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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF FIRST UNITED,

Respondent,

-against-

NO. 69

TOWN OF CALLICOON,

Appellant.

20 Eagle Street
Albany, New York
September 8, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE WILSON: Last case on the calendar is
2 matter of First United v. Town of Callicoon.

3 MR. VINCELETTE: May it please the court. I'm
4 Dan Vincelette. I represent the appellant, Town of
5 Callicoon and its assessor. There are two questions before
6 this court on this appeal. One is a substantive issue.
7 And that is - - -

8 CHIEF JUDGE WILSON: Sorry, once again - - -
9 sorry to interrupt you. Do you wish to save time for
10 rebuttal?

11 MR. VINCELETTE: Oh, I'm sorry. Yes. I would
12 like to reserve one minute for rebuttal. Thank you.

13 There are two questions before this court. One
14 is a substantive issue, which is was the trial court in the
15 Appellate Division overly restrictive in their application
16 of the burden of proof for real property tax exemption
17 under Real Property Tax Law Section 420-a?

18 The second question is more one of jurisprudence,
19 which is did the Appellate Division and the trial court
20 improperly shift the burden of proof to the respondent town
21 once the town raised an affirmative defense of zoning
22 noncompliance by the petitioner?

23 JUDGE GARCIA: Can you raise simply zoning
24 noncompliance as an affirmative defense? Or do you have to
25 specify which zoning ordinance is allegedly being violated?

1 MR. VINCELETTE: No. I believe, as an
2 affirmative defense - - - and it was our sixth affirmative
3 defense in our answer - - - was that the use of the
4 property did not conform with the zoning code.

5 JUDGE GARCIA: And then the burden goes back to
6 them to prove a negative, like we've complied with every
7 single zoning ordinance? It could be 500 - - -

8 MR. VINCELETTE: Well, you - - - you could look
9 at that as a negative or you could look at it as a
10 positive, that we are in compliance.

11 JUDGE GARCIA: So that's what their burden is,
12 though? Once you say - - -

13 MR. VINCELETTE: Excuse me. Yes, sir.

14 JUDGE GARCIA: - - - you violated the zoning
15 codes, we don't have to tell you which zoning law, but you
16 violated a zoning law. Then that goes back to them. And
17 they have to go through every law in your zoning code to
18 say no, we didn't; no, we didn't; no, we didn't; no we
19 didn't?

20 MR. VINCELETTE: Well, Your Honor - - -

21 JUDGE GARCIA: Why is that a good way to
22 business?

23 MR. VINCELETTE: Well, Your Honor, this is the
24 Town of Callicoon. The issue from - - -

25 JUDGE GARCIA: But this isn't a rule for the Town

1 of Callicoon. So why is that a good way to do business?

2 MR. VINCELETTE: Well - - -

3 JUDGE GARCIA: Why wouldn't a better rule be - -
4 - you raise an affirmative defense - - - you say you
5 violated this provision of our zoning law?

6 MR. VINCELETTE: Right.

7 JUDGE GARCIA: And then they can say, no, we
8 didn't, and have to come forward with proof to that.

9 MR. VINCELETTE: Right. Well, Your Honor, first,
10 as a matter of pleading, it was generally pleaded as to - -
11 - you know, there was a zoning - - - there is a - - -

12 JUDGE GARCIA: And then somewhere in there, did
13 you narrow these 500 zoning laws down to 1?

14 MR. VINCELETTE: Well, there weren't 500, Your
15 Honor. But it was - - - yeah, it was the use of the
16 property. And this was - - -

17 JUDGE GARCIA: Isn't that generally zoning, like
18 use of the property, right?

19 MR. VINCELETTE: Yes, it is. Yes. And the
20 property is in the rural district. And there are only a
21 few uses that are allowed in the rural district, single-
22 family, cemeteries, government buildings, stuff like that.

23 JUDGE GARCIA: So again, that may be true here.

24 MR. VINCELETTE: Uh-huh.

25 JUDGE GARCIA: But in a case where there are 500

1 uses - - -

2 MR. VINCELETTE: Yes.

3 JUDGE GARCIA: Then it would be okay to just say
4 you violated our zoning laws? And you have to say I'm not
5 using it for these - - - you know, I'm using it for - - -

6 MR. VINCELETTE: On the pleading level, yes.
7 With an answer, it's no more overly broad than stating you
8 failed to state a cause of action or there's no
9 jurisdiction over the defendant.

10 JUDGE GARCIA: But it's an affirmative defense,
11 right? They're saying - - -

12 MR. VINCELETTE: Yes.

13 JUDGE GARCIA: - - - we're a charitable
14 institution. We're using this for appropriate purpose.
15 You're saying all well and good, but even if that's true,
16 you have to comply with the zoning law, and you have not
17 done that.

18 The question to me is, then, what's the level of
19 pleading you have to do to put them on notice of what
20 you're alleging, right? Do you have to say you violated my
21 zoning code, which may in another town be very extensive?
22 Or can you - - - do you have to say - - - at least point to
23 some provisions and say you're using it in violation of
24 these provisions?

25 MR. VINCELETTE: It would be a better practice to



1 state the specific provision or a schedule of zoning code.
2 In this case, I believe it was sufficiently pleaded, in
3 keeping up with the policy of liberal pleading, both
4 petition and answer.

5 CHIEF JUDGE WILSON: So - - -

6 JUDGE GARCIA: But given that it's vague - - -
7 I'm sorry.

8 CHIEF JUDGE WILSON: No, no, no, go ahead. Go
9 ahead.

10 JUDGE GARCIA: I'm monopolizing this.

11 CHIEF JUDGE WILSON: No.

12 JUDGE GARCIA: Given that it's more - - - it's a
13 vague answer, right, or a vague raising of this affirmative
14 defense, wouldn't there then be some obligation to clarify
15 that in the course of a trial, even if that's a - - -

16 MR. VINCELETTE: Oh, absolutely. Oh, yes, Your
17 Honor. Absolutely.

18 JUDGE GARCIA: And then I'm having a hard time
19 finding in the record where you make the argument you're
20 making to this court.

