Religious Rights in the Chicago Landmarking Process

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The Chicago Landmarks Ordinance[1] authorizes restrictions on the renovation or alteration of specially designated buildings or other structures. The express purpose of the ordinance is to identify and preserve "landmarks"—i.e., places "having a special historical, community, architectural, or aesthetic interest or value to the City of Chicago and its citizens."[2] Given their cultural importance and frequent architectural beauty, it should come as no surprise that churches are likely targets for landmarking.[3] Yet the restrictions entailed by designation as a landmark threaten interference with the autonomy of religious congregations. This primer outlines the legal protections afforded to religious organizations that should be considered in the landmarking process.

A. The Chicago Landmarks Ordinance

The Chicago Landmarks Ordinance, enacted in 1968, establishes a commission to pursue the ordinance's goals of preserving significant buildings and places in the City. The Commission recommends to the City Council places or objects for landmark designation, and reviews proposed alterations of landmarked properties as part of the permit review process.[4]

The ordinance defines specific criteria for landmark designation of a particular place or building:

1) its "value as an example of . . . architectural, cultural, economic, historic, social or other" heritage;
2) its location as a site of a significant historic event;
3) its identification with a significant person in the City's history;
4) its exemplification of an architectural style;

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[1] Chicago Mun. Code §§ 2–120–580 to 2–120–920.
[2] *Id.* § 2–120–580(1).
[3] Angela C. Carmella, *Landmark Preservation of Church Property*, 34 Cath. Law. 41, 44 (1991).
[4] A recent appeals court decision, *Hanna v. City of Chicago*, 388 Ill. App. 3d 909 (1st Dist. 2009), called into doubt the constitutionality of the Landmarks Ordinance. Although the Appellate Court remanded the case to the Cook County Circuit Court without first striking down the ordinance, it seemed to endorse the plaintiffs' claim that the landmarking criteria are unconstitutionally vague. *Id.* at 916–17, 919. On remand, the Circuit Court upheld the constitutionality of the ordinance, granting summary judgment in favor of the City by order dated May 2, 2012.

5) its identification with a historically significant architect, designer, engineer, or builder;
6) its representation of a theme; and
7) its identification as an established and familiar visual feature.[5]

Generally, a place qualifies for landmarking if it meets two or more of these criteria.[6]

Once the Commission recommends property for landmarking, the "landmark" will be established if the property owner consents, if the City Council enacts an ordinance accepting the recommendation, or if the Council fails to act within one year of the commission's recommendation.[7] Landmark designation prohibits alteration or demolition of the landmark, or erection of a sign on or near the landmark, without approval of the commission.[8] The Commission is required by the Landmarks Ordinance to grant permits only where the proposed work will not materially alter the element or elements that led to landmark designation in the first place.[9]

The broad criteria for landmarking could be read to encompass almost any structure, but the ordinance contains one important exclusion:

> No building that is owned by a religious organization and is used primarily as a place for the conduct of religious ceremonies shall be designated as a historical landmark without the consent of its owner.[10]

This exclusion recognizes the sanctity of places of worship, and that the government cannot control the spaces where religious ceremonies are held without interfering with religious ceremonies themselves. It is unclear, for example, whether the exemption would apply to a house of worship temporarily put out of use, or would interfere with the ability of a religious institution to demolish a house of worship. In addition, this exclusion omits protection for other religious buildings such as convents, rectories, or schools, even if some religious services take place in those buildings. These shortcomings and ambiguities may lend support to constitutional challenges to the ordinance.

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[5] Chicago Mun. Code § 2–120–620.
[6] *Id.* §§ 2–120–630, 2–120–700.
[7] *Id.* §§ 2–120–650 (owner consent), 2–120–700 (City Council ordinance), 2–120–705 (failure to act within one year).
[8] *Id.* § 2–120–740.
[9] *Id.* §§ 2–120–770, 2–120–780.
[10] *Id.* § 2–120–660.

B. Constitutional Protections: Religious Freedom & Equal Protection

Both the state and federal constitutions guard against governmental interference with religion, and supplement the exemption in the Landmarks Ordinance.

Article I, Section 3 of the Illinois Constitution provides, in relevant part:

> The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed, and no person shall be denied any civil or political right, privilege or capacity, on account of his religious opinions . . . . No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship.

The First Amendment to the U.S. Constitution provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

"While the plain language of article I, section 3 [of the Illinois Constitution], indicates that the drafters intended protection of religious practice in Illinois to be more expansive than that guaranteed by the United States Constitution, our supreme court has determined otherwise."[11] Thus, the Illinois Constitution is interpreted in "lockstep" with the U.S. Constitution, i.e., as providing the same level of protection for religious liberties.

Under the First Amendment, a neutral law of general applicability that incidentally burdens a religious practice will be upheld so long as it is rationally related to a legitimate government interest.[12] On the other hand, laws that are not neutral or generally applicable are subject to strict scrutiny—they must be narrowly tailored to serve a compelling governmental interest.[13] The U.S. Supreme has indicated

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[11] *Mefford v. White*, 331 Ill. App. 3d 167, 178–79, 770 N.E.2d 1251, 1260 (4th Dist. 2002).

