BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CORPORATION OF THE PRESIDING BISHOP
OF THE CHURCH OF JESUS CHRIST
OF LATTER-DAY SAINTS,
Petitioner,

vs.

CITY OF WEST LINN,
Respondent,

and

ROBERT FULTON, SUSAN FULTON,
GREGG CRAWFORD, HOLLY CRAWFORD,
WALTER SWANSON, KATHI SWANSON,
DALE KRUG, COLLEEN KRUG
and STEVEN WILKES,
Intervenors-Respondent.

LUBA No. 2002-155

FINAL OPINION
AND ORDER

Appeal from City of West Linn.

James H. Bean, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Lindsay, Hart, Neil & Weigler, LLP.

Timothy V. Ramis, Portland, filed a response brief and argued on behalf of respondent. With him on the brief was Ramis, Crew, Corrigan & Bachrach, LLP.

Steven W. Abel and Samuel J. Panarella, Portland, filed a response brief on behalf of intervenors-respondent.

BASSHAM, Board Chair; BRIGGS, Board Member; HOLSTUN, Board Member, participated in the decision.

REMANDED 07/17/2003

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a city decision denying its conditional use permit and design review applications for a church.

MOTION TO INTERVENE

Robert Fulton, Susan Fulton, Gregg Crawford, Holly Crawford, Walter Swanson, Kathi Swanson, Dale Krug, Colleen Krug, and Steven Wilkes (intervenors) move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The subject property is a 5.64-acre tract consisting of two lots zoned Single Family Residential, 10,000-square foot minimum lot size (R-10). An existing dwelling is located in the northwest corner of the property. The subject property is bordered on the north by a large vacant field used for agricultural purposes. The property is bordered on the south by Rosemont Road, a designated arterial. East of the property is Shannon Lane, a local street with a treed median. On the west, Miles Drive, a local street, currently ends at the west property line, a short distance north of Rosemont Road. The surrounding area is generally developed with single-family dwellings.

The R-10 zone allows "religious institutions," subject to conditional use approval. Petitioner contemplates subdividing the subject property to create a 3.85-acre parcel, where the church would be constructed. The proposed parcel will consist of the eastern two-thirds of the parent tract, and will border Rosemont Road on the south and Shannon Lane on the east. The existing dwelling and an extension of Miles Drive south through the property to Rosemont Road will occupy the western third of the parent tract. A narrow access strip along the northern border of the parent tract would connect the existing dwelling with Shannon Lane.

The proposed church, a single-story structure 28 feet in height, would be located in the approximate middle of the proposed 3.85-acre parcel. The church will occupy 16,558 square feet, and will be bordered on three sides by parking lots providing 179 parking spaces. The number of parking spaces was determined pursuant to a formula applied by the city's planning staff, who calculated that a church structure of that size required at least 176 spaces. The proposed church and parking lots will occupy approximately 2.02 acres, with the remainder of the 3.85-acre parcel consisting of open, landscaped areas, buffer areas, and a drainage swale. The site plan proposes a 30-foot buffer area between the parking lot and Shannon Lane.

The proposed building includes a chapel for worship and a large multi-purpose hall for social gatherings, along with several small classrooms and administrative offices. The proposed facility will serve two "wards" or congregations, the current membership of which totals approximately 949 members. At present, petitioner provides no church or meeting house within the city for either ward, and ward members attend services in nearby cities. Petitioner contemplates that one ward will attend church services early Sunday morning, while the other ward will begin its services approximately two hours later. For a one-hour period both wards will occupy different portions of the building, with an estimated total combined attendance of approximately 540 persons. Eventually, petitioner plans to create three smaller wards from the two existing ones, which will reduce the total number of persons using the facility at the same time. In addition to Sunday services, the proposed church will be used by smaller groups for short periods during the week.

The R-10 zone provides a number of dimensional requirements for uses permitted outright in the zone, such as single-family dwellings. For conditional uses, Community Development Code (CDC) 11.080 provides that "the appropriate lot size for a conditional use shall be determined by the approval authority at the time of consideration of the application based upon the criteria set forth in [CDC] 60.070[A](1) and (2)." CDC 60.070.A.1 requires

in relevant part that the site size and dimensions provide "[a]dequate area for aesthetic design treatment to mitigate any possible adverse effect from the use on surrounding properties and uses." CDC 60.070.A.2 requires a finding that the "characteristics of the site are suitable for the proposed use considering size, shape, location, topography, and natural features."

After evaluating at least 12 other sites in the city, petitioner concluded that only the subject site met the needs of its members, and accordingly filed a conditional use application with the city, accompanied by a proposed site plan. Planning staff recommended approval to the planning commission, based on a number of conditions to which petitioner agreed, including revision of the landscaping plan to more effectively screen the parking lot from Shannon Lane with a combination of mature trees and understory vegetation. The planning commission conducted three public hearings, at which a number of neighboring landowners testified in opposition. On September 5, 2002, the planning commission voted to deny the application, finding that (1) no buffer could adequately screen the parking lot from surrounding residences; (2) a church of the proposed size is not appropriate in a residential zone; (3) roads are not adequate to serve the proposed church; and (4) the proposed church is not compatible with adjoining residential uses. Petitioner appealed the planning commission decision to the city council.

The city council conducted three public hearings and, on October 28, 2002, denied the appeal. The city council concluded that the proposed use did not comply with CDC 60.070.A.1.b and 60.070.A.2, quoted above. In addition, the city council found that the proposed church did not comply with design review criteria at CDC 55.100.B.6.b and 55.100.C, which require compatibility with existing development in the area and buffering between different types of land uses, and with CDC 55.100.D.3, which imposes noise standards.

The city council's decision also addressed and rejected petitioner's arguments under the federal Religious Land Use and Institutionalized Persons Act (RLUIPA). The city found

that denial under CDC conditional use and design review requirements does not impose a "substantial burden" on religious exercise, because any applicant that proposed the same size building and parking lot on the subject property would have been denied for the same reasons. The city also found that it has a compelling government interest in maintaining the quality of residential neighborhoods.

This appeal followed.

FIRST THROUGH FOURTH ASSIGNMENTS OF ERROR

In these assignments of error, petitioner argues that the city's findings of noncompliance with CDC 60.070.A.1.b, 60.070.A.2, 55.100.B.6.b, and 55.100.C are not supported by substantial evidence. In each of the challenged findings, the city concluded, essentially, that the proposed 3.85-acre parcel is not large enough to provide the area, buffering or setbacks necessary to ensure compliance with these criteria.

Because the precise reasons for the city's denial under the foregoing criteria are important in resolving petitioner's federal statutory claims under the sixth assignment of error, we set out the relevant criteria and the city's findings in some detail, below.

A. CDC 60.070.A.1.b (Size and Dimensions of Site)

For conditional use approval, CDC 60.070.A.1.b requires that the "size and dimensions" of the site provide "[a]dequate area for aesthetic design treatment to mitigate any possible adverse effect from the use on surrounding properties or uses." The city found that the proposed parcel was too small to provide adequate buffers along the north and east borders, although the findings indicate that if petitioner could obtain additional acreage from the owner of the parent 5.64-tract the proposed design might be reconfigured to provide adequate buffers.[1]

[1] The city's findings under CDC 60.070.A.1.b state, in relevant part:

> "4. While the proposed church use could not occupy the entire 5.64 acres of the two existing lots because of the need to extend Miles Drive and because of an existing

home that the owner of the property wishes to maintain, the proposed church use could occupy substantially more of the existing two lots than the proposed 167,615 square feet while still accommodating the Miles Drive extension and the existing home to be preserved.

"* * * * *

"10. Because of the size of the building and the parking lot, the proposed use would have substantial impacts on adjacent properties, which are residential properties, most of which are single-family homes.