21 MR. VINCELETTE: Well, we made a summary judgment
22 motion. First off, we had a - - - an affidavit from the
23 code enforcement officer with the zoning code attached to
24 it. And he specifically stated this use is not allowed in
25 the RU rural district. He cited - - - the provision of the

1 code is 203-10. He cited that specifically and said any
2 use that is not allowed in a district is specifically not
3 allowed. And you have to apply for a permit or a
4 conditional use.

5 JUDGE CANNATARO: And why is that not an implicit
6 acknowledgment that it would be the town's burden to prove
7 their affirmative defense? Because that's exactly what you
8 did in that motion.

9 MR. VINCELETTE: We raised - - - yes. We raised
10 it, Your Honor. And it was on the - - - on the motion for
11 summary judgment. We raised that as an affirmative
12 defense. And we held the burden on that summary - - -

13 JUDGE CANNATARO: And you introduced some
14 support, some - - -

15 MR. VINCELETTE: Yes.

16 JUDGE CANNATARO: - - - factual support for that
17 allegation. Thereby, one would think making out a prima
18 facie case for whatever relief - - -

19 MR. VINCELETTE: Yes.

20 JUDGE CANNATARO: - - - you were looking - - - so
21 to get to the second of your two questions, whether there
22 was improper shifting of the burden, everything that
23 happened on summary judgment would suggest to me that both
24 the court and the town properly understood where the burden
25 laid on the affirmative defense, which is, the town has to

1 prove it.

2 MR. VINCELETTE: Well, the town did. The trial
3 court held that the town did prove its prima facie case on
4 summary judgment. It then shifts to the - - -

5 JUDGE CANNATARO: And - - - and is the rule - - -
6 would the rule be different at trial? I mean, if - - -

7 MR. VINCELETTE: No.

8 JUDGE CANNATARO: - - - if the - - - if the -

9 MR. VINCELETTE: The rule is the same.

10 JUDGE CANNATARO: So you have to prove your
11 affirmative defense at trial, right?

12 MR. VINCELETTE: And we raised it. We did, Your
13 Honor. And the thing - - - the thing with the shifting of
14 the burden of proof is not withstanding the burden of
15 proof. The dissent brought this out in the Appellate
16 Division. Even if the burden was upon the town, both the
17 Appellate Division and the trial used an overly restrictive
18 interpretation of the zoning code and the concept of the
19 affirmative defense.

20 CHIEF JUDGE WILSON: Well, can we slow down a
21 little?

22 MR. VINCELETTE: I'm sorry, Your - - -

23 CHIEF JUDGE WILSON: No, no, that's okay.

24 MR. VINCELETTE: Yes.

25 CHIEF JUDGE WILSON: If there were no tax issue

1 here at all - - -

2 MR. VINCELETTE: Uh-huh.

3 CHIEF JUDGE WILSON: - - - somebody in the town
4 has a piece of property and they're using it in violation
5 of the - - - of a code, according to the town, the town
6 brings the proceeding?

7 MR. VINCELETTE: The code enforcement officer
8 would probably cite the - - -

9 CHIEF JUDGE WILSON: Right. And then - - -

10 MR. VINCELETTE: - - - the problem, yeah.

11 CHIEF JUDGE WILSON: Right. And then in a
12 proceeding, you agree that the town would have the burden
13 there - - -

14 MR. VINCELETTE: Yes.

15 CHIEF JUDGE WILSON: - - - to show a violation -
16 - -

17 MR. VINCELETTE: Yes.

18 CHIEF JUDGE WILSON: - - - of the code? So to
19 Judge Garcia's point, you would then, in your affirmative
20 action, right, your complaint you brought - - -

21 MR. VINCELETTE: Right.

22 CHIEF JUDGE WILSON: - - - you would say, here's
23 what they're violating, and it's our burden to prove that.

24 MR. VINCELETTE: I believe there's a distinction,
25 though, under the Real Property Tax Law. And there's two

1 things. First of all, there's two proceedings here.

2 In the first year, our firm was not retained
3 until after the return date and issue had been joined.
4 Under Real Property Tax Law Section 712, the town's not
5 obligated to file an answer. All allegations within the
6 petition are deemed denied, which would include affirmative
7 defenses to be raised by respondent at trial or in a
8 summary judgment motion. In the second year, we made a
9 motion to dismiss. It was denied. And at that point, an
10 answer was served.

11 But to Your Honor's point, with exemption,
12 there's a policy in the state to have a restrictive
13 interpretation of exemption, real property tax exemption.
14 This court acknowledged that last year in the Brookline
15 dialysis case. And this policy, it's - - - to Your Honor's
16 point, there's a difference between public health and
17 safety with code enforcement and the benefit of a real
18 property tax exemption to foster charitable or religious
19 works, or you know, the - - - the flip side of that, which
20 this Court was concerned about in the Brookline dialysis
21 case, was the further erosion of the tax base, particularly
22 with rural communities, where you know, the courts are
23 taking an overly broad grant of the exemption to the
24 taxpayer. So the - - -

25 JUDGE GARCIA: But you would say that the - - -



1 the other side needs some notice of what the provision is
2 that they're allegedly violating, even in the exemption
3 context, right?

4 MR. VINCELETTE: I would agree, Your Honor. But
5 at what point? I believe, at the point of pleading with
6 the answer, we had said there is a zoning issue here.

7 JUDGE GARCIA: But let's say - - - you had a
8 trial here. And I - - -

9 MR. VINCELETTE: We did. Yeah.

10 JUDGE GARCIA: - - - as I read that record, a
11 fair reading of that record, the violation was the property
12 was being used as a church or as an accessory use thereof.
13 And all of the arguments, even where they touch on retreat,
14 go to that violation.

