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Chapter
29. Local Control of Religious Structures, Uses, and Displays
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III. Special Protection Under State Court Decisions

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§ 29:29. Accessory uses

What constitutes an allowed church or religious use generally has changed from a place of worship alone, used once or twice a week, to a church used during the entire week, nights as well as days, for various parochial and community functions. It seldom consists of one building, but, where it does, the building is itself of sufficient size to accommodate all of its various activities. The question arises as to the extent to which the additional activities are considered allowed or accessory uses.

Where state courts grant churches special protection from zoning restrictions, allowed accessory uses are generously permitted. In Lawrence School Corp. v. Lewis,[1] a New York court noted: "[E]ducational and religious institutions are generally entitled to locate on their property facilities for such social, recreational, athletic and other accessory uses as are reasonably associated with their educational or religious purposes."[2]

Permitted uses have included:

(1) mortuaries used in connection with a church;[3]

(2) parochial schools;[4]

(3) parking lots and playgrounds;[5]

(4) convents, rectories, and monasteries;[6]

(5) gymnasiums and swimming pools;[7]

(6) meeting rooms, auditoriums, Boy Scout rooms, and other places of quasi-public assembly;[8]

(7) day care centers;[9]

(8) drug rehabilitation centers;[10]

(9) softball fields;[11]

(10) counseling facilities;[12]

(11) book and audiovisual centers;[13]

(12) homeless food programs;[14] and

(13) domestic violence and crime victim residency programs.[15]

In Application of Faith for Today,[16] the Appellate Division, Second Department, of New York, reversed an order of special term sustaining the determination of the board of standards and appeals that denied to a branch of the Seventh Day Adventist Church the right to alter a two and one-half story dwelling, by adding a second story and cellar extension and expanding the then present use to include a dining room, kitchen, printing shop, storage room, chapel, Bible classroom, and private garage and parking area. The premises were in a two-family dwelling zone. The board of appeals had held that irrespective of the worthwhile purposes involved, the actual producing of material, telecasts, and television programs, even though for propagation of the Gospel, was not a proper use in a residential district. The evidence showed that the church produced and conducted television programs and correspondence courses, it received and answered 8,000 letters a week, in two years it mailed out more than 100,000 Bibles, and it used modern office equipment and machinery, including printing machinery. The New York City zoning resolution permitted, in residential districts, philanthropic and eleemosynary institutions.

On the authority of Cromwell v. American Bible Society,[17] in which the court held that the New York Bible Society was a philanthropic and eleemosynary institution, strictly limited by its charter to publishing and promoting the general circulation of the Bible, the court held that the attempt to prohibit the uses desired by the Seventh Day Adventists in the instant case was an attempt to extend the restrictions on use of property, beyond the power of the board.[18]

However, in Appeal of Russian Orthodox Church of the Holy Ghost,[19] under an ordinance that permitted religious use in the district, the church claimed the right to establish a cemetery, apart from a church building itself, as a religious use, on the ground that the place of burial and burial rites to take place there were an important part of its dogma. The court held that a cemetery is basically a secular use of land, not incidental to residential or agricultural use, and the fact that the land was owned by a church did not change this fact.

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[FN1] Lawrence School Corp. v. Lewis, 174 A.D.2d 42, 578 N.Y.S.2d 627, 72 Ed. Law Rep. 313 (2d Dep't 1992).

[FN2] 174 A.D.2d at 46, 578 N.Y.S.2d at 630 (citations omitted).

But see Yeshiva & Mesivta Toras Chaim v. Rose, 136 A.D.2d 710, 523 N.Y.S.2d 907, 44 Ed. Law Rep. 587 (2d Dep't 1988) (building for center for study of holocaust not religious use); Cochise County v. Broken Arrow Baptist Church, 161 Ariz. 406, 778 P.2d 1302 (Ct. App. Div. 2 1989) (manufacturing and printing of bibles not use for religious worship).

See also The Chapel v. City of Solon, 40 Ohio St. 3d 3, 530 N.E.2d 1321 (1988) (accessory buildings subject to site plan review).

[FN3] City of Tucson v. Arizona Mortuary, 34 Ariz. 495, 272 P. 923 (1928). But for a church to park buses on its property located in a residential district, it must be established that church use of buses is clearly incidental and customary to churches, that parking of buses on church property is also clearly incidental and customary, and where these contentions were not supported by any evidence, they could not be established by judicial notice. East Side Baptist Church of Denver, Inc. v. Klein, 175 Colo. 168, 487 P.2d 549 (1971).

