RAISING THE FREE EXERCISE CLAUSE AGAINST URBAN RENEWAL: SUBALTERN STATUS FOR PLANNERS?

Telling of the reverence our society has accorded traditional forms of religious worship is the fact that until 1973 no religious group had sought the protection of our courts against the state for an existing house of worship.[1] In *Pillar of Fire v. Denver Urban Renewal Authority*[2] the issue of whether a church structure that is sui generis[3] can be condemned under the state's power of eminent domain was raised for the first time.

The Denver Urban Renewal Authority (DURA) notified Pillar of Fire that Memorial Hall, the birthplace and first permanent structure of the faith, would be condemned to make way for an office building unless the church agreed to underwrite the development of the entire block upon which Memorial Hall stands.[4] Unable to secure financial backing for such a development, Pillar of Fire sought to defeat DURA's petition to condemn the building. In an original proceeding, the Supreme Court of Colorado held that Pillar of Fire had raised an

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1. It is possible, of course, that cases have been brought at the state trial court level although prior to 1973 none had been officially reported.

2. ..... Colo. ....., 509 P.2d 1250 (1973).

3. *See* note 11 *infra.*

4. Pillar of Fire, an evangelistic offshoot of Methodism, presently maintains churches in 18 states and several foreign countries. Memorial Hall was constructed in 1903, and the trial court found that the building is in good repair. Brief for Appellant for Petition in Original Jurisdiction at 10, ... Colo. ....., 509 P.2d 1250 (1973). A highly persuasive argument may be made by petitioner on remand that if DURA had been willing to allow Memorial Hall to stand had Pillar of Fire undertaken the development of the rest of the block, then DURA cannot logically claim that Memorial Hall impedes DURA's plans for the renewal area in the event that Pillar of Fire cannot develop the block.

It was estimated that the development envisioned by DURA would cost at least 25 million dollars and that the developer should expect to operate at a deficit for eight or nine years. Although the court made no mention of the propriety of DURA's proposal, it would seem singularly inappropriate to condition the existence of a house of worship on whether the religious organization is prepared to assume the function of a real estate developer. It is an ironical usage that allows us to speak of condemning (from *damnare*) churches in the first place.

issue under the first amendment's protection of the free exercise of religion and remanded the case to the district court for a balancing of the interests of church and state.[5] Had the court spurned the church's attempt to invoke the first amendment, petitioner's efforts to obtain judicial review of the condemnation proceeding would have been precluded by *Berman v. Parker*,[6] the leading case involving substantive review of a redevelopment authority's administrative decisions. There, the Supreme Court rejected appellants' petition for review of an administrative decision because:

> Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation. . . .
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> Once the object is within the authority of Congress . . . the means by which it will be attained is also for Congress to determine.[7]

By finding in *Pillar of Fire* that a first amendment right was involved, the court shifted to DURA the burden of showing, on remand, that no reasonable alternative to condemnation exists, that the site of the church is so vital to the overall renewal plan that petitioner's property should be condemned.[8] The significance of the *Pillar of Fire* decision lies partly in its allowing petitioner to transfer the burden of proof to DURA, rendering inapplicable the presumption of validity that normally attends legislative acts[9] in the courts.[10]

Although the holding of *Pillar of Fire* is limited, arguably, to church structures that are sui generis, the decision marks the way for future

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5. ..... Colo. at ....., 509 P.2d at 1251, 1253.

6. 348 U.S. 26 (1954).

7. *Id.* at 32-33.

8. ..... Colo. at ....., 509 P.2d at 1253, 1254.

9. Pillar of Fire was challenging the application, not the constitutionality, of the statute that created DURA. A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement if it unduly burdens the free exercise of religion. Wisconsin v. Yoder, 406 U.S. 205, 220 (1972); *see* NAACP v. Button, 371 U.S. 415, 438-39 (1963); Snowden v. Hughes, 321 U.S. 1, 8-9 (1944).