15 MR. VINCELETTE: That's - - -

16 JUDGE GARCIA: And now it seems - - - and maybe
17 I'm wrong on this - - - that you're arguing retreat is not
18 a separate viable approved use, under the - - -

19 MR. VINCELETTE: No. And I think that's the
20 problem with the record, Your - - - with the court's
21 analysis, both the trial court and the Appellate Division.
22 They tried to put the town into this church box, all right?
23 At both - - - in the summary judgment with the code
24 enforcement officer, we stated it's not a stated use under
25 the rural district, all right, and not specifically the

1 church.

2 JUDGE GARCIA: Agreed. And that's - - - and not
3 for then.

4 MR. VINCELETTE: Yes.

5 JUDGE GARCIA: But you have to show something,
6 then.

7 MR. VINCELETTE: Yes. And then at trial - - -

8 JUDGE GARCIA: But it seems what you were trying
9 to show was - - -

10 MR. VINCELETTE: Right.

11 JUDGE GARCIA: - - - church or accessory use to a
12 church.

13 MR. VINCELETTE: Right. And once again, at
14 trial - - - and this went beyond the accessory or the
15 church use - - - the assessor was on the stand. And she
16 was asked, why did you deny this application? She said,
17 because they stated they were a retreat or a prayer house.

18 CHIEF JUDGE WILSON: Well, wait. So she
19 basically stated that she denied it on the papers that
20 showed what their stated intent was when they purchased the
21 property?

22 MR. VINCELETTE: Correct.

23 CHIEF JUDGE WILSON: But she didn't say anything
24 about the actual use; is that fair?

25 MR. VINCELETTE: That's fair, Your Honor. But at

1 that point - - -

2 CHIEF JUDGE WILSON: So does - - -

3 MR. VINCELETTE: Yeah?

4 CHIEF JUDGE WILSON: - - - does that - - -

5 suppose I bought a piece of property in Callicoon.

6 MR. VINCELETTE: Right.

7 CHIEF JUDGE WILSON: And I hung a big - - -

8 MR. VINCELETTE: Yup.

9 CHIEF JUDGE WILSON: - - - sign up on it saying
10 this is a fentanyl - - - illegal fentanyl manufacturing
11 plant.

12 MR. VINCELETTE: Yes, sir.

13 CHIEF JUDGE WILSON: But I didn't actually put
14 anything on there, and all I did is I let the neighbor mow
15 and take the grass for his farm, which is sort of what
16 happened here. Can you deny me - - - how do you treat
17 that, then? Is that - - -

18 MR. VINCELETTE: Your Honor has brought up an
19 important distinction between Real Property Tax Law Section
20 420-a(1) and a(3).

21 CHIEF JUDGE WILSON: Yeah.

22 MR. VINCELETTE: A(1) looks at actual use. At
23 the time that this proceeding was commenced, the property
24 was actually being used by petitioner, and it was admitted
25 in the response to interrogatories and testimony that it

1 was being used as a retreat center, a prayer house, or
2 whatever else.

3 CHIEF JUDGE WILSON: Well, the testimony at
4 trial, though, is not quite that, right?

5 MR. VINCELETTE: Oh, the - - - the trial was - -
6 - the testimony at trial from petitioner was that the
7 property had been purchased.

8 CHIEF JUDGE WILSON: So let's slow down for one
9 second, again.

10 MR. VINCELETTE: I'm sorry.

11 CHIEF JUDGE WILSON: The only testimony about the
12 actual use comes either from the petitioner, who says a
13 men's group used it once for a retreat overnight. And
14 there were two other times when people came there and
15 stayed, I think, one night overnight, a youth group, maybe
16 something like that, and that was - - - and - - - sorry - -
17 - and that there was a plot that was being harvested and
18 they were collecting vegetables and distributing the
19 vegetables to people back in Queens.

20 And the only other bit of testimony, I think, in
21 the record is from the town supervisor, who lives next
22 door, who said he didn't think that the plot was as big as
23 they said it was, that was being used for the vegetables,
24 and that he, for decades - - - and I think his family
25 before that - - - harvested hay there and used it for their

1 livestock.

2 MR. VINCELETTE: Yes.

3 CHIEF JUDGE WILSON: And that's all there was
4 about actual use at the trial; is that right?

5 MR. VINCELETTE: I think petitioner's witness
6 testified at other times it was being used as a retreat
7 center, and it was being used - - -

8 CHIEF JUDGE WILSON: Has been used on like three
9 occasions for an overnight stay by unspecified people. Do
10 we even know in which tax year those occurred, from the
11 trial record?

12 MR. VINCELETTE: And I believe that he - - - they
13 were specifically asked in the interrogatories to define it
14 by year. And I believe the testimony, he did testify when
15 those groups came up to the retreat.

16 The thing is, it's - - - when is - - - is there a
17 numerical requirement for actual use? If a retreat - - -
18 if a group decides to use a retreat center once or twice a
19 summer or whatever it is, that's an actual use. If they
20 use it every day of the summer, that's an actual use.

21 CHIEF JUDGE WILSON: So if somebody - - - if they
22 were actually harvesting the vegetables, as they said, and
23 one night, this guy and whoever else was helping him plant
24 the seeds decided they were going to stay overnight and
25 plant more the next day, that would be an actual use of - -

1 - as a retreat because they stayed over?

2 MR. VINCELETTE: That - - - yes. Yes. I think
3 just showing up - - - you know, churches or not-for-profits
4 may have a retreat center that's generally not open to the
5 public, but to members. They have retreats up there. You
6 know, maybe it's a one-day retreat. Maybe it's just a day
7 retreat. Maybe it's an overnight retreat. It's still a
8 use of the property as a retreat house.