"11. There was a substantial amount of evidence presented concerning anticipated impacts from the proposed use. The applicant and supporters testified that the impacts would be relatively small or minimal. Others, including residents in the area of the proposed development, testified that the impact would be substantial. The City Council finds the testimony of those who live in the area to be more credible and relies on that testimony. The impacts on adjacent properties from the proposed use include:

"a. Noise from vehicles;
"b. Lights from vehicles;
"c. The aesthetic impact of a very large building and parking lot in an area of much smaller buildings without parking lots.

"12. These impacts on adjacent properties might be appropriately mitigated if the property where the proposed use is to be sited were large enough to provide adequate buffers around the perimeter of the active use areas (building and parking lot areas).

"13. The 'parcel' as proposed is not large enough to provide adequate buffers to mitigate possible adverse effects on surrounding properties. The adequacy of buffers is determined by both width and by other factors that affect the effectiveness of the buffer. Other factors include thickness of vegetation or difference in elevation.

"14. The site is fairly flat. It is so flat that a substantial amount of the property can be used as a parking lot. Although there are some trees on the site, it is fairly open, and some of the trees will be removed during construction. The proposed landscaping will not provide a thick screen of vegetation around the perimeter of the site. The limited amount of landscaping and the flatness of the site do not enhance the effectiveness of any buffer areas. The proposed structure will be at basically the same elevation as the structures on neighboring and nearby properties and will be very visible from and across Shannon Lane and Rosemont Road, as well as from the property to the north. There are no natural features to provide a difference in elevation that would provide a buffering effect.

"15. The size and dimensions of the parcel as proposed are not adequate to provide sufficient buffering between the building and parking lot and nearby residential areas to the east and north to mitigate the adverse impact of the proposed use.

"16. * * * The property that is immediately north of the proposed development site is vacant and is 10 acres in size. [Petitioner's representative] stated that other adequate properties were not available in the City. This testimony does not mention the possibility of using more of the entire 5.6 acres available on the two lots.

B. CDC 60.070.A.2 (Suitable Physical Characteristics of Site)

For conditional use approval, CDC 60.070.A.2 requires a finding that "[t]he characteristics of the site are suitable for the proposed use considering the size, shape, location, topography, and natural features." The city again found that the proposed 3.85-acre parcel is too small, and that if the parcel were larger it might satisfy this criterion.[2]

C. CDC 55.100.B.6.b (Compatible Size and Mass)

CDC 55.100.B.6.b is a site design review criterion requiring that:

> "The proposed structure(s) scale shall be compatible with the existing structure(s) on site and on adjoining sites. Contextual design is required. Contextual design means respecting and incorporating prominent architectural styles, building lines, roof forms, rhythm of windows, *building scale and*

> [Petitioner's representative] also did not address the extent to which some type of easement or agreement with the property owner to the north could allow more flexibility in developing the property and increasing buffers. Because [the testimony of petitioner's representative] does not address these issues, it does not establish that other options for increased size or buffers are not possible.
>
> "17. If additional area had been used for the proposed use, the site might have been reconfigured to provide additional buffering along the property boundaries.
>
> "*Conclusion*: The size and dimensions of the site do not provide adequate area for aesthetic design treatment to mitigate possible adverse effect[s] from the use on surrounding property and uses." Record 10-12.

[2] The city's findings under CDC 60.070.A.2 state, in relevant part:

> "18. The characteristics of this site are not suitable for the location of a 16,500 square foot heavily used church because, unlike other churches located in West Linn, which are located in or near commercial areas, near a large high school, or along a state highway, this church would be located in a purely residential neighborhood along a street (Rosemont Road) which, although designated as an arterial in the city's Transportation System Plan, is currently developed as a narrow two-lane road. The location of a church of this size in a purely residential neighborhood requires a larger site.
>
> "19. The testimony of opponents at the Planning Commission and at the Council * * * as to size, neighborhood characteristics, and location is credible.
>
> "*Conclusion*: The characteristics of the site are not suitable for the proposed use considering size, shape, location, topography and natural features. In particular, the size of the 'parcel' is not adequate given the location and neighborhood characteristics for the proposed development. If the parcel were larger, the characteristics of the site might be suitable for the structure and parking lot proposed." Record 12.

massing, materials and colors of surrounding buildings in the proposed structure." (Emphasis added.)

The city concluded that the scale and mass of the proposed church was not compatible with the single-family dwellings on adjoining sites. The decision notes that design compatibility is not required if the proposed building is "adequately separated from other buildings by distance, screening, [or] grade variations" under CDC 55.100.B.6.d. The decision also notes that if the proposed parcel used a greater amount of the total area of the parent tract, the parcel might provide sufficient separation under CDC 55.100.B.6.b or provide a large enough site to satisfy CDC 55.100.B.6.d. However, the city concluded that, as proposed, the building and site satisfied neither criterion.[3]

[3] The city's findings under CDC 55.100.B.6.b and 55.100.B.6.d state, in relevant part:

> "22. The building on the existing property that is planned to remain is a large single family home. The other structures on adjoining properties [that] are located across Rosemont Road and across Shannon Lane, are substantially smaller [than] the proposed church structure. The difference in scale and mass between the proposed structure and the existing structures across Rosemont Road and Shannon Lane is sufficient to make the proposed design of the church structure incompatible in terms of scale and mass with structures on adjoining properties.
>
> "23. * * * When a religious institution is proposed for a residential neighborhood, scale and mass must be addressed. Under these circumstances, CDC 55.100.B.6.d must be considered when analyzing CDC 55.100.B.6.b. CDC 55.100.B.6.d provides that compatibility is not required if the proposed building 'is adequately separated from other buildings by distance, screening, grade variations, or is part of a development site that is large enough to set its own style of architecture.'
>
> "24. The separation of the proposed building from buildings on adjoining properties is not sufficient to justify the contrasting scale and massing of the proposed building, given the topography and landscaping. The Council finds the testimony of opponents, including the Neighbors of Shannon Lane, on the issue of compatibility to be credible and relies on that testimony. The applicant has not proposed methods that could be used to make the structure compatible, such as a greater distance from surrounding single family uses, adequate buffers and screening, a different orientation of the building, or some combination of these methods.
>
> "25. The development site (the proposed 'Parcel A') is not large enough to have its own architecture to justify the contrasting scale and massing of the proposed building, given the topography and landscaping.

D. CDC 55.100.C (Adequate Buffering and Screening)

CDC 55.100.C is a design review standard requiring that "buffering shall be provided between different types of land uses," and that the adequacy of proposed buffers shall be determined by considering the following factors:

> "a. The purpose of the buffer, for example to decrease noise levels, absorb air pollution, filter dust, or to provide a visual barrier.
>
> "b. The size of the buffer required to achieve the purpose in terms of width and height.
>
> "c. The direction(s) from which buffering is needed.
>
> "d. The required density of the buffering.
>
> "e. Whether the viewer is stationary or mobile."

Applying these factors, the city concluded that the proposed buffers along the north and east boundaries of the proposed 3.85-acre parcel were inadequate.[4]

> "26. If the proposed development site used a greater amount of the total area of the two lots, it might be possible to provide adequate separation or to create a development site that is large enough to set its own style of architecture.
>
> "27. Additionally, [petitioner's representatives] testified that the building size and layout are in accord with a set design and, therefore, not amendable to alterations such as a smaller structure.
>
> "*Conclusion*: The proposed design of the building is not compatible with structures on adjacent [parcels] as to size and mass and therefore cannot be approved under CDC 55.100.B.6.b. Furthermore, the separation between buildings and size of the development site are insufficient to allow a contrasting design to be approved under CDC 55.100.B.6.d." Record 13-14.

[4] The city's findings addressing CDC 55.100.C state, in relevant part:

> "28. The proposed building and parking lot require a buffer to decrease noise levels, to provide a visual barrier, and to screen lights, including lights from cars using the parking lot and driveways.
>
> "29. The width of the buffer will depend on various factors, such as density of vegetation or presence of any other barrier to light, vision or sound.
>
> "30. The primary need for buffering is along Shannon Lane and the north property line.
>
> "31. The required density will depend on the total distance.