10. The presumption is neutralized in the face of first amendment claims. *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963); NAACP v. Button, 371 U.S. 415, 438 (1963); Thomas v. Collins, 323 U.S. 516, 529-30 (1945); Valent v. Board of Educ., 114 N.J. Super. 63, 78, 274 A.2d 832, 840 (Ch. Div. 1971).

challenges by religious groups when urban renewal authorities seek to condemn church buildings that are not clearly sui generis in nature.[11] The court indicated that churches normally are not immune from condemnation under the power of eminent domain. "[C]hurch property is private property which can be taken by eminent domain for paramount public use . . . ."[12] An examination of the four cases cited in support of this proposition reveals, however, that the immunity issue has not been resolved conclusively with respect to church buildings.

Macon & Atlantic Railway v. Riggs[13] is one of only two cases cited by the court in which the taking of church property was at issue. The pertinent language of the opinion is clearly dictum in view of the court's holding that respondent could *not* enter the property.[14] In

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11. Sui generis means "of its own kind or class." BLACK'S LAW DICTIONARY 1602 (rev. 4th ed. 1968). It is not as if churches within the definition will have sui generis embossed on their portals, however, and it may prove extremely difficult to determine whether church structures are sui generis for the purposes of first amendment protection. The *Pillar of Fire* court used the term in reference to the unique historical and symbolic importance of Memorial Hall to the Pillar of Fire faith. Within this frame of reference the claim that a church is sui generis could arise if a synagogue were designed by Chagall, or even where a congregation feels a strong spiritual affinity toward the church in which they have worshipped for a number of years. Viewed microcosmically—and no legal principle compels us to increase the angle of vision—the ordinary neighborhood church, the church building itself, may have unique historical and symbolic significance for its congregation—to *them* it may be of its own kind or class. What the *Pillar of Fire* court would protect is the faith that adheres to the church building; and as the Mormon Tabernacle stands in relation to the faith of Mormons, so may the nondescript First Baptist Church on Elm Street stand in relation to the faith of its congregation.

It should further be mentioned that slum areas, which by definition are candidates for renewal projects, may present unusual problems for urban planners in the form of unaffiliated, singular and, by any measure, uniquely symbolic churches. In his characterization of Harlem's religious community, Kenneth Clark observes that "many storefront churches . . . and . . . sporadic Negro quasireligious cult groups" exist in the area. K. CLARK, DARK GHETTO: DILEMMAS OF SOCIAL POWER 174 (1965). It would not be surprising if many of these wayward, offshoot churches could pass muster under *Pillar of Fire*'s sui generis requirement, and it would be a hapless court indeed that deigned to make the distinction between the Pillar of Fire and the evangelical sects that command great respect in ghetto areas.

12. ..... Colo. at ....., 509 P.2d at 1254.

13. 87 Ga. 158, 13 S.E. 312 (1891).

14. The court said: "[C]hurch property is private property, and it follows that land belonging to a church may be condemned for public use . . . just as the property of an individual may be." *Id.* at 159, 13 S.E. at 312.

Beth Medrosh Hagodol v. City of Aurora,[15] in which the land to be taken was part of a cemetery (the parcel not yet used for burial purposes), the court stated: "It is not to be said that such lands, by virtue of their sacred nature, are placed beyond the reach of the power of eminent domain . . . ."[16] In view of the court's holding that Aurora could not proceed for immediate possession of the property, the language must be seen as dictum.[17] *Welch v. City & County of Denver*[18] dealt not with religious property but with city parklands, and so the court's expansive statement that "there are no limitations on the type of property that can be acquired by the State . . . for highway purposes "[19] should be viewed within its context. A similar case is *Mack v. Board of County Commissioners*,[20] in which the state was allowed to condemn part of a private airfield in favor of a highway. Like *Welch*, the case is extremely weak precedent because no first amendment issue was presented, and here, in fact, even the dictum does not support the *Pillar of Fire* court's pronouncement. The *Mack* court stated: [I]t is clear that *subject to rare exceptions*, it is the general rule that there are no limitations on the type of property that may be acquired by the state . . . ."[21] What constitutes those rare exceptions would likely be the issue in a case involving church property that is not sui generis in nature.

