rockland Economic Assistance Corporation (REAC), administered by the Rockland County Industrial Development Agency (IDA), informally approved tax-exempt bonds for which ABY had previously applied at a different location.

But, community members opposed the sale. Once the opposition gained momentum, the IDA canceled the public hearing during which



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the REAC was scheduled to formally approve the bond funding it had informally approved. The IDA's executive director stated that it was premature to hold a hearing regarding funding to purchase the property before ABY received preliminary permits or approvals from the Town of Clarkstown to redevelop the property.

In late December, ABY submitted a building-permit application to the Clarkstown Building Department to make improvements. The Clarkstown Building Inspector denied the application, concluding that ABY needed a variance to operate a school of general instruction on the property because it lacked the minimum frontage on adjacent roads.

ABY appealed the denial to the Clarkstown Zoning Board of Appeals (ZBA), arguing the

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Clarkstown Building Inspector misapplied the law and, alternatively, seeking the variance. In March 2019, the Clarkstown Building Inspector claimed the ZBA required a survey of a property before a zoning application could be processed, even though, ABY argued, nothing in Clarkstown's Town Code or the ZBA's rules required such a survey. Regardless, ABY provided the survey and requested a hearing date for its appeal. The ZBA never responded to the request and ABY soon lost the lender's \$5 million loan commitment.

Under its contract with Grace Baptist Church, ABY was required to close on the property on May 16, 2019. ABY was unable to do so because it failed to secure the required permits. Soon after it failed to close, Grace Church informed ABY that it was terminating its contract to sell

the property and "revoking any consent to land use applications relating to the property."

ABY objected to Grace Baptist Church's cancellation and urged the ZBA to schedule a hearing on its appeal. In July 2019, the Clarkstown's counsel responded and advised ABY that the ZBA "will not entertain any appeal by ABY with respect to the property" because, among other reasons, Grace Baptist Church terminated the sale and revoked its consent to make any applications affecting the property. In October 2019, the Town of Clarkstown announced it was purchasing the property.

Notably, after the ZBA refused to hear ABY's appeal, ABY filed a Freedom of Information Law (FOIL) request with Clarkstown seeking, among other things, communications between Clarkstown and any other party concerning the sale of the property. Clarkstown denied the existence of such records, ABY appealed, and the Clarkstown Supervisor failed to respond to the FOIL appeal.

### **ABY Fights a Legal Battle on Two Fronts**

ABY filed a hybrid proceeding-action in New York State court under CPLR article 78 and Public Officers Law article 6, and an action for declaratory relief against Clarkstown. ABY sought to (i) compel the ZBA to hear ABY's appeal and determine that a variance was not needed or, alternatively, to grant the variance, (ii) annul the Building Inspector's denial, and (iii) compel Clarkstown to produce all records responsive to the FOIL request.

Clarkstown moved to dismiss ABY's claims relating to its ZBA application(s) for lack of standing. The New York State Supreme Court, Rockland County, granted the motion to dismiss ABY's claims related to the ZBA applications, and remanded the FOIL issue to Clarkstown for production of responsive material responding to ABY's FOIL appeal – without awarding attorneys' fees and costs. ABY appealed.

ABY also filed a federal lawsuit related to the permit appeal, alleging that Clarkstown officials, along with residents who formed a chapter of an organization called Citizens United to Protect Our Neighborhood Inc. (CUPON), conspired to keep ABY's school out of the town. Specifically, ABY alleged that town officials and CUPON improperly manipulated an ostensibly neutral building permit application and zoning appeals process to scuttle ABY's purchase of Grace Baptist Church's property.

ABY's federal suit asserted claims under RLU-IPA, 42 U.S.C. §§1983 and 1985, a claim under the New York Constitution alleging violations of freedom of worship and assembly, and a claim for tortious interference with its contract.

Clarkstown officials and CUPON moved to dismiss for lack of subject matter jurisdiction and failure to state a claim. The District Court dismissed all claims on the grounds that (i) ABY's religious discrimination and civil rights claims were unripe because the ZBA never issued a final decision on the permit appeal/variance application, and (ii) ABY's alleged tortious interference injury was not traceable to Clarkstown (with leave to replead against CUPON in state court), and so ABY lacked standing to assert the claim against Clarkstown.

### **Seemingly Contradictory Decisions**

In ABY's appeal of the state court action, *Ateres Bais Yaakov Academy of Rockland v. Town of Clarkstown*, 218 A.D.3d 462 (N.Y. App. Div. 2nd Dept. 2023), the New York Appellate Division, Second Department, held that ABY lacked standing to pursue the zoning appeals.