E. The Parties' Arguments

Petitioner advances similar challenges to all of the foregoing findings, arguing with respect to each criterion that the record does not include substantial evidence to support the city's findings of noncompliance. As noted, those findings of noncompliance are based primarily on the city's view that the proposed 3.85-acre parcel is too small to allow mitigation of the adverse impacts it attributes to the proposed church and parking lot. Petitioner cites to evidence that the proposal satisfies these criteria, and argues that the evidence the city relied upon is not evidence a reasonable person would rely upon.

Petitioner argues further that even if the cited concerns regarding noise, lights, aesthetic conflicts, the compatibility of the structure with adjoining uses, and the adequacy of the proposed buffers are valid, the city cannot simply reject the entire proposal outright when the city can impose (and the applicant is willing to accept) reasonable conditions that would provide for additional landscaping and buffering to address the cited concerns. Petitioner notes that planning staff recommended, and petitioner was willing to accept, a condition imposing additional landscaping along Shannon Lane. In addition, petitioner informed the city during the proceedings below that if additional land is necessary that it has arranged to acquire additional land from the 5.6-acre parent tract. Record 600. Petitioner states further that it is willing to accept any other reasonable condition of approval imposed by the city.

"32. Along Shannon Lane the 'viewers' will be both mobile (in cars) and stationary (in homes across the street).

"33. The buffer along Shannon Lane is only 30 feet wide and contains limited vegetation.

"34. The buffer along the north property line is only 26 feet wide and contains limited vegetation.

"*Conclusion*: The buffers along the east and north property lines are not sufficient to provide an adequate buffer between the proposed use and the residential uses in place or allowed on properties to the east and north." Record 14-15.

The city responds generally that the city's findings of noncompliance with CDC 60.070.A.1.b, 60.070.A.2, 55.100.B.6.b, and 55.100.C are supported by substantial evidence. In particular, the city argues that its findings that the proposed 3.85-acre parcel is not large enough to mitigate adverse effects and provide adequate separation and buffering between the proposed building and parking lot and adjoining residential uses are supported by the record, particularly by the testimony of neighbors. The city explains that in determining whether a land use decision is supported by substantial evidence, LUBA may not substitute its judgment for that of the local government and may not independently reweigh the evidence. *Tigard Sand and Gravel, Inc. v. Clackamas Co.*, 33 Or LUBA 124, 138, *aff'd* 149 Or App 417, 943 P2d 1106, *adhered to on recons*, 151 Or App 16, 949 P2d 1225 (1997), *rev den* 327 Or 83 (1998). Further, in order to overturn a local government's denial on evidentiary grounds, the petitioner must demonstrate that only evidence supporting the application can be believed and that, as a matter of law, such evidence establishes compliance with each of the applicable criteria. *Id.*, citing *Jurgenson v. Union County Court*, 42 Or App 505, 600 P2d 1241 (1979).

As to whether the city could have imposed reasonable conditions of approval that would make the application consistent with CDC 60.070.A.1.b, 60.070.A.2, 55.100.B.6.b, and 55.100.C, the city argues that petitioner bears the burden of showing that the application meets applicable criteria. According to the city, petitioner offered no evidence that reasonable conditions of approval could ensure compliance with the above criteria. The city argues that any conditions of approval designed to ensure adequate buffers would require substantial modifications to the submitted site plan, and there is no evidence that such modifications are feasible, given the limited size of the subject property. In addition, the city points out, petitioner made it clear that the size and design of the church building could not be altered, which significantly limits the range of possible modifications. In any case, the city argues, it is not the city's obligation to develop conditions of approval on behalf of a

applicant, as an alternative to denying an application that, as submitted, does not comply with applicable criteria.

F. Analysis

We agree with the city that there is substantial evidence in the whole record that supports the city's findings of noncompliance with CDC 60.070.A.1.b, 60.070.A.2, 55.100.B.6.b, and 55.100.C. Given the subjectivity of those criteria, the evidence the city cites to and relied upon is more than sufficient to support a finding of noncompliance. Certainly, petitioner has not demonstrated that the record is such that only petitioner's evidence may be believed, or that that evidence demonstrates compliance with these criteria as a matter of law.

The city is correct that no state or local authority of which we are aware obligates the city to take the initiative to modify the proposal by imposing conditions of approval designed to render proposed development consistent with applicable criteria. Indeed, the general rule in Oregon has long been that the city is not required to approve a noncomplying development proposal, even if conditions of approval might be imposed that would render the proposal consistent with applicable criteria. *Rogue Valley Manor v. City of Medford*, 38 Or LUBA 266, 271 (2000); *Shelter Resources, Inc., v. City of Cannon Beach*, 27 Or LUBA 229, 241-42, *aff'd* 129 Or App 433, 879 P2d 1313 (1994); *Simonson v. Marion County*, 21 Or LUBA 313, 325 (1991).[5] Petitioner offers no basis under these assignments of error to overrule the above cases or otherwise require the city to develop or consider whether the proposed

[5] As we noted in *Rogue Valley Manor*, in 1999 the legislature adopted ORS 197.522, which provides that a local government shall approve application that is consistent with applicable local law "or shall impose reasonable conditions on the application" to make the proposed activity consistent with local law. ORS 197.522 appears in the part of ORS chapter 197 that is devoted to moratoria. ORS 197.505 to 197.540. The parties do not cite or discuss ORS 197.522, and we have no occasion here to determine whether that statute has the effect of legislatively overruling the above-cited cases and requiring local governments generally to approve development that is inconsistent with applicable criteria, if it can be made consistent through imposition of reasonable conditions of approval.

application could be approved with reasonable conditions of approval, as an alternative to denial.

The first through fourth assignments of error are denied.

FIFTH ASSIGNMENT OF ERROR

In the fifth assignment of error, petitioner argues that the city's findings of noncompliance with the design review noise standards at CDC 55.100.D.3 misconstrue the applicable law and are unsupported by substantial evidence.

CDC 55.100.D.3 provides:

> "Structures or on site activity areas which generate noise, lights, or glare shall be buffered from adjoining residential uses in accordance with the standards in [CDC] 55.100.C where applicable. Businesses or activities that can reasonably be expected to generate noise shall undertake and submit appropriate noise studies and mitigate as necessary. * * *
>
> "To protect the health, safety, and welfare of the citizens of West Linn, the following design standards are established in Tables 1 and 2. * * *"

Table 1 prescribes the maximum sound levels within 25 feet of a dwelling during daytime and evening hours. In relevant part, Table 1 provides that between the hours of 7 a.m. and 7 p.m. "statistical noise" may not exceed three measurements with associated decibel levels: L50 (55 decibels), L10 (60 decibels) and L01 (75 decibels).[6] Further, Table 1 provides that "impulse sounds," which we understand to mean transient, short duration sounds, may not exceed 100 decibels. Table 2 of CDC 55.100.D.3 prescribes maximum sound levels within 25 feet of a dwelling at certain frequencies during daytime and evening hours.

[6] We understand the L50, L10 and L01 standards to reflect the percentage of time that sounds exceed the permissible decibel level. For example, sounds that violate the L50 standard would exceed the prescribed decibel level at least 50 percent of the time measured (*e.g.*, 30 minutes in one hour), while sounds that violate the L10 and L01 standards would exceed the prescribed decibel level at least ten percent and one percent, respectively, of the time measured.