Clearly, the *Pillar of Fire* court failed to adequately substantiate its statement that, ordinarily, church property is private property for the purposes of eminent domain. It is instructive, therefore, to examine cases in other areas of law, and in other jurisdictions, to determine whether—and if so, under what circumstances—first amendment protections are applicable to religious property.[22]

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15. 126 Colo. 267, 248 P.2d 732 (1952).

16. *Id.* at 275, 248 P.2d at 736.

17. As the court itself noted: "Much of what has been said concerning these questions may rightfully be considered as dictum, because the opinions expressed as to these questions are not necessary to the decision of the exact question before us . . . ." *Id.* at 276, 248 P.2d at 736-37. *But see* note 28 and accompanying text *infra*.

18. 141 Colo. 587, 349 P.2d 352 (1960).

19. *Id.* at 592-93, 349 P.2d at 355.

20. 152 Colo. 300, 381 P.2d 987 (1963).

21. *Id.* at 303, 381 P.2d at 988 (emphasis added).

22. Although no cases were found involving the taking of church property under the police powers of the state, it should be noted that the state's burden is

The further one ranges from the taking of an actual church edifice, the fewer obstacles there are to the taking. Land leased by a church and utilized as a garage can be taken for school purposes;[23] vacant church land can be taken by eminent domain[24] or adverse possession;[25] the unused portion of a church cemetery can be condemned under the power of eminent domain;[26] formerly used but abandoned church cemeteries can be taken;[27] and it is well-established that church cemeteries can be taken under eminent domain, even when they are still in use.[28] However strong the precedent for taking certain kinds of church property, it is by no means settled that church buildings themselves may be condemned under the power of eminent domain.

There are no reported cases involving the taking of a church edifice by condemnation proceedings, but *Ashworth v. Brown*,[29] in which a church's request for injunctive relief against a trespasser under a false claim of title was granted, weighs heavily against the instant court's pronouncement on church property. In deciding that equitable relief should be granted to prohibit the dismantling and destruction of the

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substantially reduced when constitutional claims collide with state police powers. *See* Beverly Oil Co. v. City of Los Angeles, 40 Cal. 2d 552, 557, 254 P.2d 865, 867 (1953): "[T]he very essence of the police power as differentiated from the power of eminent domain is that the deprivation of individual rights and property cannot prevent its operation, once it is shown that its exercise is proper and that the method of its exercise is reasonably within the meaning of due process of law." *Accord*, Braunfeld v. Brown, 366 U.S. 599 (1961) (Sunday closing laws constitutional as applied against Saturday sabbatarians); Prince v. Massachusetts, 321 U.S. 158 (1944) (child labor laws applicable to religious groups); Reynolds v. United States, 98 U.S. 145 (1878) (statute outlawing polygamy upheld).

23. Ocean Grove Camp Meeting Ass'n v. Board of Educ., 3 N.J. Misc. 349, 128 A. 397 (Sup. Ct. 1925).

24. Chambers v. Arizona, 82 Ariz. 278, 284, 312 P.2d 155, 159 (1957) (dictum).

25. Thompson v. Bowes, 115 Me. 6, 97 A. 1 (1916).

26. St. James African Methodist Episcopal Church v. Baltimore & O.R.R., 114 Md. 442, 79 A. 35 (1911); Rittenhouse v. Creasy, 12 Luz. Reg. 14 (C.P. Pa. 1882).

27. City of New Orleans v. Christ Church Corp., 228 La. 184, 81 So. 2d 855 (1955).

28. *In re* Application of the Bd. of Street Opening, 133 N.Y. 329, 31 N.E. 102 (1892). "The fact that lands have previously been devoted to cemetery purposes does not place them beyond the reach of the power of eminent domain." *Id.* at 333, 31 N.E. at 103. *See generally* Note, *Cemetery Land Use and the Urban Planner*, 7 URBAN L. ANN. 181 (1974).

29. 240 Ala. 164, 198 So. 135 (1940).

church, the Supreme Court of Alabama discerned a direct link between the church building and the free exercise of religion.

