

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF PLANNING, HISTORIC PRESERVATION OFFICE
1100 4th Street SW, Suite E650, Washington, D.C. 20024**

HPA No. 12-263

IN THE MATTER OF:

**World Mission Society, Inc. (Church of God)
700 A Street NE
Square 896, Lot 802**

DECISION AND ORDER

The World Mission Society Church of God (“World Mission”) here seeks a permit to authorize removal of 28 contributing stained-glass windows from its church building within the Capitol Hill Historic District. The Historic Preservation Review Board (“HPRB”) unanimously recommended that the permit should be denied because removal of the windows would be inconsistent with the purposes of the Historic Landmark and Historic District Protection Act (“Act” or “Preservation Act”) and with the standards for window replacement found in the implementing regulations. World Mission presented several arguments to the Mayor’s Agent, including that the denial of the permit would impose an unreasonable economic hardship and would violate the federal Religious Land Use and Institutionalized Persons Act (“RLUIPA”), 42 U.S.C. 2000cc, *et seq.* For the reasons explained below, the permit must be DENIED.¹

The Historic Preservation Office (“HPO”) Staff Report describes the background of the windows. A Methodist congregation caused the church building at issue to be constructed in 1895 in the Romanesque Revival style. A contemporary observer praised the stained-glass windows as “beautiful” and “brilliant.” After a fire in 1919, some windows probably were replaced, but an expert retained by the HPO concluded that the windows in place now “date to no later than the renovation of *circa* 1921, with a number of the original, arched windows from 1895 likely still in place.” HPO Rep. at 3. Four church congregations have occupied the church building before the current applicant.

World Mission purchased the church building for \$1,250,000 in October 2011. It subsequently sought a permit to remove all the stained-glass windows and replace them with clear glass. World Mission holds that it is forbidden by its core beliefs to worship in a space depicting shapes in stained glass. (MA Tr. 55-56.) HPO then discovered that World Mission had already removed several windows without a permit, and it required the Church to replace them. Although World Mission complied and put back most of the windows, some had been damaged in the process. HPO concluded that the windows should be considered “historic windows” and “special windows” under the regulations, imposing more stringent requirements for alteration than for ordinary windows. The staff also found that the windows “are undeniably a character-defining feature of this century-old-place of worship.”

¹ This opinion will constitute the findings and fact and conclusions of law required for decision in a contested case under the D.C. Administrative Procedure Act, D.C. Code § 2-509(e).

HPO Rep. at 5. Moreover, the staff report found that the church building is a ‘major building’ in the historic district. *Id.* at 4-5. The staff recommended to the HPRB that the application is not consistent with the purposes of the Preservation Act or with the window standards in the regulations. *See* 10C D.C.M.R. § 2301.

The HPRB held a hearing on March 23, 2012. World Mission argued that the church was not a building contributing to the character of the historic district and that the window replacements would be consistent with the purposes of the Act. Several people and organizations opposed the application, including Advisory Neighborhood Commission 6C (“ANC 6C”), the Capitol Hill Restoration Society (“CHRS”), and neighbors. The testimony established that the windows were historic, that they were visible from the public street, and that minor past alterations to the building had not undermined its integrity. The HPRB found no merit in either of the World Mission’s arguments, and members stated that it lacked authority to rule on claims of religious liberty. (HPRB Tr. 11-13.) HPRB members expressed frustration that World Mission had purchased a historic church in a legally established historic district without ascertaining if they could remove its protected windows, terming World Mission’s lack of due diligence “incredible” and “unconscionable.” (*Id.*, 61–63.) At the end of the hearing HPRB unanimously adopted the staff report recommendations.

World Mission then brought this action before the Mayor’s Agent. It argues: 1) that denial of a permit to remove the windows would violate its religious freedom as protected by the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc, *et seq.* (“RLUIPA”); 2) that denial would impose an unreasonable economic hardship, per D.C. Code 6-1105(f); and, 3) that issuance of a permit is necessary in the public interest (*id.*). The Mayor’s Agent held a hearing on May 18, 2012. At the hearing, the District of Columbia Preservation League (“DCPL”) and the Capitol Hill Coalition for Sensible Development were granted party status to oppose the application. ANC 6C submitted a letter stating that it had voted 5:1:1 to oppose the application and appeared through Bill Crews, who represents Single Member District 6C07, in which the church building sits. CHRS and individual neighbors also appeared to oppose the application.