[12] *Employment Division v. Smith*, 494 U.S. 872 (1990) (upholding denial of unemployment benefits to members of church who had ingested peyote as part of their religious practice).

[13] *See id.*; *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (striking down zoning laws and other municipal ordinances targeted at ritual animal sacrifices by religious group).

that strict scrutiny also applies where the affected exercise of religion is combined with another fundamental right, such as free speech, or where the government "has in place a system of individualized exemptions."[14]

Multiple courts have applied strict scrutiny to preservation laws that blocked a church's attempt to demolish its property. The U.S. district court in Kansas, for example, ruled that the denial of a demolition permit for an administration building under the state's Historic Preservation Act violated a monastic community's free exercise rights. As the court recognized, "[n]o court has found historic preservation to be a compelling government interest."[15]

In a similar case, a federal court in Maryland ruled in favor of the Roman Catholic Archbishop of Baltimore, after the local historic district commission denied a permit for demolition of a monastery and chapel. The church had sought to replace these buildings with smaller, more modern construction, based on its "religious obligation to place the spiritual needs of the faithful entrusted to their care above concern for a dilapidated building."[16] Under the First Amendment, the "court is not empowered to question the validity of that belief."[17]

The State of Washington Supreme Court has also recognized that under the federal constitution and its own state constitution, a historic preservation law must yield to religious freedom.[18] The landmark ordinance at issue was subject to strict scrutiny not only because it contained a "system of individualized exemptions," but because it threatened the church's free speech as well as free exercise rights.[19] Indeed, it is impossible to separate governmental control over church buildings from governmental control over religious expression.

In short, the application of the Chicago Landmarks Ordinance to church property over the church's objection would be on very shaky legal ground in the face of the First Amendment.

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[14] *Smith*, 494 U.S. at 884.
[15] *Mount St. Scholastica, Inc. v. City of Atchison*, 482 F. Supp. 2d 1281, 1295 (D. Kan. 2007).
[16] *Keeler v. Mayor of Cumberland*, 940 F. Supp. 879, 883 (D. Md. 1996).
[17] *Id.* at 884.
[18] *First Covenant Church v. City of Seattle*, 840 P.2d 174, 185 (1992) ("The possible loss of significant architectural elements is a price we must accept to guarantee the paramount right of religious freedom.").
[19] *Id.* at 181.

C. Statutory Protections: RLUIPA and Illinois RFRA

Congress and the Illinois Legislature have enacted statutes to elevate protection for religious practice above the constitutional standards established in the courts. The Illinois Religious Freedom Restoration Act, 775 ILCS 35/1 et seq. (Illinois RFRA), provides:

> Government may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless it demonstrates that the application of the burden to the person (i) is in furtherance of a compelling governmental interest and (ii) is the lest restrictive means of furthering that compelling governmental interest.[20]

The federal Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) employs nearly identical language to shield religious practices from land use regulations.[21] Landmark ordinances and designations qualify as "land use regulations" that are subject to RLUIPA, because they "limit[] or restrict[] a claimant's use or development of land."[22]

Both RLUIPA and Illinois RFRA help to ensure that substantial burdens on religious exercise will be subject to strict scrutiny. Because of the parallels between these statutes and First Amendment jurisprudence, analysis of an ordinance under these statutes typically merges with the First Amendment analysis.[23]

RLUIPA contains additional safeguards against religious discrimination in the land use context. Under part (b) of the Act, a land use regulation may neither treat a religious assembly "on less than equal terms with a nonreligious assembly,"[24] nor discriminate "on the basis of religion or religious denomination."[25]

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[20] 775 ILCS 35/15.

[21] 42 U.S.C. § 2000cc(a)(1) ("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 . . . .").

[22] 42 U.S.C. § 2000cc-5(5).

[23] *See River of Life Kingdom Ministries v. Village of Hazel Crest*, 611 F.3d 367, Vision Church v. Village of Long Grove, 468 F.3d 975, 996 (7th Cir. 2006) (en banc) ("Given the similarities between RLUIPA § 2(a)(1) and First Amendment jurisprudence, we collapse [the petitioner's] claims for the purpose of this analysis . . . .").

[24] 42 U.S.C. § 2000cc(b)(1).

[25] *Id.* § 2000cc(b)(2).

"For example, '[i]f a church and a community center, though different in many respects, do not differ with respect to any accepted zoning criterion, then an ordinance that allows one and forbids the other denies equality and violates the equal-terms provision.'"[26] In the landmarking context, RLUIPA will operate to enjoin "selective enforcement" against a religious institution, which can be evidenced by disparate treatment of similarly situated institutions.[27]

D. Conclusion

The Chicago Landmarks Ordinance contains a laudable exclusion that recognizes the sanctity of places of worship. Yet the right of religious organizations to make decisions concerning their own buildings, inseparable from the fundamental rights of free exercise and free expression, is buttressed by constitutional and statutory protections. Under these provisions, religious freedom is a paramount right that prevails over the government's interest in historic preservation.

[26] *Irshad Learning Center v. County of DuPage*, 804 F. Supp. 2d 697, 712 (N.D. Ill. 2011) (quoting *River Life Kingdom Ministries*, 611 F.3d at 371).
[27] *See Vision Church v. Village of Long Grove*, 468 F.3d 975, 1003 (7th Cir. 2006).