The language of the text here was quoted approvingly by the Supreme Court of Connecticut in Havurah v. Zoning Bd. of Appeals of Town of Norfolk, 177 Conn. 440, 418 A.2d 82, 86–87, 11 A.L.R.4th 1072 (1979) (case holding that where strict religious practices precluded travel on certain days, the furnishing of overnight accommodations to congregants was a use accessory to the principal use as a house of worship and such accessory use was entitled as of right).

See What constitutes accessory or incidental use of religious or educational property within zoning ordinance, 11 A.L.R.4th 1084.

[FN4] See Alpine Christian Fellowship v. County Com'rs of Pitkin County, 870 F. Supp. 991, 96 Ed. Law Rep. 543 (D. Colo. 1994). The First Amendment was found to be violated when a church located in a residential neighborhood was denied a special permit to operate a religious school. The court stressed that the county was not forbidding the construction of a church building, but rather was restricting the "activities taking place within a church building legitimately placed in a residential neighborhood." 870 F. Supp. at 994. Without reference to the Religious Freedom Restoration Act, the court applied the "compelling state interest" test and found that the permit denial was an unjustified substantial burden on the church's free exercise of religion.

And see Roman Catholic Welfare Corp. of San Francisco v. City of Piedmont, 45 Cal. 2d 325, 289 P.2d 438 (1955). See also Catholic Bishop of Chicago v. Kingery, 371 Ill. 257, 20 N.E.2d 583 (1939); Roman Catholic Archbishop of Diocese of Oregon v. Baker, 140 Or. 600, 15 P.2d 391 (1932); Diocese of Rochester v. Planning Bd. of Town of Brighton, 1 N.Y.2d 508, 154 N.Y.S.2d 849, 136 N.E.2d 827 (1956); Langbein v. Board of Zoning Appeals of Town of Milford, 135 Conn. 575, 67 A.2d 5 (1949).

In City of Concord v. New Testament Baptist Church, 118 N.H. 56, 382 A.2d 377 (1978), the court was called upon to determine "whether a five-day-a-week school run by a fundamentalist church" was an accessory use under the terms of an ordinance which allowed "facilities usually connected with a church." While conceding that most churches today do not operate full-time schools, the court noted that church run schools were prominent in America's past and, more important, that the church here required daily, bible oriented education as a matter of conviction. Thus, given the constitutional proscription against "governmental determination of propriety in religious matters," the court was unwilling to find this school disqualified under the "usually connected" standard of the ordinance. The court therefore held that the full-time school qualified as an accessory use.

In Damascus Community Church v. Clackamas County, 45 Or. App. 1065, 610 P.2d 273 (1980), the court ruled that the grant of a conditional use permit for a church does not automatically carry with it authority to operate a parochial school. The court distinguished City of Concord, supra. Unlike the Concord ordinance, the ordinance here did not refer to "facilities usually connected with a church" but declared that full-time parochial schools are not among them, citing the county ordinance, which prescribed different minimum conditions for church use and school use, as support for this determination.

See also Abram v. City of Fayetteville, 281 Ark. 63, 661 S.W.2d 371, 15 Ed. Law Rep. 409 (1983) (conditional use permit for a church does not automatically authorize operation of full-time parochial school).

But in City of Sumner v. First Baptist Church of Sumner, Wash., 97 Wash. 2d 1, 639 P.2d 1358, 2 Ed. Law Rep. 589 (1982) (en banc), the Supreme Court of Washington vacated an injunction the city had obtained enjoining use of a church building for a full-time church sponsored and operated school until such time as the building was brought into compliance with the city's building code, the church obtained a special use permit for the school, and off-street parking requirements were met. Noting that the city's evenhanded application of the building code and zoning ordinance would have the indirect effect of unduly burdening the free exercise of religion and noting, too, that "[t]he congregants' right to send their children to a church-operated school is protected as a fundamental right under the United States Constitution," the court remanded the case with directions that the trial court balance and try to accommodate the state's interest in assuring the safety of children with the church members' fundamental right to the free exercise of their religion and to educate their children in a manner that conforms to their own religious beliefs and principles. The lower court was further directed to consider whether the means chosen to enforce the governmental interest were necessary and were the least restrictive available and to determine whether the technical building code violations in fact posed a real threat to the welfare and safety of school children. Finally, perhaps in an attempt to avoid the constitutional issue entirely, the high court directed the trial court to determine whether the building's use as a school

was a "changed" use, such that the building code applied where the church is used as a school and whether the building's use as a school was a "church" use integral to and inseparable from the practice of religion, as the church contended, so as to bring it within the building code's "grandfather" clause excepting prior uses from the requirements of the code.