World Mission argues first that application of the Act to them so as to prevent them from removing the windows violates RLUIPA, a federal statute designed to protect First Amendment religious liberty rights in the administration of land use regulation. DCPL argues that the Mayor’s Agent lacks authority to determine whether RLUIPA applies in this case, because the Mayor’s Agent is limited to applying the Act. In support of this, DCPL cites *D.C. Preservation League v. Department of Consumer and Regulatory Affairs*, 646 A.2d 984 (D.C. 1994), where our Court of Appeals stated: “There is nothing in the Preservation Act that allows the Mayor’s agent to engage in a balancing of interests which takes into account such factors as the cost of refurbishing the dilapidated structure and the threat it poses to the safety and welfare of the community. On the contrary, the limited task of the Mayor’s agent is to evaluate a demolition application in accordance with the Preservation Act, *and nothing more.*” *Id.* at 990 (emphasis in original). *See also Embassy Real Estate Holdings, LLC v. Department of Consumer & Regulatory Affairs*, 944 A.2d 1036, 1049 (D.C. 2008). These rulings counsel great caution.

But this case is quite different. In the cited precedents, the Mayor’s Agent had invoked general equitable and policy considerations to rule beyond the scope of the Preservation Act. The court appropriately instructed the Mayor’s Agent not to engage in policy making outside his statutory duties.

RLUIPA, however, directs its commands at officials implementing land use regulations, including historic preservation statutes. Its core provision states: “No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on ... religious exercise” 42 U.S.C. § 2000cc(a)(1). It is the Mayor’s Agent who issues permits on behalf of the Mayor and thus implements the Preservation Act. For the Mayor’s Agent to enforce the Act without regard to RLUIPA would blindly expose the District of Columbia to liability for violating federal rights. As Justice Brennan wrote in an analogous context, “[A]fter all, if a policeman must know the Constitution, then why not a planner?” *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 661 n. 26 (1981)(Brennan, J., dissenting). Accordingly, the Mayor’s Agent must consider whether enforcing the Preservation Act against World Mission in this case violates RLUIPA.

We can accept that preventing World Mission from removing the stained glass windows imposes some burden on the religious exercise of the church, because it inhibits their members’ ability to worship in their church building in accord with their sincere beliefs about images. But RLUIPA applies only to “substantial burdens,” a term of art freighted with a complex constitutional gloss. Briefly, Congress enacted RLUIPA in dissatisfaction with the Supreme Court’s decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), where the Court adopted a lenient interpretation of the First Amendment regarding state statutes of general application that have the effect of penalizing some citizens’ religious practices. Prior cases had imposed a higher level of scrutiny on state statutes that imposed a “substantial burden” on religious exercise. Congress then attempted to overturn *Smith*, but the Court held that statute unconstitutional as applied to state historic preservation, as exceeding Congress’s authority. *City of Boerne v. Flores*, 521 U.S. 507 (1997). RLUIPA as subsequently enacted thus walks a confusing line seeking to provide protection to constitutional religious liberty in the land regulation context without actually expanding the scope of that constitutional protection.

Courts have struggled to give RLUIPA a coherent interpretation in land use disputes. The focus has been on the term “substantial burden,” which Congress intended to be interpreted in accord with the Supreme Court’s constitutional jurisprudence. 146 Cong. Rec. S7774, S7776 (2000). It is clear that religious organizations are not exempt from reasonable non-discriminatory land use restrictions, including historic preservation restrictions, even when they have the effect of precluding a congregation from worshipping in their desired location. One commentator recently summarized the cases: “Regardless of the test applied, substantial burden claims have not fared particularly well absent some indication that government applied its land use regulations in a less than fair and carefully-reasoned manner.” Alan C. Weinstein, *The Effect of RLUIPA's Land Use Provisions on Local Governments*, 39 Ford. Urb. L. 1221, 1234 (2012). See e.g., *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007); *Petra Presbyterian Church v. Village of Northbrook*, 489 F.3d 846 (7th Cir. 2007).