In addition, CDC 55.100.D.3 provides standards for "[a]mbient degradation associated with new noise sources," applicable to new commercial or industrial development. The "ambient degradation" standards require that new noise sources shall not cause noise levels that increase the ambient statistical noises by more than 5 decibels in any one hour.[7]

Petitioner's sound engineer submitted a study that was intended to demonstrate compliance with the Table 1 standards and the "ambient degradation" standard.[8] The study measured the ambient noise at three sites on the subject property over a 14-hour period. Record 670-80. The study measured ambient L50, L10 and minimum and maximum noise levels, but did not measure L1 or impulse sounds. The study then estimated the amount of noise generated by the proposed church and associated traffic. For the church itself, the study estimated noise from outdoor heating and air conditioning (HVAC) equipment, and concluded that such noise would not exceed the Table 1 standards. Record 678. For traffic, the study found that Sunday services would increase traffic on Rosemont Road from 214 cars per peak hour to 371 cars per peak hour. The study concluded that the additional traffic would increase noise within 100 feet of Rosemont Road 3 decibels above ambient levels. Record 679. Accordingly, the study concluded that the proposed church complied with both the "maximum allowable noise limits" and the ambient degradation standards:

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[7] CDC 55.100.D.3 provides, in relevant part:

> "Ambient degradation associated with new noise sources. Any new commercial or industrial development to be built on a vacant or previously unused industrial or commercial site shall not cause or permit the operation of a noise source if the noise levels generated, or indirectly caused by that noise source, would increase the ambient statistical noise levels, L50 or L10, by more than 5 [decibels] in any one hour. * * * Ambient noise levels shall be determined by a licensed acoustical engineer."

[8] The study explains that, based on input from city planning staff, the author of the study does not believe the ambient degradation standard applies to the proposed church, because the church is not a commercial or industrial use. Record 673. Nonetheless, the study examined both the Table 1 and ambient degradation standards, in an exercise of caution. In addition, the study explains that because the ambient noise levels were approximately 5 decibels below the "maximum hourly noise levels," application of either set of standards would reach the same result. Record 677.

> "The noise generated by the proposed LDS church at the corner of Rosemont Road and Shannon Lane will meet the City of West Linn maximum allowable noise limits and the ambient noise degradation section of the [CDC]. The findings are mainly a result of the fact that the noise radiating from the outdoor HVAC equipment at the facility is not loud enough to influence the ambient noise currently found at residences around the site and the traffic generated by the Church will not cause a significant change in traffic noise levels in the area." *Id.*

During the hearings before the city council, the sound engineer was questioned as to whether the study addressed the L01 and impulse sound standards. The engineer conceded that the study did not directly address those standards, but testified that in his opinion short-duration noise generated by the proposed church, for example the sound of opening and closing car doors in the parking lot, would be consistent with the L01 standard.

The city ultimately concluded that the acoustical study failed to demonstrate compliance with standards in Table 1, Table 2 and the ambient degradation standard in CDC 55.100.D.3.[9] Specifically, the city's findings critique the study because (1) it relied on

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[9] The city's findings under CDC 55.100.D.3 state:

> "35. There was conflicting evidence on compliance with the noise standards. Applicant offered a study by a qualified engineer. The opponents offered their evaluation of noise impacts based on personal observations of noise impacts from a similarly sized * * * church. The City Council finds the testimony of the opponents to be more credible because it was based on personal observations rather than theoretical models. The applicant's engineer could have studied an actual similar use but did not. The noise study provided by applicant is insufficient to demonstrate compliance with the applicable noise standards, including the standards of Table 1, the standards of Table 2 and the Ambient Degradation Associated with New Noise Sources standard.
>
> > "a. In particular, the noise study is inadequate because it relied on theoretical noise predictions rather than measuring noise at existing churches of similar size.
> >
> > "b. The noise study is also inadequate because it measured ambient noise at the time of a seasonal event, a Christmas Tree sale, which generates an unusual amount of noise. Ambient noise measurements are those that occur at normal times when a typical amount of noise is generated.
>
> 36. The applicant's expert indicated in testimony that [the] noise study did not address the L1 standard contained in Table 1. The noise study also did not address the impulse standard contained in Table 1.

theoretical projections of noise generated by the church rather than taking actual measurements at similar churches; (2) its ambient noise measurements were taken under atypical circumstances; and (3) it did not address the L01 and impulse sounds standards in Table 1.

Petitioner first argues that the city erred to the extent it found that the ambient degradation standard is applicable to the proposed church. In its response brief, the city concedes that the ambient degradation standard is not applicable, and that the city erred to the extent it found otherwise.

Petitioner next argues that the acoustical engineer's conclusion that the proposed church complies with the maximum allowable noise limits in Tables 1 and 2 is supported by substantial evidence, and that opposing testimony and the city's criticisms of the study are an insufficient basis to find noncompliance with CDC 55.100.D.3. According to petitioner, neither the city council nor the laypersons who testified in opposition are qualified to render an opinion regarding compliance with the noise standards, and the only expert testimony in the record regarding those standards is that of the acoustical engineer.

The city responds that it is undisputed fact that the engineer made no evaluation of whether the proposed church will satisfy the L01 and impulse sound standards. Given that undisputed failure, the city argues, the engineer's conclusory statement that the church will not generate noise in excess of the "maximum allowable noise levels" is insufficient to demonstrate compliance with the applicable Table 1 and 2 standards.

As explained above, petitioner carries an exceedingly heavy burden in attempting to overcome a denial of a land use application on evidentiary grounds. We disagree with petitioner that the engineer's study and testimony is the only evidence in the record that can be believed with respect to CDC 55.100.D.3 or that that evidence establishes compliance

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Conclusion: The applicant has not demonstrated compliance with CDC 55.100.D.3." Record 16-17.

with CDC 55.100.D.3 as a matter of law. Petitioner does not dispute that CDC 55.100.D.3 requires a showing that the proposed use will not violate the maximum noise levels set out in Tables 1 and 2, nor does petitioner dispute the finding that the acoustic study did not address the L01 standard, the impulse sound standard, or the Table 2 standards. The only evidence offered with respect to those standards is the acoustic engineer's conclusory statement that the proposed church will not generate noise in excess of the "maximum allowable noise levels." While it is reasonable to presume that that statement includes the L01 and impulse sound standards and the standards in Table 2, the statement is insufficient to establish compliance with the Table 1 and 2 standards as a matter of law.

Because petitioner has failed to demonstrate reversible error in the city's conclusion that the evidence submitted by petitioner's engineer failed to demonstrate compliance with the Table 1 and 2 standards in CDC 55.100.D.3, the city's error in applying the ambient degradation standard does not provide a basis for reversal or remand.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

In its final assignment of error, petitioner argues that the city's denial of the conditional use permit and design review applications violates RLUIPA, codified at 42 USC §§ 2000cc-2000cc-5. Before turning to those arguments, we set out the city's findings rejecting petitioner's RLUIPA claim, and provide an overview of the statute and its procedural and constitutional background.

A. The City's Findings

The city rejected petitioner's RLUIPA claims for the following reasons:

> "In most situations, it is not a substantial burden to require a religious entity to comply with generally applicable non-discriminatory land use standards. Under the circumstances of this application, where the proposed religious institution use could have used more of the total 5.6 acres and where there is an adjacent vacant 10-acre property, the application could have been for a similar development (same building size and number of parking spaces) on a larger lot that would have allowed a different configuration with additional

> buffering to meet the standards that were not met. Alternatively, the [applicant] could have attempted to enter into an easement or other agreement with the property owner to the north. The City Council finds that the denial based on the failure to meet applicable standards imposes no burdens on religious exercise because the applicant might have obtained approval if the site were larger.
>
> "* * * To grant this application would be to provide the applicant with immunity from land use regulation because applicant submitted a land use application for a project that does not meet applicable standards and criteria.
>
> "Maintaining the quality of residential neighborhoods is one of the prime duties of a municipal government and is a compelling government interest. The City does allow churches in residential areas, but not if they are inconsistent with universally applicable land use rules and adversely affect the quality of the residential neighborhood. While large churches and parking lots may be permitted, even in residential areas, they must be on lots of sufficient size, dimensions and configuration, taking into account topography and vegetation, to avoid a negative impact on the neighborhood. The proposed development (building and parking lot size and design) might have been acceptable on a larger parcel. The City is not placing a substantial burden on the applicant by concluding that the proposed 'parcel,' which is not yet a legal lot or parcel, is not large enough to accommodate the proposed development without substantial impacts on surrounding properties."
>
> "The City does not discriminate against or among religious institutions. Any applicant, whether a religious institution of any type or denomination or non-religious entity, would have been denied if it had proposed the same size building and parking lot on the 3.85-acre site at this location. * * * It is not a substantial burden on a religion or religious belief to deny a land use application when any other applicant would have been denied for the same proposal." Record 17-18.