9 JUDGE HALLIGAN: And - - - and - - -

10 JUDGE CANNATARO: And was it the town's position
11 at the hearing that a retreat is a prohibited use?

12 MR. VINCELETTE: Yes.

13 JUDGE CANNATARO: As well as a church?

14 JUDGE HALLIGAN: And where - - -

15 MR. VINCELETTE: Yes.

16 JUDGE HALLIGAN: - - - where in the code - - -
17 where in the code does that - - - is that made clear?

18 MR. VINCELETTE: It's made clear - - - the RU
19 District, there's a schedule of uses - - -

20 JUDGE HALLIGAN: Yeah. Uh-huh.

21 MR. VINCELETTE: - - - and one family, et cetera,
22 et cetera. Then in that same section in the code, it
23 states any use that's not enumerated is excluded. And this
24 is Section 203-10 in the code. I believe that's on page
25 129, the code officer's affidavit. In paragraph 10, he

1 refers to the fact that the - - - the code states if it's
2 not enumerated, then it's prohibited, and you must go to
3 the town board or to the planning board - - -

4 JUDGE CANNATARO: And the enumerated - - -

5 JUDGE HALLIGAN: Wait, wait. Sorry. Go ahead.

6 MR. VINCELETTE: Yes.

7 JUDGE CANNATARO: I just want - - - the
8 enumerated uses are single-family home and farm, right?

9 MR. VINCELETTE: No, no, no, no. There's a
10 schedule of the code that states what the uses are, and
11 they include - - - it is in the code - - - the code
12 officer's affidavit, on R129 of the record. And it's A
13 through I, or whatever it is.

14 JUDGE CANNATARO: There's a lot of permitted
15 uses.

16 MR. VINCELETTE: There's about A through I or so.

17 JUDGE CANNATARO: Okay.

18 MR. VINCELETTE: Yeah, yeah.

19 JUDGE CANNATARO: I'm sorry, Judge.

20 MR. VINCELETTE: But spiritual church, accessory
21 use or whatever is not in there.

22 JUDGE HALLIGAN: So - - - just so I'm clear.

23 MR. VINCELETTE: Yes.

24 JUDGE HALLIGAN: Is it your position that the use
25 as a retreat is explicitly prohibited or that - - -

1 MR. VINCELETTE: Yes.

2 JUDGE HALLIGAN: Okay. And where exactly do we
3 see an explicit prohibition? Your view is that they
4 couldn't have gotten a permit for this use, if they had
5 applied - - -

6 MR. VINCELETTE: Oh, they could have, but they
7 didn't - - -

8 JUDGE HALLIGAN: Okay. That's my question.

9 MR. VINCELETTE: - - - they didn't apply for it.
10 Oh, sure.

11 JUDGE HALLIGAN: Okay. So the problem is the
12 lack of a permit request - - -

13 MR. VINCELETTE: Absolutely. Yes.

14 JUDGE HALLIGAN: - - - but not that use as a
15 retreat is categorically prohibited regardless - - - in
16 other words, if you apply for a permit, you can't get it.

17 MR. VINCELETTE: Yes. It's a - - -

18 JUDGE HALLIGAN: You're not arguing that?

19 MR. VINCELETTE: No, no.

20 JUDGE HALLIGAN: Okay.

21 MR. VINCELETTE: Not at all. It's a permitted
22 use or a conditional use. You would have to at least - - -

23 JUDGE HALLIGAN: So you needed to apply for a
24 permit?

25 MR. VINCELETTE: Yes. Yes. And that's what the

1 staff - - -

2 JUDGE RIVERA: But absent the permit, you're in
3 violation of the code?

4 MR. VINCELETTE: I'm sorry. I missed the first
5 part.

6 JUDGE RIVERA: Absent of the permit - - -

7 MR. VINCELETTE: Absent.

8 JUDGE RIVERA: - - - you are in violation of the
9 code?

10 MR. VINCELETTE: That's correct.

11 JUDGE RIVERA: And they were in violation in the
12 code more than once?

13 MR. VINCELETTE: Yes.

14 JUDGE RIVERA: That's the testimony.

15 MR. VINCELETTE: Yes. Yes.

16 JUDGE RIVERA: And that was the intent when
17 buying the property, to begin with. But - - -

18 MR. VINCELETTE: Yes.

19 JUDGE RIVERA: - - - the Chief Judge is correct.
20 It's the use, the actual use.

21 MR. VINCELETTE: That's correct.

22 JUDGE RIVERA: So moving - - - let's say, we
23 agreed with you - - -

24 MR. VINCELETTE: Yeah.

25 JUDGE RIVERA: - - - that there was a violation



1 of the code and that ends the story. Moving forward, if
2 they didn't hold these retreats - - -

3 MR. VINCELETTE: Uh-huh.

4 JUDGE RIVERA: - - - they of course could apply
5 for - - -

6 MR. VINCELETTE: Yes. Oh, sure.

7 JUDGE RIVERA: - - - an exemption or apply for
8 permission to hold the retreats?

9 MR. VINCELETTE: Sure. Yes.

10 JUDGE RIVERA: So they're not foreclosed in the
11 future from perhaps - - -

12 MR. VINCELETTE: No. No.

13 JUDGE RIVERA: - - - being exempt from taxation -
14 - -

15 MR. VINCELETTE: No.

16 JUDGE RIVERA: - - - at some other point in time?

17 MR. VINCELETTE: Well, this isn't - - - Your
18 Honor is bringing up a zoning issue. And absolutely - - -

19 JUDGE RIVERA: Yes.

20 MR. VINCELETTE: - - - there's no prohibition for
21 them to apply for a permit for whatever use.

22 JUDGE RIVERA: Correct.

23 MR. VINCELETTE: But as far as exemption goes - -
24 - and yes, if - - - if they had received a permit and they
25 had their retreat there, then it would - - - I would

1 concede that there is case law, and from this court, that a
2 spiritual retreat center or whatever qualifies for 420-a.

