



Virginia Local Government Law

Establishment of Religion or Affordable Housing Incentive? Glassman v Arlington County

By: Andrew McRoberts. *This was posted Tuesday, December 28th, 2010*

After a six-year legal battle, [Arlington County, Virginia](#) may have finally prevailed in its plan to create affordable housing one block from the Clarendon Metro station. [See official County statement here.](#) *Washington Post* story on the decision is [here](#).

Previous legal battles over this project had included zoning challenges that resulted in a 2006 [Virginia Supreme Court decision](#) which resulted in an amendment of the zoning ordinance provision in question and [a subsequent unsuccessful legal challenge](#), which ended when the Virginia Supreme court refused to hear the case.

In an [opinion issued December 23, 2010, the Fourth Circuit Court of Appeals has upheld the federal District Court for the Eastern District of Virginia](#), which held that Arlington County's approvals, loans and plan to create affordable housing in a metro corridor was not subterfuge for establishment of religion in violation of the First Amendment.

Ironically, the [First Baptist Church of Clarendon](#) – owner of the real estate and an essential player in the deal – prevailed as well, just two days before Christmas. The church, which had a shrinking congregation and a resulting financial crisis, gained cash flow, a new sanctuary and potentially new congregants by selling its air rights to a developer. And its historic steeple will survive.

The Court applied the familiar “Lemon Test” in determining whether the County’s actions had the primary effect of advancing religion or lacked a secular purpose:

“In determining whether Arlington County acted in a manner that effectively makes a law ‘respecting an establishment of religion,’ as prohibited by the First Amendment, we focus on both the purpose of the County’s activity in participating in the development of the housing project and the effect of its involvement.

<http://valocalitylaw.com/>

[Richmond](#) • [Christiansburg](#) • [Fredericksburg](#) • [Research Triangle](#) • [McLean](#)

Copyright Sands Anderson PC

THE INFORMATION CONTAINED IN OUR WEB SITE DESCRIBES LEGAL MATTERS HANDLED IN THE PAST BY OUR ATTORNEYS. OF COURSE, THE RESULTS WE HAVE ACHIEVED DEPEND UPON A VARIETY OF FACTORS UNIQUE TO EACH MATTER. BECAUSE EACH MATTER IS DIFFERENT, OUR PAST RESULTS CANNOT PREDICT OR GUARANTEE A SIMILAR RESULT IN THE FUTURE.

The Establishment Clause prohibits state action with a sectarian legislative purpose or with the primary effect of advancing religion, including fostering an ‘excessive government entanglement’ with religion. See [Lemon v. Kurtzman](#), 403 U.S. 602, 612-13 (1971); see also [Agostini v. Felton](#), 521 U.S. 203, 232 (1997) (stating that ‘excessive entanglement’ has sometimes been considered independently, and sometimes as part of the ‘effects’ analysis). But it does not prohibit all interaction between church and state. To the contrary, ‘[i]nteraction between church and state is inevitable, and we have always tolerated some level of involvement between the two.’ *Agostini*, 521 U.S. at 233 (internal citation omitted). Thus, the test for determining whether a legislative act withstands an Establishment Clause challenge requires (1) that the act have a secular purpose; (2) that its principal or primary effect be neither to advance nor to inhibit religion; and (3) that it not foster excessive government entanglement with religion. See *Lemon*, 402 U.S. at 612-13; [Ehlers-Renzi v. Connelly Sch. of the Holy Child, Inc.](#), 224 F.3d 283, 288 (4th Cir.2000).”

The plaintiff, Mr. Glassman, who lives near the development, acknowledged that promoting affordable housing was a secular purpose, but he alleged it was a sham for saving the church from its financial woes and thus had the primary effect of promoting and unnecessarily entangling the County with religion. The Fourth Circuit Court, like the District Court, disagreed. And because no constitutional violation was found, the plaintiff’s civil conspiracy claim under 42 U.S.C. section 1983 also failed.

Various avenues of appeal exist, but all only exist in the respective court’s discretion: Request for reconsideration by the Fourth Circuit Court panel of three judges that decided the case, request for an *en banc* hearing before the full Fourth Circuit, and request for writ of certiorari from the U.S. Supreme Court.

<http://valocalitylaw.com/>

[Richmond](#) • [Christiansburg](#) • [Fredericksburg](#) • [Research Triangle](#) • [McLean](#)

Copyright Sands Anderson PC

THE INFORMATION CONTAINED IN OUR WEB SITE DESCRIBES LEGAL MATTERS HANDLED IN THE PAST BY OUR ATTORNEYS. OF COURSE, THE RESULTS WE HAVE ACHIEVED DEPEND UPON A VARIETY OF FACTORS UNIQUE TO EACH MATTER. BECAUSE EACH MATTER IS DIFFERENT, OUR PAST RESULTS CANNOT PREDICT OR GUARANTEE A SIMILAR RESULT IN THE FUTURE.