B. Background to RLUIPA

Some background in first amendment jurisprudence is necessary to give context to the parties' arguments under RLUIPA. The first amendment to the United States Constitution provides in pertinent part that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof * * *." Free exercise claims are typically analyzed under the "compelling interest" test, under which a government regulation that imposes a "substantial burden" on religious belief is unconstitutional unless it furthers a "compelling governmental interest" by using the "least restrictive" means.

Sherbert v. Verner, 374 US 398, 83 S Ct 1790, 10 L Ed 2d 965 (1963). That approach was modified considerably in *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 US 872, 110 S Ct 1595, 108 L Ed 2d 876 (1990), in which the Supreme Court held that the compelling interest test does not apply to free exercise challenges to governmental application of "a valid and neutral law of general applicability," in that case a state statute criminalizing use of peyote. *Id.* at 879. In *Smith*, the Supreme Court noted one possible exception to that holding: where the government applies a law that requires an "individualized governmental assessment." *Id.* at 884.

In response to the *Smith* decision, Congress enacted the Religious Freedom Restoration Act (RFRA). RFRA's purpose was to restore the substantial burden/compelling governmental interest test to the analysis of free exercise claims. The Supreme Court, however, found in C*ity of Boerne v. Flores*, 521 US 507, 117 S Ct 2157, 138 L Ed 2d 624 (1997), that RFRA was unconstitutional because Congress had exceeded its authority under section 5 of the fourteenth amendment, which allows Congress to remedy constitutional violations. The court found that RFRA's legislative record lacked sufficient evidence of discriminatory laws to justify such sweeping and intrusive measures at every level of government. *Id*. at 532.

After the *City of Boerne* decision, Congress again sought to increase protection of religious exercise and enacted RLUIPA in 2000. To avoid the same deficiencies cited in *City of Boerne*, Congress confined the scope of the act to land use and institutionalized persons, and developed a massive evidentiary record documenting discrimination against religion and the need for remedial measures under section 5 of the fourteenth amendment to protect religious practices. Congress also relied on the commerce clause and spending clause as additional authority. In addition, in an apparent effort to bring RLUIPA within the ambit of the potential exception noted in *Smith* for application of laws that allow for "individualized governmental assessment," Congress specified that RLUIPA applies in relevant part only to

application of land use regulations that allow the government to make "individualized assessments" of the proposed land use.

With that background, we briefly outline the pertinent requirements of RLUIPA before turning to the parties' contentions.

C. Overview of RLUIPA

42 USC § 2000cc-(a)(1) provides the general rule regarding land use regulation under RLUIPA:

> "No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution –
>
> "(A) is in furtherance of a compelling governmental interest; and
>
> "(B) is the least restrictive means of furthering that compelling governmental interest."

The breadth of that general rule is limited in its scope of application by 42 USC § 2000cc-(a)(2), which provides in relevant part that the general rule applies in any case in which:

> "(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved."

42 USC § 2000cc-5(5) defines "land use regulation" broadly to include a zoning law that "limits or restricts a claimant's use or development of land * * * if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest."

RLUIPA provides a specific definition of "religious exercise" at 42 USC § 2000cc-5(7), that provides in relevant part that "[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose."

Under 42 USC § 2000cc-2(b), RLUIPA provides that if a petitioner produces prima facie evidence supporting a violation of the general rule, "the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion."

RLUIPA provides several rules of construction, including 42 USC § 2000cc-3(e), which states that

> "A government may avoid the preemptive force of any provision of this chapter by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden."

In addition, RLUIPA states that it "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 USC § 2000cc-3(g).

With that brief introduction, we now turn to issues raised in this case under RLUIPA.

D. Applicability of RLUIPA

1. Individualized Assessment

The parties dispute the threshold issue of whether RLUIPA applies to the city's decision at all. Petitioner contends that the present case falls squarely within the scope of 42 USC § 2000cc-(a)(2)(C), which as previously noted states that RLUIPA applies in circumstances where a substantial burden on free exercise is imposed by a land use regulation or system of land use regulations, under which the government makes "individualized assessments" of the proposed land use.

The city responds that "a government makes an 'individualized assessment' only when the government has absolute discretion whether to allow a use and is not bound by any neutral, generally applicable, pre-established standards." Respondent's Brief 38. If we

understand the city correctly, it argues that only land use regulations that require essentially ad hoc and standardless considerations fall within the scope of RLUIPA. The city contends that because the CDC criteria applied in this case are set forth in the city's code, are neutral with respect to religion, and apply generally to any application for conditional use or design review approval, those criteria do not involve an "individualized assessment" within the meaning of 42 USC § 2000cc-(a)(2)(C). Therefore, we understand the city to argue, this case falls within the general rule described in *Smith* for "a valid and neutral law of general applicability." If so, and if RLUIPA is understood as an attempt to occupy the potential exception noted in *Smith* for "individualized government assessments," the city argues, then application of the CDC standards at issue here simply does not implicate RLUIPA.

We disagree. The city does not provide any examples, nor are we aware of any under Oregon law, where a local government has unbridled discretion to approve or deny a proposed use of land. Typically, local land use decisions are made pursuant to specific standards set forth in the local government's legislation. Such land use regulations typically set out uses or categories of uses that are allowed outright in a zone, subject sometimes to discretionary siting and design review standards. Such land use regulations typically set out other uses or categories of uses that are allowed only conditionally, subject to discretionary and often subjective standards that are typically intended to mitigate adverse impacts from such conditional uses on uses that are allowed outright in the zone. Under such a scheme, conditional uses or uses subject to site or design review are only potentially allowable uses. Such uses must undergo a discretionary process for granting individualized approval and unless they successfully navigate that discretionary process, they are not allowed.

The CDC is one of these typical schemes of land use regulation. Petitioner is allowed to construct a church in the R-10 zone only if petitioner demonstrates compliance with extremely subjective conditional use and design review criteria that afford the local government decision maker significant discretion to approve or deny the application. That

discretion is considerably augmented by the deferential review afforded the city council's evidentiary judgments and interpretations of local legislation, under applicable Oregon statutes and case law. *See Tigard Sand and Gravel*, 151 Or App at 18 (substantial evidence review is not *de novo* and does not entail or permit reweighing of evidence by LUBA); ORS 197.829(1) (LUBA must affirm a local government's interpretation of a local regulation unless it is inconsistent with the express language, purpose or policy underlying the regulation). We believe it obvious that such regulations are precisely the type of land use regulations that Congress describes in 42 USC § 2000cc-(a)(2)(C).[10]

In short, the fact that the pertinent CDC regulations applied here are "neutral" and "generally applicable" in the sense that they are not directed specifically at religious exercise and apply broadly to a number of secular uses does not remove them from RLUIPA's ambit. The city's much narrower view of what constitutes a land use regulation involving "individualized assessment" essentially renders RLUIPA without regulatory effect, because few if any land use decisions affecting religious exercise are made subject to the entirely ad hoc, standardless exercises of discretion that the city describes. A view much more

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[10] The Joint Statement of the Senate co-sponsors for RLUIPA states the following:

> "The hearing record compiled massive evidence that this right [free exercise of religion] is frequently violated. Churches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of the zoning codes and *also in the highly individualized and discretionary process of land use regulation*. Zoning codes frequently exclude churches in places where they permit theatres, meeting halls, and other places where large groups of people assemble for secular purposes. *Or the codes permit churches only with individualized permission from the zoning board, and zoning boards use that authority in discriminatory ways.*
>
> "Sometimes zoning board members or neighborhood residents explicitly offer race or religion as the reason to exclude a proposed church, especially in cases of black churches and Jewish shuls and synagogues. *More often, discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or 'not consistent with the city's land use plan.'* Churches have been excluded from residential zones because they generate too much traffic, and from commercial zones because they don't generate enough traffic. Churches have been denied the right to meet in rented storefronts, in abandoned schools, in converted funeral homes, theaters, and skating rinks – in all sorts of buildings that were permitted when they generated traffic for secular purposes. *See* 106 Cong Rec S7774-76 (daily ed. July 27, 2000) (joint statement of co-sponsors Sen. Hatch and Sen. Kennedy) (emphasis added).

consistent with RLUIPA's apparent purpose is that it governs application of land use regulations, such as the ones at issue here, that allow a local government to approve or deny proposed uses of land under subjective, discretionary standards.