Significantly, there is no reported decision in which a court has found that the denial of a permit under a historic preservation ordinance violates RLUIPA. In a leading First Amendment case, the Court of Appeals for the Second Circuit rejected a free exercise challenge to preservation restrictions that prevented a church from demolishing its parish hall in order to build an office building. It stated: “[N]o First Amendment violation has occurred absent a showing of discriminatory motive, coercion in religious practice, or the Church’s inability to carry out its religious mission in its existing facilities.” *Rector, Wardens, & Members of the Vestry of St. Bartholomew’s Church v. City of New York*, 914 F.2d 348, (2d. Cir. 1990). See *Episcopal Student Foundation v. City of Ann Arbor*, 341 F. Supp. 2d

691 (E.D. Mich. 2004) (RLUIPA is not violated where permit denial does not force religious group “to choose between exercising its religious beliefs or incurring criminal or financial penalties.”)

World Mission does argue that denying it a permit to remove the stained glass windows does prevent it from following its religious beliefs in its current building, because it cannot worship in a space with such iconography. It cites in support of its view that such constraint violates RLUIPA, *Society of Jesus of New England v. Boston Landmarks Commission*, 564 N.E. 2d 571 (Mass. 1990), where the Court held that historic designation of the interior of a church, thus subjecting it to regulation of alterations, violates article 2 of the Declaration of Rights of the Massachusetts Constitution. The court stated: “The configuration of the church’s interior is so freighted with religious meaning that it must be considered part of and parcel of the Jesuits’ religious worship.” *Id.* at 573. The stained glass windows in this case are a prominent element of the interior of World Mission’s worship space. The Mayor’s Agent must be concerned that enforcement of the Preservation Act will actually impinge on the worship practices of any religious congregation.

On the other hand, the District has not designated the interior of this or any church, but only regulates alterations to their exteriors.² The evidence clearly establishes that the windows are important visual features of the exterior of the church building, even with the plexiglass coverings on some of the windows. (MA Tr. 213.) Limiting preservation regulation to church exteriors generally strikes a reasonable balance between the secular public interest in cultural preservation and the religious liberty interest of any worship group. Notably, the District likely would have had no objection to the type of renovation of the interior of the Jesuit church into office and residential space at issue in the Massachusetts case.

Even more importantly, in this case World Mission purchased a church building with historic windows long protected as part of a historic district. This is entirely different from imposing new preservation restrictions on an existing congregation, frustrating their expectations about pursuing their religious inspiration. Here, World Mission created the conflict between the preservation law and its religious doctrine. It purchased this historic church building largely because it was affordable. It knew that the building was within a historic district but completely failed to investigate whether it could lawfully remove the windows it knew that it could not live with. (*Id.* 95-96) World Mission members testified that World Mission had purchased churches in historic districts in New Zealand and the United Kingdom, had been permitted to remove windows with images, and assumed that they could do the same in the District. (*Id.*, 63-64.) Even if this testimony is accurate,³ it does not justify such a cavalier attitude toward the District’s legal requirements. It is *per se* unreasonable to rely upon unexamined assumptions about the content of our preservation laws, especially given the ease with which prospective purchasers can consult with the HPO. *See, e.g.*, 10C D.C.M.R. § 300 (conceptual review). Permitting such negligent ignorance of District law to justify exemptions would eviscerate our

² It may well be that article 2 of the Massachusetts Declaration of Rights offers more protection to religion than does the First Amendment or RLUIPA, but we do not need to resolve that point here.

³ The credibility of the claim that World Mission expected to employ legal process to obtain permission to remove the windows is undercut by the uncontradicted evidence that it had removed some windows without a permit before initiating any discussion with HPO.

preservation laws. *See, e.g.*, In the Matter of Robert and Sofia Bassman, HPA No. 11-400, at 3 (May 22, 2012).⁴

World Mission can solve this dilemma by selling the church building and holding worship elsewhere within the District of Columbia in a facility that does not violate their principles. This may involve some expense to World Mission, but so long as it does not amount to an “unreasonable economic hardship,” discussed below, such increased costs do not violate RLUIPA. As the court concluded in *Episcopal Student Foundation*: “The fact that alternative suitable properties may exceed Canterbury's budget, or that it may incur additional rental expenses to facilitate its religious mission, are not the type of severe burdens on one's religious free exercise that the RLUIPA seeks to protect.” 341 F. Supp. 2d at 709. World Mission is very welcome to establish a congregation in the District but only in accord with generally applicable legal standards. Its religious liberty claim under RLUIPA is ultimately unconvincing.⁵