3 CHIEF JUDGE WILSON: But your position is if they
4 are farming even a small plot of land there, as they say -
5 - - as the record indicates they were - - -

6 MR. VINCELETTE: Uh-huh.

7 CHIEF JUDGE WILSON: - - - I think on both
8 sides - - - and on one occasion during the tax year, they
9 stayed overnight and continued farming the next day, that's
10 in violation of a code?

11 MR. VINCELETTE: Yes.

12 JUDGE HALLIGAN: So a single nonconforming use is
13 sufficient?

14 MR. VINCELETTE: Yes. Yes.

15 JUDGE RIVERA: No, but you don't mean staying
16 overnight is a violation. I understood your argument to be
17 if the overnight stay is part of a retreat?

18 MR. VINCELETTE: Well, even if you were there for
19 an hour or two, even if it wasn't overnight, you're there
20 for the purpose of a retreat. And the concern - - -

21 JUDGE RIVERA: Well, that's what I'm saying.

22 MR. VINCELETTE: Right.

23 JUDGE RIVERA: That's what I'm saying.

24 MR. VINCELETTE: Right.

25 JUDGE RIVERA: It's not about staying overnight.

1 MR. VINCELETTE: Staying overnight, no.

2 JUDGE RIVERA: It's - - - the point is the use
3 itself.

4 MR. VINCELETTE: Exactly. Precisely. Yes.

5 JUDGE RIVERA: If the use is a retreat, that's in
6 violation of the code?

7 MR. VINCELETTE: Yes.

8 JUDGE CANNATARO: So even if they're using a
9 portion of the property for what is, concededly, a
10 permitted use of the property, the other use of it, the
11 retreat part of it, sort of invalidates their whole
12 permission?

13 MR. VINCELETTE: Yes. But you know, the town did
14 take issue with the farming use, as far as - - -

15 JUDGE CANNATARO: Yeah, but that - - -

16 MR. VINCELETTE: - - - farming in and of - - -

17 JUDGE CANNATARO: - - - that - - - as a factual
18 question was - - -

19 MR. VINCELETTE: Right.

20 JUDGE CANNATARO: - - - resolved against the town
21 at - - - at the hearing, right?

22 MR. VINCELETTE: Right. Right. But the farming
23 use does not - - - it's the town's position the farming use
24 did not entitle the petitioner to - - - to the exemption.
25 That's - - - it's not even an incidental use. If you have



1 a retreat, a spiritual retreat or - - - a prayer house and
2 spiritual retreat was the stated use of the property.
3 Farming is not a part of that.

4 JUDGE RIVERA: Well, didn't they have to show
5 that it was exclusively used as farming?

6 MR. VINCELETTE: Well, the statute says exclusive
7 and the court has interpreted it as primary. So the
8 primary use of the property definitely was not for farm.
9 It was for a retreat center. They had a barn that could -
10 - -

11 CHIEF JUDGE WILSON: Well, is - - -

12 MR. VINCELETTE: - - - on the - - -

13 CHIEF JUDGE WILSON: - - - is that right? I
14 thought the primary use measured in terms of volume
15 activity was the town supervisor harvesting hay?

16 MR. VINCELETTE: I - - - I'm sorry, Your Honor.
17 I missed the first part of your - - -

18 CHIEF JUDGE WILSON: Sure. Isn't the primary
19 actual use - - -

20 MR. VINCELETTE: Uh-huh.

21 CHIEF JUDGE WILSON: - - - the harvesting of hay
22 by the town supervisor who lives next door.

23 MR. VINCELETTE: No. That really - - - it's just
24 happenstance that the - - -

25 CHIEF JUDGE WILSON: Isn't that - - -



1 MR. VINCELETTE: - - - town supervisor lives next
2 door and - - -

3 CHIEF JUDGE WILSON: Yeah, but isn't that most of
4 what's going on in the property?

5 MR. VINCELETTE: I would submit that if there
6 is - - - he was haying it because he's a dairy farmer and
7 he - - - he's a crop farmer - - -

8 CHIEF JUDGE WILSON: Yeah. Yeah.

9 MR. VINCELETTE: - - - across the road. That was
10 for his own use or whatever. And that was by agreement of
11 the - - - the previous owner and his family and now - - -

12 CHIEF JUDGE WILSON: But if we're looking at the
13 actual use of what is going on there, there's some small
14 amount of vegetables you think being farmed there, and a
15 large amount of hay being taken, and a couple of people
16 coming on a couple of occasions to - - - for a retreat.

17 MR. VINCELETTE: Right.

18 CHIEF JUDGE WILSON: That's - - - and so the
19 primary use seems to me to be taking all this hay off the
20 property, no?

21 MR. VINCELETTE: Well, if that's the primary - -
22 -

23 JUDGE RIVERA: Well, that's not their use.

24 MR. VINCELETTE: I'm sorry, Your Honor?

25 JUDGE RIVERA: It's supposed to be their use.



1 That's not their use.

2 MR. VINCELETTE: Right. Exactly.

3 JUDGE RIVERA: They may sell products - - -

4 MR. VINCELETTE: That's not a charitable - - -

5 JUDGE RIVERA: - - - but that's not their use.

6 MR. VINCELETTE: That does not come under the
7 purview of the statute.

8 JUDGE RIVERA: It doesn't further the church's
9 goals.

10 MR. VINCELETTE: It does not. The haying of the
11 property - - -

12 JUDGE RIVERA: The - - -

13 MR. VINCELETTE: - - - by the neighbor - - -

14 JUDGE RIVERA: No, no, go ahead. Go ahead.

15 MR. VINCELETTE: Okay. The haying of the - - -

16 JUDGE GARCIA: Would that apply to like - - -
17 would that apply to mining, so if you leased your land out
18 and someone came on and mined it? And then you would say,
19 well, that's not the primary use because I'm not doing it.
20 I just leased my property to the guy next door, and he's
21 mining it.