Nonetheless, the city argues that RLUIPA must not be construed to govern or limit application of discretionary and subjective standards such as those here, because doing so essentially grants religious institutions immunity from regulation. The city cites to legislative history indicating that Congress did not intend RLUIPA to provide religious institutions with immunity from land use regulation. The city argues that interpreting RLUIPA essentially to prohibit application of discretionary land use standards to religious institutions would "put an end to land use planning as we know it in Oregon." Respondent's Brief 34. According to the city, under that interpretation a wide range of applicants would start claiming to be religious institutions, and the result would be that governments could no longer apply any discretionary standards to land use applications.

The city's concerns are ill-founded. As explained below, we do not construe RLUIPA to provide religious institutions with immunity from land use regulation, or to prohibit application of discretionary land use standards to religious institutions.

2. Proposed Uses of the Property

The city notes that as relevant here RLUIPA applies only when the government applies land use regulations that involve the "proposed *uses* for the property[.]" 42 USC § 2000cc-(a)(2)(C) (emphasis added). According to the city, while CDC conditional use permit criteria at CDC 60.070.A.1.b and 60.070.A.2 concededly pertain to the proposed *use* of the subject property, the CDC design review criteria at CDC 55.100.B.6.b, 55.100.C., and 55.100.D.3 pertain only to the details of the proposed structure and parking lot. Because the city's decision under the design review criteria does not involve land use regulations that govern the proposed *use* of the property, the city argues, the city's decision under those criteria is not subject to RLUIPA.

We disagree. While the distinction drawn by the city is tenable as a linguistic matter, we seriously doubt Congress intended to exclude from 42 USC § 2000cc-(a)(2)(C) land use regulations such as the design review criteria at CDC 55.100.B.6.b, 55.100.C., and 55.100.D.3. The regulatory focus of those criteria is substantively similar to the conditional use criteria at CDC 60.070.A.1.b and 60.070.A.2. Broadly speaking, both sets of criteria allow a proposed use of land only if the applicant demonstrates that any adverse impacts or incompatibilities with nearby uses can be mitigated. If the applicant fails to make that demonstration under either set of criteria, the city can deny the proposed use of land. We see no meaningful difference between denial of a proposed use of land under design review criteria and a similar denial under conditional use criteria, for purposes of 42 USC § 2000cc-(a)(2)(C).

E. Substantial Burden

The parties next dispute whether the city's decision imposes a "substantial burden" on religious exercise. RLUIPA does not define "substantial burden," but it is a term of art with an extensive jurisprudential history. That history, however, is less than uniform. In general, a substantial burden on the free exercise of religion is one that forces adherents of a religion "to refrain from religiously motivated conduct." *Brown-El v. Harris*, 26 F3d 68, 70 (8th Cir 1994). However, a government regulation does not substantially burden religious activity when it only has an incidental effect that makes it more difficult to practice the religious activity. *Thiry v. Carlson*, 78 F3d 1491, 1495 (10th Cir 1996).

Not surprisingly, the parties disagree as to the nature of the burden itself. Petitioner asserts that the burden is the complete inability to build its house of worship. The city responds that the effect of its decision is only that petitioner cannot build the exact church it wants exactly where it wants to built it. According to the city, petitioner might win approval if it would reduce the size of the building or parking lot, or obtain additional land necessary to provide more adequate buffers. We understand the city to argue that the burden of

proposing and accepting such modifications is at most a minor inconvenience to petitioner's free exercise of religion that does not amount to a "substantial burden."

Proper characterization of the precise nature of the burden is obviously critical.[11] In the present case, RLUIPA expressly defines religious exercise to include "[t]he use, building, or conversion of real property for the purpose of religious exercise[.]" Therefore, we believe the proper inquiry is to determine the extent and nature of the burden on petitioner's ability to build a church. Under RLUIPA, and contrary to the *City of Lakewood* case cited in n 11, the centrality of the church building itself to petitioner's exercise of religion is immaterial.

In our view, the city's denial of petitioner's application to construct a building intended for religious exercise, based on the highly discretionary standards that the city applied in its "individualized assessment" in this case, constitutes imposition of a "substantial burden" on religious exercise within the meaning of RLUIPA. We might reach a different conclusion if the city's land use regulatory scheme also included zones where petitioner's church would be allowed outright without an "individualized assessment." Similarly, denial of petitioner's application might not constitute a "substantial burden" if the record showed that larger sites were available in the city and that a new application for a larger, available site in the city would be approved. However, the city does not provide zoning districts where petitioner's church would be allowed outright, and it is not at all clear that there are other suitable and available sites for petitioner's proposed church.

Further, we disagree with the city's view, expressed in its findings and brief, that no substantial burden is imposed where (1) a similar application by a non-religious institution

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[11] We note that how the burden is defined or characterized often decides the issue of whether it is substantial or not. *See Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F Supp 2d 1203, 1226-27 (CD Cal 2002) (denial of building permit for church fundamentally inhibits the church's ability to practice its religion); *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F2d 303, 306-07 (6th Cir 1983) (denial of building permit for church was merely inconvenient economic burden on religious freedom and freedom to worship is only tangentially related to worshipping in a church's own structure because building a church is not "fundamental tenet" or "cardinal principle" of the faith).

would be denied under the same criteria, or (2) petitioner's application might have been approved if petitioner had modified the site plan to propose a larger site.

The first argument suggests that the regulatory effect of RLUIPA is limited to prohibiting discrimination against religious institutions or, conversely, ensuring equal treatment to religious institutions. However, a separate section of RLUIPA imposes those precise obligations. 42 USC § 2000cc-(b)(1) and (2). If the question of whether a local government has imposed a "substantial burden" on religious exercise is resolved by simply inquiring whether the local government treated religious and non-religious entities equally, then there would be no need for the general rule set out at 42 USC § 2000cc-(a)(1). The apparent intent of RLUIPA is to require that local governments treat proposed land uses by religious entities more favorably, if necessary, than those proposed by non-religious entities. *See* 42 USC § 2000cc-3(e) (a government may retain the policy or practice but exempt substantially burdened religious exercise). However far that obligation goes, and putting aside for the moment the question of whether such preferential treatment is constitutional, we disagree with the city that the regulatory effect of RLUIPA is limited to treating religious and non-religious entities equally.

We are also unpersuaded by the city's finding that there are "no burdens on religious exercise because [petitioner] might have obtained approval if the site were larger." Record 17. This reasoning begs the question. The requirement for a larger site derives from the very land use regulations asserted to impose the substantial burden in the first place. As petitioner correctly points out, the "city's conclusion amounts to the nonsensical assertion that the challenged regulations do not substantially burden religious exercise because they require the site to be larger." Petition for Review 40-41. It is no defense to the charge that a regulation

imposes a substantial burden to say that the proposal would be approved it if satisfied the regulation or if the regulation did not apply.[12]

F. Compelling Governmental Interest

Because petitioner has established that the city's denial under its land use regulations imposes a substantial burden on petitioner's religious exercise, the burden of persuasion switches to the city to demonstrate that the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. 42 USC § 2000cc-(a)(1)(A and B) and 2000cc-2(b).