World Mission’s argument of unreasonable economic hardship also fails because its economic concerns can be attributed entirely to its failure to investigate the scope of the existing preservation restrictions on the church building. Our Preservation Act equates unreasonable economic hardship with a regulatory taking under the Fifth Amendment. D.C. Code 6-1102(a)(14). A key element in any regulatory takings claim is the frustration of reasonable investment backed expectations. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). Here, World Mission’s expectations about the value of this property for their purposes was clearly unreasonable because of its failure to exercise due diligence in ascertaining beforehand whether it could remove the windows.⁶

Moreover, our Court of Appeals has stated that to establish an unreasonable economic hardship, an applicant must show “whether *any* reasonable economic use exists for the property.” *900 G Street Associates v. Department of Consumer and Regulatory Affairs*, 430 A.2d 1387, 1391 (D.C. 1981) (emphasis in original). World Mission failed to demonstrate that it could not sell the church building for a price approximating what it paid for it. Although members testified that the church had been “on and off the market” for a decade before World Mission bought it (MA Tr. 34), it has not sought to market the church building. The real estate agent for the previous seller testified that the church was “a difficult site to sell,” (*Id.*) but had no other experience marketing a church. At the time of the purchase, a bank appraised the property at a value above what World Mission paid for it. (*Id.*, 109) The evidence at the hearing also established that other church buildings on Capitol Hill and surrounding neighborhoods have been converted in recent years to other uses, such as residences. (*Id.*, 162-63) It is significant for this analysis that no one has suggested that removal of the windows will increase the market value of the church building. Thus any economic hardship to World Mission, as opposed to the usefulness of the building for its worship, would not be addressed by removing the windows.

⁴ Decisions of the Mayor’s Agent are collected at <http://www.law.georgetown.edu/library/collections/histpres/decisions.cfm>.

⁵ The statement in World Mission’s written submission to the Mayor’s Agent that “the Church cannot worship anywhere else in the District or any other area in the Washington Metropolitan region” (7) is not supported by evidence and incredible on its face.

⁶ This distinguishes this case from In the Matter of: Third Church of Christ, Scientist, HPA No. 08-141 (May 12, 2009).

World Mission's other arguments are much weaker. Its challenge to the well-supported judgments of the HPRB and HPO that the church is a contributing building to the historic district is meritless. These are the type of judgments about historic significance within the expertise of the HPRB that the Mayor's Agent normally defers to. *See* 2225 California St., NW, HPA No. 11-472 (February 24, 2013). In this case, that judgment is amply supported by the staff report and testimony that the church is within the period of significance of the district and that the minor changes to its exterior (modern doors and air conditioning units) do not prevent it from conveying the significance of its architectural heritage. (*Id.*, 163, 183-85.)

World Mission also failed to offer a plausible claim that removing the windows was "necessary in the public interest," either because it would be consistent with the purposes of the Act or necessary to create a project of special merit. D.C. Code § 6-1102(a)(10). Removal of 28 character-defining windows is not consistent with the core statutory purpose of retaining and enhancing contributing buildings in historic districts. *Id.*, § 6-1101(b)(1)(A). Nor can removing the windows be seen as necessary to construct a project of special merit. *Id.*, § 6-1102(10),(11). World Mission understandably sees it as urgent that it bring its distinctive religious ministry to the community, but surely all religious groups consider their ministries to be important, and government officials must maintain strict neutrality among them. Religious ministries must be seen as "general benefits" and cannot qualify as special within the meaning of the statute. *Id.*, § 6-1102(11); *see Kalorama Heights Limited Partnership v. Department of Consumer & Regulatory Affairs*, 655 A.2d 865, 873 (D.C. 1995). The other renovations to the church undertaken by World Mission, while commendable, fall well below any standard for "exemplary architecture" justifying removal of the windows.

ACCORDINGLY, the demolition permit is DENIED.

June 13, 2013



J. Peter Byrne
Mayor's Agent Hearing Officer

Confirmed June 17, 2013:



Harriet Tregoning
Director, Office of Planning

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Decision and Order was served this 17th day of June, 2013 by mailing a copy of the same *via* electronic mail or first-class, United States Postal Service mail, postage prepaid, to the following:

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Certifying Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Decision and Order was served this 18th day of June, 2013 by mailing a copy of the same *via* electronic mail or first-class, United States Postal Service mail, postage prepaid, to the following:

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