22 MR. VINCELETTE: Yeah. Your Honor, I am unaware
23 of any case where mining would be considered an exempt
24 activity under the Real Property Tax Law. I mean, I think
25 that the Real Property Tax Law envisions there's just five

1 groups that are entitled to this.

2 JUDGE CANNATARO: But hold on. I'm getting a
3 little confused.

4 MR. VINCELETTE: Okay.

5 JUDGE CANNATARO: We're not talking about their
6 qualification for the exemption. We're talking about
7 whether or not they're violating the code.

8 MR. VINCELETTE: Correct.

9 JUDGE CANNATARO: And the question you heard from
10 the Chief was there's some evidence in the record that the
11 primary use of the property was sort - - - I don't know if,
12 you know, taking hay is farming. But to me, it sounds like
13 farming - - -

14 MR. VINCELETTE: Okay.

15 JUDGE CANNATARO: That would provide a basis for
16 a finding that they didn't - - - that they weren't in
17 violation of the zoning code. Nothing whatsoever to do
18 with whether or not they qualified for a religious
19 exemption.

20 MR. VINCELETTE: For the farming use, you would
21 be correct, Your Honor. But farming in and of itself is
22 not an exempt use. It must be in furtherance of the
23 purpose of the exempt organization.

24 JUDGE CANNATARO: Right.

25 MR. VINCELETTE: This is a church.

1 JUDGE CANNATARO: But I'm talking about your
2 affirmative defense - - -

3 MR. VINCELETTE: Right.

4 JUDGE CANNATARO: - - - that they're not entitled
5 to the exemption because they're in violation of the zoning
6 code. And it seems to me like there's a quantum of
7 evidence in this record that they weren't in violation of
8 the zoning code, at least enough for a judge to reach that
9 conclusion.

10 MR. VINCELETTE: The haying that's been mentioned
11 was not done by petitioner. It was done by a third - - -

12 JUDGE CANNATARO: Does that matter?

13 MR. VINCELETTE: It does. Oh, it absolutely
14 does.

15 JUDGE CANNATARO: Why? Does that make it not a
16 use of the property?

17 MR. VINCELETTE: Not by the petitioner. The
18 petitioner - - - there's two - - - two parts to the
19 statute. One is it must be owned by a not-for-profit or
20 religious corporation.

21 JUDGE HALLIGAN: But that's the exemption - - -

22 JUDGE CANNATARO: That's the exemption.

23 JUDGE HALLIGAN: - - - as opposed to the - - -

24 MR. VINCELETTE: Right.

25 JUDGE HALLIGAN: - - - zoning code - - -

1 MR. VINCELETTE: Right.

2 JUDGE HALLIGAN: - - - violation you're
3 asserting.

4 MR. VINCELETTE: Right.

5 JUDGE HALLIGAN: Those seem distinct. And so if
6 there's evidence that the property is being used in a
7 conforming manner, if we treat haying as farming, then
8 where is there a zoning code violation?

9 MR. VINCELETTE: The zoning code violation is the
10 use of the property as a spiritual retreat center and as a
11 prayer house. That's - - - that's the violation.

12 JUDGE RIVERA: Which is what he testified to?

13 MR. VINCELETTE: Which is - - -

14 JUDGE RIVERA: The retreat on more than one
15 occasion.

16 MR. VINCELETTE: - - - which is - - - which is
17 what everyone - - - yes.

18 JUDGE RIVERA: You have a red light. If I
19 could - - -

20 MR. VINCELETTE: Oh.

21 JUDGE RIVERA: - - - just quickly ask this - - -

22 MR. VINCELETTE: Yes.

23 JUDGE RIVERA: - - - question on the 2022
24 petition.

25 MR. VINCELETTE: Yes.



1 JUDGE RIVERA: Did the town deny that on
2 procedural grounds, the failure to request the exemption
3 or - - -

4 MR. VINCELETTE: No.

5 JUDGE RIVERA: - - - on the substance?

6 MR. VINCELETTE: Yeah. No application was ever
7 filed. So there was nothing to deny.

8 JUDGE RIVERA: But was that the ground - - - oh,
9 I see.

10 MR. VINCELETTE: There was nothing to deny. So
11 agreed to - - -

12 JUDGE RIVERA: But when you actually denied it?

13 MR. VINCELETTE: No. There was no grievance - -
14 - I - - - I'm sorry. There was no application to be denied
15 in 2022.

16 JUDGE RIVERA: I see.

17 MR. VINCELETTE: So petitioner filed a grievance
18 to the Board of Assessment Review. I believe they included
19 the application from the previous year. And it was denied
20 by the Board of Review, which you know, was then brought up
21 for judicial review when the petition was filed.

22 JUDGE RIVERA: Okay. Thank you.

23 MR. VINCELETTE: Yeah.

24 MR. ALTMAN: May it please the court? I haven't
25 been well. I'm Michael Altman. And I represent the

1 respondent in this case, the church in Flushing. When this
2 initially - - -

3 JUDGE RIVERA: I just want to be clear. Mr. Kim
4 did testify that there were retreats held on the property?

5 MR. ALTMAN: No.

6 JUDGE RIVERA: He never testified that there were
7 retreats held on the property?

8 MR. ALTMAN: No, no. There was no evidence of
9 retreats - - -

10 JUDGE RIVERA: That's not his testimony.

11 MR. ALTMAN: Whose testimony?

12 JUDGE RIVERA: Mr. Kim.

13 MR. ALTMAN: No. He didn't - - - no retreats - -
14 -

15 JUDGE RIVERA: Okay.

16 MR. ALTMAN: - - - were held on the property.

17 JUDGE RIVERA: Okay.

18 MR. ALTMAN: There were - - - there was a
19 service. They bought the property in 2018. They all - - -
20 a bunch of them came up and held some service there in
21 celebration of - - - of the purchase of the property. And
22 then on two occasions, groups of children came up to
23 observe the farming. And they stayed overnight in what was
24 titled - - - I think there was a sign there, "Retreat
25 House". But it was not used as a retreat. And there were

1 never regular church services held there.