The city's findings identify protection of its residential neighborhoods as a compelling governmental interest. Record 18. The parties dispute whether the identified interest is compelling. However, we need not resolve that dispute, because for the reasons set out below we conclude that even assuming the identified governmental interest is a compelling one, the city has failed to demonstrate that denial of petitioner's application is "the least restrictive means" of furthering that interest.

G. Least Restrictive Means

Under our view of RLUIPA, the circumstances under which a local government may permissibly *deny* an application for a religious building under discretionary standards requiring an "individualized assessment" of the proposed use are quite limited. Denials that place a "substantial burden" on religious exercise are permissible only if the local government demonstrates, in relevant part, that denial under those regulations is "the least restrictive means" of furthering an identified compelling governmental interest. Under such circumstances, the local government's burden is to demonstrate that denial is the only

[12] However, as discussed below, whether the application could be approved under reasonable conditions of approval that may require modification to the proposal is a relevant consideration under the third prong of the general rule, under which a local government may impose a substantial burden on religious exercise if it demonstrates, in part, that the imposition "is the least restrictive means of furthering [a] compelling governmental interest." 42 USC § 2000cc-(a)(1)(B).

available means to further that compelling governmental interest. We conclude that the city has failed to satisfy that burden in this case.

As noted, petitioner argues that there are less restrictive means than denial, because most if not all of the city's concerns regarding noise, lights, aesthetic impacts and compatibility can be addressed by imposing one or more reasonable conditions of approval. Petitioner notes that staff recommended, and petitioner accepted, a proposed condition of approval that would require additional vegetative buffering along Shannon Lane. Petitioner also points out that it indicated willingness to expand the proposed 3.85-acre parcel, if necessary, to allow the proposed building or parking lot to be located further from Shannon Lane, as well as willingness to accept other reasonable conditions. The city's own findings suggest repeatedly that if petitioner obtained additional land from the parent 5.6-acre parcel, or from the adjacent 10-acre parcel, that the proposed building and parking lot could be configured to comply with applicable criteria.

The city responds that "[t]he City can only impose reasonable conditions of approval and can only impose conditions of approval as a way of satisfying applicable criteria when there is evidence that complying with the conditions is feasible and would result in satisfaction of the criteria." Respondent's Brief 33. The city then faults petitioner for failing to propose an alternative site plan or demonstrate that additional conditions of approval are feasible or would result in compliance with the pertinent CDC standards. We believe that the city fails to fully appreciate its obligations under RLUIPA.

First, as noted, it is the city's burden to demonstrate on review that denial is the least restrictive means of furthering the identified compelling interest. We have difficulty understanding how that burden is met when the applicant has indicated willingness to accept conditions of approval that the city's own findings suggest may well satisfy applicable criteria. We do not see that petitioner's failure to submit a modified site plan showing a

more adequate vegetative buffer or a larger parcel or to make a formal showing of feasibility reduces the city's burden under 42 USC § 2000cc-(a)(1)(B).

Second, the city fails to appreciate that if it wishes to avoid the "preemptive force" of RLUIPA, it must either: (1) change the offending regulation; (2) retain the regulation but exempt substantially burdened religious activity; or (3) adopt "any other means that eliminates the substantial burden." 42 USC § 2000cc-5(e). The third option would seem to authorize the city to seek alternatives to denial, such as imposing reasonable conditions of approval, that would reduce the burden on the exercise of religion to the point where it is no longer "substantial."

In short, the city's burden under 42 USC § 2000cc-(a)(1)(B) in the circumstances of this case is to show, essentially, that the proposed religious structure cannot be approved consistent with applicable CDC requirements. Whether the proposed structure can be approved with imposition of reasonable conditions of approval is highly relevant to that showing. Where, as here, the record indicates that the application might satisfy applicable criteria with imposition of what appear to be reasonable conditions, that showing has not been made.[13]

Accordingly, we conclude that the city has failed its burden to demonstrate that denial is the "least restrictive means" of furthering a compelling governmental interest.

H. Constitutionality of RLUIPA

Finally, the city argues that even if its decision violates RLUIPA, the statute exceeds Congress' authority under the enforcement clause (section 5 of the fourteenth amendment) and is unconstitutional under the establishment clause of the first amendment. According to

[13] We do not mean to suggest that RLUIPA imposes an obligation on local governments to proactively develop modifications or conditions of approval without the assistance of the applicant. However, a local government that ignores or turns a blind eye to proposed or apparent modifications or conditions of approval that might allow approval as an alternative to denial is significantly increasing the already difficult burden it may have to assume under 42 USC § 2000cc-(a)(1)(B).

the city, violation of an unconstitutional statute or a statute that exceeds Congressional authority provides no basis for reversal or remand.

1. Enforcement Clause

The city argues that, like RFRA, RLUIPA exceeds Congress' authority under the enforcement clause because RLUIPA grants greater protections to religious institutions than those currently provided by the free exercise clause. The city notes that, in *City of Boerne*, the U.S. Supreme Court held that Congress's power under the enforcement clause is remedial and is limited to enforcing the provisions of the fourteenth amendment. Congress exceeds that power if it seeks to expand the rights protected under the fourteenth amendment. 512 US at 519 ("Congress does not enforce a constitutional right by changing what the right is."). According to the city, RLUIPA suffers from the same flaw, because it requires application of the "substantial burden/compelling interest" test to neutral laws of general applicability, and thus legislatively overrules or limits *Smith*.

In adopting RLUIPA, Congress attempted to remedy three major flaws in RFRA by: (1) narrowing the scope of the act to land use and institutionalized persons; (2) compiling a substantial body of evidence documenting the need for remedial measures with respect to land use decisions affecting religious institutions; and (3) relying on the spending clause and the commerce clause, in addition to the enforcement clause, as granting it authority to adopt remedial measures. Several courts have concluded that RLUIPA either is consistent with Supreme Court jurisprudence or, to the extent it grants more protection to religious exercise and institutions than that jurisprudence would require, RLUIPA does not exceed Congress' authority. *See Mayweathers v. Newland*, 314 F.3d 1062, 1070 (9th Cir. 2002) (RLUIPA is consistent with *Smith*, which explicitly allows heightened legislative protection for religious worship); *Freedom Bapt. Church of Del. v. TP. of Middletown*, 204 F Supp 2d 857, 874 (ED Pa 2002) (RLUIPA is consistent with *Smith* and *City of Boerne* and, in any case, placing a "statutory thumb" on the side of religious free exercise does not violate the enforcement

clause, because it constitutes the kind of congruent and proportional remedy Congress is empowered to adopt under that clause).

The city's enforcement clause argument is based on its view that the CDC provisions applied in this case are "neutral laws of general applicability" described in *Smith*, and thus RLUIPA essentially overrules or limits *Smith* and the Supreme Court's free exercise jurisprudence. However, as explained above, the conditional use and design review criteria applied in this case are not properly viewed as the kind of "neutral laws of generally applicability" described in *Smith*, but rather are the type of regulations requiring "individualized assessment" cited in *Smith* as a potential exception to the holding in that case. For the reasons stated in *Mayweathers* and *Freedom Bapt. Church of Del.*, we disagree with the city that RLUIPA is inconsistent with *Smith* or exceeds Congress's authority under the enforcement clause.

2. Establishment Clause

The city also argues that RLUIPA is unconstitutional under the establishment clause because it violates the three-part test of *Lemon v. Kurtzman*, 403 US 602, 612-13, 91 S Ct 2105, 29 L Ed 2d 745 (1971). Under *Lemon*, a statute will survive challenge under the establishment clause if (1) it has a secular purpose; (2) its primary effect neither advances nor inhibits religion; and (3) it does not foster excessive government entanglement with religion. Failure under any prong is sufficient to run afoul of the establishment clause. *Edwards v. Aguillard*, 482 U.S. 578, 583, 107 S Ct 2533, 96 L Ed 2d 510 (1987).