> Religious freedom is fundamental in this country. . . . It need merely to be announced when this right is invaded. Incident to this is the right of assembly for religious worship . . . .
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> To this end a spot of ground may be acquired, a building may be erected, both dedicated to religious uses. *The right to their uninterrupted and continuous use* as a place of worship, for preaching, teaching, and other religious activities, *is an element of religious freedom. In protecting such properties . . . the courts are safeguarding the right of religious freedom.*
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> [I]n such case there is something more than a mere trespass on private property. . . . *No money standards can measure or redress such wrongs.* The continuous and uninterrupted use of church property for the purpose to which it is dedicated is the right to be protected.[30]

Ashworth could be read to extend protection only to the uninterrupted use of *a* place of worship, not to particular church buildings. This reading is not compelled by the language of *Ashworth*, however, and the holding that damage to church buildings is not capable of recompense should strongly support church groups seeking to protect their churches against compensatory condemnation proceedings. It is serviceable precedent for raising a first amendment claim against urban developers when the church cannot satisfy the possible sui generis requirement of *Pillar of Fire*.

Zoning cases involving attempts to restrict church construction in residential neighborhoods are numerous, and they are likely to be seen as viable precedent when religious uses collide with renewal projects. Although first amendment issues have been raised in some of these cases[31]—judicial statements that religious structures enjoy

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30. *Id.* at 165-66, 198 So. at 136 (emphasis added). Weaker precedent is found in Vaughn v. Pansey Friendship Primitive Baptist Church, 252 Ala. 439, 41 So. 2d 403 (1949); Bailey v. Washington, 236 Ala. 674, 185 So. 172 (1938); Guin v. Johnson, 230 Ala. 427, 161 So. 810 (1935); Christian Church v. Sommer, 149 Ala. 145, 43 So. 8 (1907).

31. In Note, *Churches and Zoning*, 70 HARV. L. REV. 1428 (1957), it was stated that "[a]lthough the central issue in determining the validity of an ordinance excluding churches from a zoned area would seem to be whether the restriction interferes with the first-amendment guarantee of freedom of religion . . . none of the decisions invalidating these ordinances has explicitly rested on this ground." *Id.* at 1436. While it is true that most zoning decisions have been based on due process considerations, at least three cases pre-dating the Harvard Note

constitutionally protected status abound—a caveat is necessary. No zoning case has turned on a holding that church buildings themselves are invested with religious significance. It is the right to exercise one's religion where one chooses that has been litigated in these cases. In fact, zoning cases deal almost exclusively with *proposed* church structures, and the oft-cited judicial tag that "wherever the souls of men are found, there the house of God belongs"[32] must be viewed in this light.

In sum, there is scant precedent for the determination of whether church buildings can be condemned for state purposes. Even when a religious group succeeds in presenting a claim arising under the first amendment, it is subject to the vicissitudes of the balancing requirement.[33] The first amendment is stated in absolute terms, but in attempting to apply the amendment to disputes involving religious interests the courts have frequently found themselves making vexing, quantitative determinations of rights. Recent decisions suggest that two factors are crucial in weighing the interests of religious claimants: *how essential* are the attributes of the religion for which protection is sought, and *how direct* an infringement of rights deserving first amendment protection is involved.[34] Certainly the condemnation of

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and several following it depend explicitly, if not entirely, on free exercise grounds. *See, e.g.*, Board of Zoning Appeals v. Schulte, 241 Ind. 339, 352, 172 N.E.2d 39, 45 (1961); Board of Zoning Appeals v. Decatur Co. of Jehovah's Witnesses, 233 Ind. 83, 94, 117 N.E.2d 115, 120-21 (1954); Congregation Temple Israel v. City of Creve Coeur, 320 S.W.2d 451, 454-55 (Mo. 1959); Community Synagogue v. Bates, 1 N.Y.2d 445, 458, 136 N.E.2d 488, 496, 154 N.Y.S.2d 15, 26 (1956); State *ex rel.* Lake Drive Baptist Church v. Board of Trustees, 12 Wis. 2d 585, 599-600, 108 N.W.2d 288, 295-96 (1961); *cf.* Stark's Appeal, 72 Pa. D. & C. 168 (C.P. 1950).

32. Garden City Jewish Center v. Garden City, 2 Misc. 2d 1009, 1015, 155 N.Y.S.2d 523, 529 (Sup. Ct. 1956), *quoting* O'Brien v. City of Chicago, 347 Ill. App. 45, 51, 105 N.E.2d 917, 920 (1952).