2 I think this thing went south when the - - - the
3 exemption was denied on three separate occasions - - -
4 actually, on two. The first occasion was a year before.
5 The assessor never gave the reason. When I filed the - - -
6 the grievance in 2021, I think it was, I had no idea why
7 the town hadn't given us the exemption the year before.

8 I just put down - - - and you'll see if you look
9 at it. I signed that grievance petition. I didn't know
10 about the - - - that it was a zoning issue. I couldn't get
11 the assessor to tell me why she denied - - - it looked like
12 they were stonewalling us. So I put down, you know, it was
13 a church.

14 Then come to find out, when they put in an answer
15 to this - - - to this certiorari proceeding, they were
16 proceeding on some violation of zoning law. And it turns
17 out we weren't violating the zoning law at all. There was
18 never any proof in the trial of any violation of the zoning
19 law, the place wasn't used as a church, was never - - -
20 there were never regular services there. There was only
21 that one service to - - - or that one celebration.

22 And it was never really used as a retreat. There
23 were three separate occasions. The only evidence of use
24 of - - - as a retreat was our own testimony, which was - - -
25 - excuse me - - - which - - - our own testimony, which

1 was - - - the judge found completely truthful. The
2 assessor, whether she was playing us or she was just a
3 novice, never told us and wouldn't tell me why she was
4 denying this.

5 And the - - - and the supervisor, who lived
6 across the street, wasn't paying for the hay. They were
7 just allowing him to continue what he had been doing
8 before. And his motive seemed to be he wanted them to get
9 an agricultural exemption, which I assume - - - which would
10 benefit him in some way.

11 But we had a whole trial here. There was not one
12 bit of evidence. Even the code enforcement officer didn't
13 testify. And it was - - - it was brought out that the
14 assessor went to the property. I mean, this is a mandatory
15 exemption. They didn't question the fact that this was a
16 religious organization, a religious corporation, and that
17 they were growing crops. And there was - - - the only
18 evidence about how - - - about the crops was - - - was us.

19 JUDGE TROUTMAN: When you say - - -

20 MR. ALTMAN: We - - -

21 JUDGE TROUTMAN: - - - "mandatory exemption",
22 they don't have to establish that they're using the
23 property in conformance with zoning laws?

24 MR. ALTMAN: No.

25 JUDGE TROUTMAN: Okay.



1 MR. ALTMAN: No. It's a - - -

2 JUDGE RIVERA: But why not?

3 MR. ALTMAN: It's a religious corporation.

4 JUDGE RIVERA: Wait. Hold on. Why not? If
5 you're seeking an exemption, you have to prove that you're
6 entitled to it. And here - - -

7 MR. ALTMAN: Yes, you do, but - - -

8 JUDGE RIVERA: - - - and here - - - and here,
9 based on the case law, in addition to establishing they're
10 a church, which is the purpose, wouldn't they have to also
11 establish that we're in conformance with those all the - -
12 - all the zoning laws?

13 MR. ALTMAN: No. That is not - - - that is not
14 something you have to establish - - -

15 CHIEF JUDGE WILSON: Is it - - -

16 MR. ALTMAN: - - - as part of - - -

17 CHIEF JUDGE WILSON: Are you saying that because
18 you're saying it's the town's burden to show that they're
19 out of compliance?

20 MR. ALTMAN: It's the - - - it's the town burden
21 to show that - - -

22 CHIEF JUDGE WILSON: Suppose the town showed that
23 they were out of compliance, would that then defeat their
24 tax exemption?

25 MR. ALTMAN: Purportedly, it seems to be the law

1 now.

2 JUDGE RIVERA: But you would first - - - you
3 would first have to allege that you are in compliance with
4 the zoning code, because if you're out of compliance,
5 you're not entitled to the exemption.

6 MR. ALTMAN: No. That's not true. We showed
7 that - - - we had to show that under 420-a of the Real
8 Property Tax Law that we were a religious corporation, and
9 we were performing on that property are - - - are - - -
10 what - - - what this corporation - - -

11 JUDGE TROUTMAN: So if you are a religious
12 corporation, you can use the property in any way you
13 choose - - -

14 MR. ALTMAN: No.

15 JUDGE TROUTMAN: - - - even though it's not
16 compliant with zoning laws?

17 MR. ALTMAN: No. That - - - no. That's not true
18 at all. We were using it in conformance with what our
19 mission was, which was to - - -

20 JUDGE TROUTMAN: Okay. Your mission, I get that.
21 You're saying your mission. But you are insisting that the
22 zoning laws don't apply?

23 MR. ALTMAN: No. I'm not saying that. But we
24 don't have to initially show that we're in conformance with
25 the zoning laws.

1 JUDGE CANNATARO: To get a religious exemption.

2 MR. ALTMAN: We had a religious exemption - - -

3 JUDGE RIVERA: But you're not entitled to the
4 exemption if you're out of compliance with the zoning laws.
5 You have to at least allege it.

6 MR. ALTMAN: Yeah. No, no, we don't have to
7 allege that initially. And nobody has - - - has
8 indicated - - - there's no - - - there's no case that says
9 that has to be - - -

10 JUDGE CANNATARO: So who - - -

11 MR. ALTMAN: - - - alleged, has to be shown
12 initially. All we have to do is show that we're - - - we -
13 - - we own the - - - the religious corporation owns the
14 property and is using it in performance of its mission.
15 And that mission, as it turns out, was growing vegetables
16 behind this building - - -

17 JUDGE RIVERA: I thought its mission was to be -
18 - -

19 MR. ALTMAN: - - - which was already there - - -

20 JUDGE RIVERA: I thought its mission was to be a
21 retreat center. That - - - you could also grow the
22 vegetables. Yes, I acknowledge that.