In Application of Covenant Community Church, Inc., 111 Misc. 2d 537, 444 N.Y.S.2d 415 (Sup 1981), the court reversed and remanded a town zoning board of appeals' denial of a conditional use permit for construction of a church, parochial school, and day care center complex in a single family residence district. The court held that the board's grounds for denying the permit—that the size of the congregation (about 1,200) and the intended use of the premises for various sports and recreational activities: would result in substantially and permanently increased traffic and noise in a well-established residential area; would impair the use and quiet enjoyment of the surrounding properties; would change the character of the neighborhood; and would tend to diminish property values—were insufficient when weighed against a church's judicially established right to utilize its facilities and premises for nonreligious activities that serve to support and strengthen its religious practices.

But in Faith Assembly of God of South Dennis and Hyannis, Inc. v. State Bldg. Code Commission, 11 Mass. App. Ct. 333, 416 N.E.2d 228 (1981), the court ruled that, absent some showing of a coercive effect of the enactment on the practice of its religion, the application of more stringent building code requirements to school buildings than to churches did not impermissibly infringe the church's right to freely exercise its religion, despite the fact that the changes the church would have to make to its adjoining school building would be costly.

New York. Association of Zone A & B Homeowners Subsidiary, Inc. v. Zoning Bd. of Appeals of City of Long Beach, 298 A.D.2d 583, 749 N.Y.S.2d 68, 171 Ed. Law Rep. 329 (2d Dep't 2002) (unless the zoning ordinance provides otherwise a religious accessory use may be housed in a primary use building).

[FN5] Keeling v. Board of Zoning Appeals of City of Indianapolis, 117 Ind. App. 314, 69 N.E.2d 613 (1946); and see Mahrt v. First Church of Christ, Scientist, 75 Ohio L. Abs. 5, 142 N.E.2d 567 (C.P. 1955), judgment aff'd, 75 Ohio L. Abs. 24, 75 Ohio L. Abs. 27, 142 N.E.2d 678 (Ct. App. 2d Dist. Montgomery County 1956), in which it was held that the court would take judicial notice that off-street restricted parking on an *adjacent* vacant lot in a residential district was a customary accessory use of churches.

[FN6] Board of Zoning Appeals of City of Indianapolis v. Wheaton, 118 Ind. App. 38, 47, 76 N.E.2d 597, 601 (1948); Appeal of O'Hara, 389 Pa. 35, 131 A.2d 587 (1957); Diocese of Rochester v. Planning Bd. of Town of Brighton, 1 N.Y.2d 508, 154 N.Y.S.2d 849, 136 N.E.2d 827 (1956).

Given the modern trend toward ecumenicism and secularism among organized religions, group living among religious peers today frequently deviates from the strict monasticism of the past. In light of this, questions may arise as to whether a particular living situation constitutes a permitted convent or monastery or, instead, is a prohibited boarding house or commune.

In Association for Educational Development v. Hayward, 533 S.W.2d 579, 586 (Mo. 1976), a group of seven men, including one priest, who lived together were held not to constitute a permitted monastery. Despite the group's recognition by the Roman Catholic Church, their commitment to unmarried life, and an intense shared spiritualism, the court emphasized their lack of vows and freedom to pursue secular occupations and interests in finding their living arrangement not to constitute a monastery. The court commented that, running throughout all the proffered definitions of monasteries and rectories is the requirement that the occupants "have as their primary and regular vocation the religious life or ministry under a religious superior. None of the definitions include within their scope persons whose religious activities constitute an avocation even though their religious beliefs are intensely held and adhered to and their avocational activities are church related."

By way of contrast, in Diakonian Soc. v. City of Chicago Zoning Bd. of Appeals, 63 Ill. App. 3d 823, 20 Ill. Dec. 634, 380 N.E.2d 843, 846 (1st Dist. 1978), the use in question was held to be a permitted monastery rather than a prohibited private club or rooming house. Despite the fact that the 13 men were of different denominations and frequently pursued studies away from the house, the court cited the ancient lineage of the order, the members' vows of poverty, chastity, and obedience, and the strict scheduling of the day's activities, including religious observances, in finding this to be a monastery. Distinguishing Hayward, the court stated, "[W]e believe that plaintiff has established that its members were religious professionals rather than men with an intense religious avocation, as in Hayward."