33. *See* Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327 (1969); Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development*, 80 HARV. L. REV. 1381 (1967).

34. In Wisconsin v. Yoder, 406 U.S. 205 (1972), the exemption from compulsory education laws granted the Amish by the Supreme Court was based primarily on the crucial finding that the Amish practice of withdrawing their children from worldly influences, including public schools, upon their learning the fundamentals of reading, writing and mathematics, is vitally linked to the exercise of the Amish religion. The Court found that secondary education "contravenes the basic religious tenets and practice of the Amish faith," that compulsory attendance "carries with it a very real threat of undermining the Amish community and religious practice," and that it would "gravely endanger if not destroy

any usable church structure impinges upon the exercise of religion to some degree, if only by temporarily inconveniencing the congregation; but even under the wardship of the first amendment the claims of religious groups seeking to protect church structures may seem pallid—in terms of how essentially and how directly the free exercise is threatened—in comparison to claims for protection of religious activities.

Against these claims are posited the interests of the state, and the rule most often articulated is that the state must show either compelling or paramount interests in order to reach the balancing stage.[35] In holding that "urban renewal is a *substantial state interest* that can justify taking property dedicated to religious uses,"[36] the *Pillar of Fire* court indicated that a less stringent standard must be met by the state, an indication that should give us pause.[37]

But if the *Pillar of Fire* court missed the established mark in allowing a merely substantial state interest to propel DURA into the balancing stage, and if the court was overly broad and unpersuasive in stating that church property is private property for the purposes of

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the free exercise of respondents' religious beliefs." *Id.* at 218-19. In Carpenters Local 213 v. Ritter's Cafe, 315 U.S. 722, 726 (1942), Justice Frankfurter, quoting Chief Justice Hughes in Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 708 (1931), said: "Whenever state action is challenged as a denial of 'liberty,' the question always is whether the state has violated *'the essential attributes* of that liberty.'" (Emphasis added.) *See* Sherbert v. Verner, 374 U.S. 398 (1963); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940).

35. *E.g.,* NAACP v. Button, 371 U.S. 415, 438 (1963): "The decisions of this Court have consistently held that only a compelling state interest . . . can justify limiting First Amendment freedoms." *Accord,* Bates v. City of Little Rock, 361 U.S. 516, 524 (1960) ("[T]he State may prevail only upon showing a subordinating interest which is compelling."); Thomas v. Collins, 323 U.S. 516, 530 (1945) ("Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."); Board of Educ. v. Barnette, 319 U.S. 624, 643-44 (1943); Barnett v. Rodgers, 410 F.2d 995, 1000 (D.C. Cir. 1969); Rowland v. Sigler, 321 F. Supp. 821, 824 (D. Neb. 1971). *But cf.* Holmes v. Silver Cross Hosp., 340 F. Supp. 125, 129-30 (N.D. Ill. 1972).

36. ..... Colo. at ....., 509 P.2d at 1253 (emphasis added).

37. It would appear that the court might easily have found a compelling or paramount state interest here. On the necessity of urban renewal it said:

> Planned and well thought out redevelopment of our cities is essential to the future success and well-being of our country. Urban slums and blighted areas suffocate the spirit of the inhabitants in the cities and force them to leave to seek a more acceptable environment in which to live . . . . [L]arge-scale overall planning is necessary to restore health to the cities and to prevent slums from expanding to enlarge the cycle of decay.

Id. at ....., 509 P.2d at 1251.

eminent domain, it yet took a somewhat bold, affirmative stance in allowing Pillar of Fire to raise the first amendment issue. The decision in *Pillar of Fire* should put urban planners on notice that they may find themselves laboring under substantial burdens of proof when they attempt to condemn churches, possibly even when the churches are less unique than Memorial Hall. It is a decision that should be most favorably received by religious groups and constitutionalists, for the Supreme Court of Colorado has diminished the severity of the major obstacle—adequately raising a first amendment issue—facing religious claimants seeking to protect their churches. Perhaps most importantly, the decision stands well with our history of reverence for traditional forms of religious worship.

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