23 MR. ALTMAN: Yeah.

24 JUDGE RIVERA: But - - -

25 MR. ALTMAN: Well, they had some idea - - -



1 JUDGE RIVERA: - - - Mr. Kim - - - Mr. Kim - - -

2 MR. ALTMAN: - - - that they were going - - -

3 JUDGE RIVERA: Excuse me. Excuse - - -

4 MR. ALTMAN: - - - to be a retreat center. But -

5 - -

6 JUDGE RIVERA: Sir?

7 MR. ALTMAN: - - - that was - - -

8 JUDGE RIVERA: Sir?

9 MR. ALTMAN: - - - it was - - -

10 JUDGE RIVERA: Sir?

11 MR. ALTMAN: All right. I'm sorry.

12 JUDGE RIVERA: Mr. Kim's statements were always
13 that that was intended to be a retreat center, whether or
14 not he held retreats. You've said he's never admitted to
15 holding retreats, but that was the intent - - -

16 MR. ALTMAN: Well.

17 JUDGE RIVERA: - - - for the purchase of the
18 property.

19 MR. ALTMAN: The - - - that may have been part of
20 the intent of the purchase of the property. But as the
21 witness for the church indicated, what - - - what it turned
22 out to be was a farming operation, not on a large scale,
23 but they would do it on a regular basis and bring the
24 vegetables down to Queens - - - and - - - and we had
25 photographic evidence of this - - - and distribute among

1 the poor people in the area of the church in Queens. And
2 occasionally - - -

3 JUDGE RIVERA: Let me ask you this. If - - - if
4 there was a finding that there had been retreats held
5 there, but there was also, as you say, the growing of
6 vegetables, brought it down to Queens, all of that, would
7 that then mean that you were - - - your client was in
8 compliance with the zoning code, even if - - -

9 MR. ALTMAN: I think - - -

10 JUDGE RIVERA: - - - even if partial conduct was
11 in violation of the code?

12 MR. ALTMAN: It wasn't in violation of the code.

13 JUDGE RIVERA: No, no. I didn't ask that.

14 MR. ALTMAN: The - - - the town's allegation was
15 that we were - - - had - - - were conducting services and
16 the retreat center was an extension of - - - of the church
17 on the property. There was no church. There was - - - it
18 said retreat center. It was never used as a retreat
19 center. And we had it for three, four years. Now they're
20 gone. They were - - - you know, the town didn't treat them
21 right, and we didn't file this past year. But in any
22 event, we had a whole trial on this. It's - - -

23 JUDGE RIVERA: Are you saying they no longer own
24 the property?

25 MR. ALTMAN: They no longer own the property.

1 JUDGE RIVERA: Okay.

2 MR. ALTMAN: They sold the property - - -

3 JUDGE RIVERA: Okay.

4 MR. ALTMAN: - - - to a nonexempt group. So it's
5 back on the tax roll as far as the town is concerned.

6 But we had a whole trial on this. And there was
7 not one bit of evidence presented that we were in violation
8 of any zoning law. And that's the long and short of it.
9 So I have nothing more to say.

10 CHIEF JUDGE WILSON: Thank you.

11 MR. VINCELETTE: Just briefly, if I may direct
12 the court to - - - to R384 - - -

13 JUDGE RIVERA: To what?

14 MR. VINCELETTE: Oh, I'm sorry. R384, Mr. Kim's
15 redirect. Mr. Altman asked him about the groups that were
16 up there. Excuse me. And he stated that a men's group
17 comes up as a group. Women's group comes up as a group.
18 Elderly comes up. There was testimony that there was an
19 elderly or senior Bible group that - - - that came up
20 there. There was a youth group that came up there. There
21 was testimony in the trial from Mr. Kim that there were
22 retreats held up there.

23 I would also direct the court to R389. When I
24 asked Mr. Kim - - - I'm sorry, R379, where I asked Mr. Kim,
25 question, "And Mr. Kim the church did not purchase this

1 property solely for farming services; is that correct?"

2 Answer, "No." Question, "In fact, it was purchased for the
3 purposes of Bible study, prayer meeting, annual retreat,
4 and group meetings for the church; is that correct?"

5 "Yes."

6 JUDGE GARCIA: Counsel, can you point anywhere in
7 the record where there is an argument made by the town that
8 use of this property as a retreat is not an approved use
9 under the code?

10 MR. VINCELETTE: Yes. In the summary judgment
11 motion - - - in the summary judgment motion, there's the
12 affidavit of the code enforcement officer, Kevin Zieres.
13 He has the code attached to his affidavit. And he cites,
14 Subsection 10, which states it's - - -

15 JUDGE GARCIA: And he says in his affidavit, use
16 of this property as a retreat is a violation of this code
17 provision?

18 MR. VINCELETTE: He states that it's not
19 permitted under the RU schedule.

20 JUDGE GARCIA: Use as a retreat?

21 MR. VINCELETTE: I believe - - -

22 JUDGE GARCIA: Or as an - - - as an accessory to
23 a church use?

24 MR. VINCELETTE: I believe he states both.
25 First, he goes to church accessory, and then he goes to

1 Subsection 10, which says any nonenumerated use is excluded
2 and it is only allowed with a permit.

3 JUDGE GARCIA: Thank you.

4 MR. VINCELETTE: Thank you.

5 CHIEF JUDGE WILSON: Thank you.

6 MR. VINCELETTE: Thank you, Your Honor.

7 (Court is adjourned)

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C E R T I F I C A T I O N

I, Joey Oliveros, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of First United v. Town of Callicoon, No. 69 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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