[FN7] See Lawrence School Corp. v. Lewis, 174 A.D.2d 42, 578 N.Y.S.2d 627, 72 Ed. Law Rep. 313 (2d Dep't 1992); Shaffer v. Temple Beth Emeth of Flatbush, 198 A.D. 607, 190 N.Y.S. 841 (2d Dep't 1921); Community Synagogue v. Bates, 1 N.Y.2d 445, 154 N.Y.S.2d 15, 136 N.E.2d 488 (1956); Temple Israel of Lawrence v. Plaut, 10 Misc. 2d 1084, 170 N.Y.S.2d 393 (Sup 1957), order rev'd, 6 A.D.2d 886, 177 N.Y.S.2d 660 (2d Dep't 1958).

But in Bethlehem Evangelical Lutheran Church v. City of Lakewood, 626 P.2d 668 (Colo. 1981) (en banc), the Colorado Supreme Court held that a requirement that the church, as a condition precedent to receiving a building permit to construct a gymnasium, construct, pay for, and dedicate public improvements necessitated by the proposed construction (e.g., sidewalks, curbs, street paving, gutters) was not a violation of freedom of religion since the interference, if any, with the free exercise of religion was minimal and the requirement was necessary to promote the public health, safety, or the general welfare, was reasonable, and was not unduly oppressive upon the church.

[FN8] See Keeling v. Board of Zoning Appeals of City of Indianapolis, 117 Ind. App. 314, 69 N.E.2d 613 (1946); Application of Garden City Jewish Center, 2 Misc. 2d 1009, 155 N.Y.S.2d 523 (Sup 1956). In Garbaty v. Norwalk Jewish Center, Inc., 148 Conn. 376, 171 A.2d 197 (1961), it was held that a building, owned and operated by a nonprofit corporation, organized for charitable, religious, social, and educational purposes, used partly for religious services and the celebration of weddings, but primarily as a community project, with a swimming pool for use by the defendant's members and their guests, the building itself being used for meetings of various affiliated and nonaffiliated organizations and for social activities, was a permitted use in a residential district under an ordinance permitting churches and church buildings, clubs, social

and recreational buildings, and philanthropic or eleemosynary uses or institutions. The court held that while no portion of the premises was used solely for any particular one of the uses enumerated (each being in a separate subdivision of the ordinance), no portion was used for any purpose other than one or more of these purposes.

Stating that any contemporary church group must of necessity perform nonreligious acts—such as using business machines for getting out letters and periodicals in order to reach its members, and (as in the case at bar) operating a coffee house in furtherance of the church's ministry to university students—the Chancery Court of Delaware issued a temporary injunction restraining the city from carrying out its order to discontinue the use and occupancy of the premises for such purpose in a single family residence. The court held that such activities, including presentation of speakers on secular as well as religious subjects and the showing of films, could not be banned as unrelated to church ritual. Synod of Chesapeake, Inc. v. City of Newark, 254 A.2d 611 (Del. Ch. 1969), citing Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville, 90 Cal. App. 2d 656, 203 P.2d 823 (4th Dist. 1949).

Where a "church or temple" was a use listed as of right, the fact that the applications sought to construct a "church activities building" did not make the application distinguishable. "[W]e would point out that in Indiana, if one is entitled to build a church, he may not be denied the opportunity to build accessories as well." Board of Zoning Appeals of Elkhart County v. New Testament Bible Church, Inc., 411 N.E.2d 681, 685 (Ind. Ct. App. 1980), citing Board of Zoning Appeals of Town of Meridian Hills v. Schulte, 241 Ind. 339, 172 N.E.2d 39 (1961).

See also Twin-City Bible Church v. Zoning Bd. of Appeals of City of Urbana, 50 Ill. App. 3d 924, 8 Ill. Dec. 919, 365 N.E.2d 1381 (4th Dist. 1977).

