"Federation Corner" column
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**Professor Leggett needs to remember laws are based on facts, not fear**
by Wayne Goldstein

First-term County Executive Ike Leggett, who served 16 years on the County Council, has also been a Howard University law professor for the past 31 years, although he is currently on leave. I don't know what classes he taught, but I assume that he always emphasized that learning the facts of a case before arguing it was essential to success, and that hiding one's lack of preparation with emotional outbursts creating panic would not work.

Given this long experience teaching future lawyers and being a lawmaker himself, it is both bizarre and baffling how Professor Leggett, his staff, and his County Attorney have so badly botched their efforts to push the passage of Bill 15-07, an amendment to the county's Forest Conservation Law (FCL), that was supposed to "level the playing field" in how religious institutions were treated as compared to nonreligious institutions. Specifically, one church objected to being required to keep or to replant forest acreage at a much higher rate than a nonreligious institution in the same situation; claiming that its requirement would be 8 times greater than a nonreligious institution. It wanted the FCL to be changed so that its requirement would be the same as nonreligious institutions. At stake was a requirement to plant three acres of trees to create new forest. Based on a cost of 90 cents per square foot, the church would be required to spend about $118,000 to help increase the amount of county forest.

Apparently, the church's pastor first began to complain to Mr. Leggett about this requirement last summer. The discussions continued, and a letter dated 2/20/07 was written by the church's attorney to Mr. Leggett. In this letter, the attorney claimed that the county, by the facts and its own admission, was in violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000 concerning this section of the FCL. RLUIPA is the latest in a series of efforts by Congress to make it easier for religious institutions to construct buildings and to otherwise worship without excessive land use restrictions hampering their 1st and 14th amendment constitutional rights. Previous laws have been struck down by the courts as being in violation of the Establishment clause in the 1st amendment that prohibits the government from giving favorable treatment to one religion over another or to religious over nonreligious institutions.

In 2001, the County Council passed this FCL amendment. This was because the county did not require religious institutions to get special exceptions to build, whereas nonreligious institutions had to. The Council then reasoned that in exchange for not having to deal with the very high cost, the substantial burden, and the uncertainty of getting and keeping a special exception, it was a reasonable tradeoff to have a somewhat larger reforestation requirement, depending on how much forest would be cut to build the new religious institution. At that time, shortly after the passage of RLUIPA, the County Attorney quietly declared that this amendment very likely violated RLUIPA. County Executive Duncan decided to sign the amendment but to then tell his county agencies not to enforce it. While MNCPPC staff also believed the amendment violated RLUIPA, they did enforce it. However, every religious institution which applied for a project owned land with so few trees that they only had to plant about 33% more new trees, instead of the potential maximum of 700% more.

On 5/11/07, Mr. Leggett wrote a letter to the County Council President, asking for an FCL amendment to make the reforestation requirements the same for religious and nonreligious institutions, because the current FCL provisions: "expressly violate the Religious Land Use and Institutionalized Persons Act of 2000, the First Amendment, and the Fourteenth Amendment's Equal Protection Clause. I am hopeful that this bill can be acted on in order to provide a consistent standard for all private institutional facilities and provide relief from what I believe is an unconstitutional provision in our County Code."

At the 7/24/07 hearing for Bill 15-07, Mr. Leggett's representative testified: "We also believe that the current County Code violates [RLUIPA]. The Executive understands that there may be some sentiment to correct the differences in the forest conservation and afforestation standards between religious institutions and other institutions by making all institutions meet the same requirements that apply to the base zones in which they are located. That could be a future consideration that would generate additional discussion and issues that may be more far-reaching. However, we encourage you to address the immediate and, perhaps unlawful and unconstitutional, differences now through quick approval and passage of the bill before you today."

On both 7/24/07 and 7/31/07, in public, and on television, County Attorney Clifford Royalty unequivocally stated that if the church sued Montgomery County under RLUIPA, the County would lose. Mr. Royalty is the chief of the Division of Zoning, Land Use, and Economic Development in that office. His areas of concentration are civil rights litigation, land use, and telecommunications law. He is a member of the Maryland Bar and admitted to practice before the U.S. District Court of Maryland. I am not aware that Mr. Royalty or any attorney in his office researched and wrote a formal opinion, including relevant and recent case law, to back up his assertion that the county would lose this case.