The Appellate Division held ABY lost its interest in the property when Grace Baptist Church revoked the purchase and sale agreement and withdrew its consent to ABY's land use application.

The Appellate Division further concluded that ABY had not demonstrated an injury-in-fact within

the zone of interests intended to be protected by the relevant zoning laws, ruling that losing a real estate purchase contract was not intended to be remedied by zoning code provisions under which the Building Inspector denied the permit.

In what was likely of little consolation to ABY, the Appellate Division upheld the Supreme Court's grant of relief on ABY's FOIL claim, finding that Clarkstown had no reasonable basis for denying access to responsive documents. The Appellate Division further held that ABY was entitled to an award of attorneys' fees and costs.

The Second Circuit, however, in *Ateres Bais Yaakov Academy of Rockland v. Town of Clarkstown*, 88 F.4th 344 (2d Cir. 2023), held that the District Court erroneously concluded that ABY's religious discrimination and civil rights claims were not ripe and that ABY lacked standing to assert its tortious interference claim against Clarkstown.

The Second Circuit determined that ABY's RLU-IPA claims became ripe when the Clarkstown ZBA committed itself to a procedural position it intended to be final. Noting that the finality requirement for ripeness inquiries is "relatively modest," and requires "nothing more than *de facto* finality," the Second Circuit held that ABY's application effectively reached finality once the ZBA declined to review ABY's permit appeal or variance application. The ZBA declined to respond to at least five ABY letters urging it to schedule a hearing.

The court pointed to the July 2019 letter from Clarkstown's counsel stating that the ZBA would not entertain ABY's appeal. At that point, the court noted, "there was nothing more ABY could have done," and it was not possible for ABY's claims to take on "a more concrete and final form." With Clarkstown's actions amounting to a *de facto* finality regarding ABY's ZBA appeal/application, the court concluded the District Court improperly dismissed ABY's religious discrimination and civil rights claims.

The Second Circuit further found that ABY's complaint plausibly alleged an injury-in-fact to satisfy the standing requirements for its tortious interference claim.

Specifically, the Second Circuit noted that ABY alleged that Clarkstown officials acted to frustrate ABY's acquisition of the property, including by publicly signaling opposition to ABY's purchase, encouraging residents to voice complaints against ABY's purchase, and denying ABY's applications to the Clarktown Building Inspector and the ZBA to delay the organization's acquisition of the property and to prevent ABY from fulfilling its contractual obligations with Grace Baptist Church.

Thus, ABY had plausibly pled a causal connection between Clarkstown officials' and CUPON's conduct and the injuries ABY allegedly suffered from the loss of its real estate contract.

### **Effect on Future Land Use Conflicts**

The New York Appellate Division's decision, which links a party's standing to challenge land use decisions regarding property to that party's ownership interest in that property, is unlikely to change how New York municipalities navigate land use conflicts.

But the Second Circuit's decision may do so for two reasons.

First, the decision shows RLUIPA's long reach. RLUIPA prohibits discrimination in zoning and land use laws against houses of worship, religious institutions, and individuals on the basis of their religious beliefs or practices. Congress enacted RLUIPA to prohibit zoning/land use laws that substantially burden the religious exercise of religious institutions and individuals unless such regulations represented the least restrictive means of furthering a compelling state interest.

The Second Circuit's decision allowed ABY to continue asserting its religious discrimination

claim against Clarkstown even after ABY's interest in the property had been extinguished, along with state law claims that rely on that interest.

While obviously not applicable in all land use disputes, when a party to a dispute has colorable claims that it is being discriminated against in the dispute based on its religious beliefs or practices, a municipality will need to balance its desire to make certain land use decisions regarding that party against the possibility that it could be liable for violating RLUIPA.

That possibility could change how municipalities approach land use decisions involving religious institutions because an institution's lack of a legal interest in a property is not a bar from bringing RLUIPA claims.

The second way the Second Circuit's decision could change how New York municipalities navigate land use conflicts is the doctrine of *de facto* finality. Municipalities that delay land use decisions regarding religious uses can no longer defend such actions on ripeness grounds by claiming their decisions were not "final."

The Second Circuit's decision makes clear that municipal inaction cannot be insulated from judicial review by not making a *formal* final determination. As a result, parties with federal RLUIPA religious discrimination claims arising out of a municipality's delayed decision may now have a better chance of defeating a motion to dismiss on ripeness grounds.

This development may prompt municipalities to avoid employing a "delay to defeat" strategy and pressure them to render timely, final land use decisions. At the very least, the Second Circuit's decision puts municipalities on notice that attempts to delay a zoning decision may work against them when there are religious discrimination claims at stake.