But see St. Luke Evangelical Lutheran Church v. Zoning Hearing Bd. of Easttown Tp., 43 Pa. Commw. 159, 403 A.2d 128 (1979), in which the board had ruled that the church's proposed group home for boys who were "status offenders" was not permitted as a religious use or accessory thereto in a district zoned for single-family residences. The court held that Pennsylvania's law of zoning (Pa. Municipalities Planning Code, 53 Pa. Stat. §§ 10101 et seq.) provided no legal authority for the proposition that an accessory use in one municipality, incident to a principal use in a second, must be permitted in the municipality in which the accessory use is located (the land on which the church building was located was contiguous to that on which the proposed group home stood, but was traversed by the township boundary line). Both the Municipalities Planning Code and the cases, said the court, recognize a territorial integrity of zoning ordinances consistent with municipal law generally. The case was remanded to the proper authorities for a hearing on the church's application for a conditional religious use.

And in Diocese of Buffalo, N. Y. v. Buczkowski, 112 Misc. 2d 336, 446 N.Y.S.2d 1015 (Sup 1982), judgment aff'd, 90 A.D.2d 994, 456 N.Y.S.2d 909 (4th Dep't 1982), the court upheld the city zoning board of appeals' denial of a use permit that would have allowed the diocese to convert a building from a residential care institution for predelinquent and delinquent young men to an intermediate care facility for the developmentally handicapped. The court held that the proposed conversion was not a change to a more restrictive

use, but to another equally restrictive one and thus fell outside the purview of the zoning ordinance's provision on changes in nonconforming uses. Further, the proposed conversion constituted a "change in use" and was thus not permissible under the zoning ordinance. Responding to a constitutional challenge under the First Amendment, the court ruled that the constitutional protection afforded to a religious organization is afforded only to its religious activities not to all activities engaged in and that denial of the use permit did not impermissibly interfere with the organization's religious functions since the proposed convention involved a charitable use, not a religious one and, as such, was subject to the same regulations as any other charitable organization or use.

Pennsylvania. Diocese of Altoona-Johnstown v. Zoning Hearing Bd. of Borough of State College, 899 A.2d 399 (Pa. Commw. Ct. 2006) (student residences and student study rooms held accessory to church); City of Hope v. Sadsbury Tp. Zoning Hearing Bd., 890 A.2d 1137 (Pa. Commw. Ct. 2006) (holding that campground and hiking trails were not accessory to church).

[FN9] See Sugarman v. Township of Teaneck, 272 N.J. Super. 162, 639 A.2d 402 (App. Div. 1994) (abrogated on other grounds by, Coventry Square, Inc. v. Westwood Zoning Bd. of Adjustment, 138 N.J. 285, 650 A.2d 340 (1994)) (nursery school). See also Unitarian Universalist Church of Central Nassau v. Shorten, 63 Misc. 2d 978, 314 N.Y.S.2d 66, 71 (Sup 1970), where the court, reviewing the various activities that have been upheld as proper uses of church property, found the operation of a day care center, even though taking the form of an affiliated but separate corporate entity in order to be eligible for state funding, was nonetheless an operation of the church and a proper religious activity which may not normally be abridged by zoning provisions.

[FN10] A drug center maintained by a church and a hospital in a parish house, designed to reach nonaddicted young people who were in the early stages of experimentation with marijuana and "soft drugs," to the exclusion of addicts, users of "hard drugs," and was not a residential facility with medication or drugs for detoxification but depended on counseling, work therapy, psychiatric sessions, and the like, was held to be a religious use of church property and a valid extension of a religious institution insofar as zoning purposes are concerned. "Religious use" was defined for zoning purposes as "broadly extended to conduct with a religious purpose." Slevin v. Long Island Jewish Medical Center, 66 Misc. 2d 312, 319 N.Y.S.2d 937 (Sup 1971).

[FN11] While stating it refused to subscribe to any rule permitting a church to enjoy "completely unfettered use of its property" just because the activities conducted thereon bear some relation to a church purpose, the Supreme Court of Idaho in Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Ashton, 92 Idaho 571, 448 P.2d 185 (1968), held that use of four of the church's seven and one-half acres for two softball fields, on which night-time baseball was played, was an integral part of the church program and was sufficiently connected with the church itself that the use of the property was permissible.

A Massachusetts statute prohibits local zoning restrictions, other than bulk, dimensional, and parking requirements, from being applied against religious and nonprofit educational uses. Mass. Gen. Laws Ann. ch. 40A, § 3. In Bible Speaks v. Board of Appeals of Lenox, 8 Mass. App. Ct. 19, 391 N.E.2d 279 (1979), the court construed this statute to mean that churches, church schools, and other nonprofit schools are entitled "to