Furthermore, Mr. Leggett never shared this information with anyone outside of government nor discussed the matter with any environmental organization. In fact, no one knew what was at stake until 7/24/07, and then they had only one week to research and understand the numerous complicated issues before the vote on 7/31/07. In the face of a hysteria among County officials created by an intense fear of a RLUIPA lawsuit, I attempted to fill this absence of legal fact by researching and writing a layperson's version of a legal memo to inform those officials still willing to listen.

In the 2/20/07 letter, the attorney explained that the courts found that RLUIPA applied if a land use regulation "treats the religious assembly on less than equal terms..." However, the case he quoted, Primera Iglesia Bautista Hispana v. Broward County, was a case where the 11th Federal Circuit Court found that the local government had NOT violated RLUIPA, a fact the church's attorney did NOT disclose in his letter to Mr. Leggett. A January 2007 newsletter included this about the case: "The Primera court held that because the Broward County zoning ordinance, which required that any nonagricultural, nonresidential uses of property be separated by at least 1,000 feet from existing agricultural and residential uses, applied generally to all non-agricultural, non-residential uses without regard to religion, it did not impermissibly "gerrymander" to place a burden solely on religious, as opposed to nonreligious, assemblies or institutions, in violation of Equal Terms provision of RLUIPA."

While he did also write of one case where a RLUIPA violation was found by a court, he did not mention any others. I have found six other RLUIPA cases from around the country where courts have ruled in favor of local governments. One of these cases was decided a week before the attorney wrote his letter and another a month afterward. With cases from Florida, Kentucky, Illinois, Indiana, and Oregon, and three of them decided in just the last eight months, one could easily argue that a threat of a RLUIPA lawsuit does not mean at all what it seemed to mean in 2001 when the law was passed. The most important, and consistent, ruling by these various courts concerns claims of a "substantial burden" caused by treating a religious institution differently than a nonreligious one. In other words, different treatment is not automatically prohibited. A series of quotes from several court opinions sum this concept up best:

"... occurs when a person is required to 'choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning the precepts of her religion' on the other... state action 'prevent[s] him or her from engaging in conduct or having a religious experience that is central to the religious doctrine ...' This burden must be more than an inconvenience to the plaintiffs, but the court's 'scrutiny extends only to whether a claimant sincerely holds a particular belief and whether the belief is religious in nature'."

In other words, according to these courts, being required to plant extra new forest would only be a "substantial burden" if it prevented the church from being built at all or if it required the church to be built in such a way that the congregants would be unable to have their essential religious experiences. However, the church only objected to the cost because it felt it was "unfair" and would require extra fundraising, not that the church could not be built or not be built as the congregation needed. The attorney also wrote: "This is a significant financial and regulatory burden without a corresponding public policy benefit." While the attorney might claim this is a "significant" burden, stating that there is no public policy benefit to replacing and increasing forest in our county is simply untrue. The whole point of the 2001 amendment was to have religious institutions take some of the financial savings from avoiding the public policy benefit of going through the special exception process and instead help pay for the public policy benefit of planting more forest.

On July 31st, after much discussion, some sincere and some self-serving, the County Council voted unanimously, 8-0, among those present, to approve the amendment. However, they did not allow the bill to go into effect for at least 90 days. Several indicated their intent to change the requirement for nonreligious institutions so that it would be the same, higher standard as for religious institutions. That is what I also support. However, I do not want the church to profit from unsupported threats of a RLUIPA lawsuit backed up by a County Executive who, as a law professor, should have remembered what makes good arguments and good law, and by a County Attorney who doesn't know what he speaks of. I'm hoping the FCL will be amended to greatly increase every institution's responsibility to protect our environment before this special amendment relieves this church of its responsibility. I'm hoping that is the plan of a majority of the councilmembers who voted for this amendment. What will we do with lapsed Professor Leggett? If other religious institutions and economic special interests now feel encouraged to threaten RLUIPA or property rights lawsuits for limitations on building in the Agricultural Reserve or for stronger forest and tree protections, will he again panic?