However, the government may, and sometimes must, accommodate religious practices and may do so without violating the establishment clause. *Corp. of the Presiding Bishop v. Amos*, 483 US 327, 335, 107 S Ct 2862, 97 L Ed 2d 273 (1987). The line between permissible accommodation and impermissible advancement of religious practices is far from clear, at least to us. It is apparently a difficult issue for the courts, as well. Of the decisions cited to us that address the constitutionality of RLUIPA under the establishment clause, one

court has ruled that it does not infringe upon the establishment clause (*Mayweathers*), while two courts have ruled that it does (*Al Ghashiyah v. Dept. of Corr.*, 2003 US Dist LEXIS 2739 (ED Wis 2003); *Madison v. Riter*, 240 F Supp 2d 566 (WD Va 2003). All three decisions involve challenges to the RLUIPA provisions governing institutionalized persons, rather than the provisions governing land use regulations. The only case cited to us that addresses the constitutionality of the land use provisions of RLUIPA is *Freedom Bapt. Church of Del.* However, the court expressly declined to analyze the statute under the establishment clause. 204 F Supp 2d at 865.

The city argues that if we adopt petitioner's view of RLUIPA (essentially, that the city cannot deny an application to construct a church under discretionary criteria), then RLUIPA clearly runs afoul of the first two *Lemon* factors. According to the city, wherever the line between permissible accommodation and impermissible advancement is located, a statute that effectively immunizes religious institutions from discretionary land use regulations that would allow denial of otherwise similar non-religious uses is on the wrong side of that line. Therefore, the city argues, LUBA should adopt a narrower interpretation of RLUIPA, one that does not impermissibly favor religious uses in violation of the establishment clause. As noted, the city argues that RLUIPA should be interpreted to require only that local governments treat religious institutions the same as other types of similar uses.

As we explained above, Congress clearly intended in adopting RLUIPA to require that local governments do more than refrain from discriminating against religious institutions. It is reasonably clear under RLUIPA that Congress intended to place a "statutory thumb" on the scales in favor of religious institutions. *Freedom Bapt. Church of Del.*, 204 F Supp 2d at 874. The question is how far that "favoritism" can go before exceeding the scope of a permissible accommodation of religion. The cases cited to us suggest that RLUIPA does not offend the establishment clause as long as its purpose and

primary effect are directed at alleviating significant governmental interference with religious exercise. For the following reasons, we believe that RLUIPA as we have interpreted it in this opinion does not cross the line between permissible accommodation and impermissible advancement of religion.

As we have interpreted RLUIPA, it does not, as the city argues, immunize petitioner from complying with applicable discretionary criteria. The city may apply such criteria and may deny the application if the record fails to establish that the proposed use can comply with those criteria. In our view, where RLUIPA changes the city's obligations is in circumstances where the application can be approved with reasonable conditions of approval. As explained above, the long-standing rule in Oregon has been that local governments *may* but *need not* approve applications that do not conform to applicable criteria, by imposing reasonable conditions of approval that allow the application to meet those criteria. Under that traditional rule, local governments may choose to consider whether a nonconforming application may be approved with conditions, or may simply deny it, notwithstanding that it could be approved with conditions that will make it consistent with applicable criteria.[14] That discretion offers the possibility of inconsistent application, in which controversial and noncontroversial land use proposals suffer different fates, depending on the local government's willingness to consider reasonable conditions of approval.

As the legislative history of RLUIPA indicates, land use decisions involving religious institutions are often controversial, and local governments may sometimes be tempted to deny proposals for locating religious institutions in settings, such as residential areas, that generate opposition, even where the proposal may be modified or conditioned in ways that will reduce conflicts and allow the proposal to comply with applicable criteria. Given the remedial purpose of RLUIPA, and the relatively narrow construction we applied to it, we

[14] As commented earlier in n 5, ORS 197.522, adopted in 1999, arguably abolishes that traditional rule.

conclude that RLUIPA's purpose and primary effect are directed at alleviating significant governmental interference with religious exercise. RLUIPA does so by constraining an area of extremely discretionary decision making that historically allowed local governments to treat controversial proposals, such as religious structures in residential settings, less favorably than other uses. We hold that, so interpreted, RLUIPA is a permissible accommodation of religious exercise.

I. Conclusion

As explained, the city's findings of noncompliance with CDC 60.070.A.1.b, 60.070.A.2, 55.100.B.6.b, and 55.100.C repeatedly suggest that if petitioner proposed a larger vegetative buffer, berm or other feature along Shannon Way, and if petitioner obtained additional land from the 5.6-acre parent parcel, or additional land or an easement from the adjoining 10-acre parcel, the proposed building and parking lot may be configured to comply with these criteria. The city did not adopt the staff recommendation for a condition of approval regarding the buffer along Shannon Way, or explore petitioner's stated willingness to increase the size of the proposed 3.85-acre parcel. The city offers no reason to believe that either the recommendation or the suggestion to enlarge the proposed parcel cannot be converted into reasonable conditions of approval. Where the record indicates that the proposed church can comply with applicable criteria if suitable conditions of approval are imposed, we believe that RLUIPA prohibits the city from denying the application without considering more fully whether the proposed use may be approved under such conditions.[15] Therefore, the city's decision must be remanded for the city to consider whether the application may be approved under suitable conditions of approval.

[15] We emphasize that we are influenced by the applicant's stated willingness to accept the staff recommendation, seek a larger parcel and accept other changes that may be necessary to mitigate impacts that the CDC criteria make relevant.

The city's denial under the noise standards at CDC 55.100.D.3 requires additional comment. The city points out that those standards, unlike CDC 60.070.A.1.b, 60.070.A.2, 55.100.B.6.b, and 55.100.C, are objective in nature, and argues that it may deny a permit to construct a proposed religious building under objective criteria without triggering scrutiny under RLUIPA. Further, the city argues that one basis for denial under CDC 55.100.D.3 was petitioner's failure to submit any evidence whatsoever regarding the L01, impulse sound and Table 2 standards. The city argues that denial for failure to submit evidence responsive to objective criteria such as those found in CDC 55.100.D.3 is an appropriate basis for denial that does not implicate RLUIPA. Therefore, the city argues, notwithstanding that the city may have violated RLUIPA in denying the application under CDC 60.070.A.1.b, 60.070.A.2, 55.100.B.6.b, and 55.100.C, the city's denial under CDC 55.100.D.3, and the city's decision itself, must be affirmed.

We disagree. First, the acoustical engineer provided oral and written testimony that, reasonably understood, took the position that the proposed use would not violate the L01, impulse sound and Table 2 standards. The city chose not to believe that testimony, but it is not the case that petitioner failed to submit *any* evidence regarding compliance with those standards. Second, it is not clear to us that denial based on an evidentiary dispute between the acoustical engineer and the testimony of neighbors is properly viewed as denial under an objective criterion, even assuming that denial under objective criteria does not trigger scrutiny under RLUIPA. The city exercised some discretion in reviewing conflicting evidence regarding the noise standard, and chose to believe the evidence of the neighbors.

Third, the city's findings addressing CDC 60.070.A.1.b, 60.070.A.2, 55.100.B.6.b, and 55.100.C suggest that issues regarding noise under those criteria may be addressed by more adequate buffering and separation. Both these criteria and the noise standards at CDC 55.100.D.3 appear to be directed at a common goal: to minimize adverse impacts from proposed uses on adjoining uses, particularly residential uses. On remand, the city must

consider whether the application may be approved under reasonable conditions of approval providing for more adequate buffers and separation of the proposed use from adjoining residential uses. Assuming such conditions may be imposed, the presence of more adequate buffers and additional physical separation will obviously affect the question of whether or not the proposal complies with the CDC 55.100.D.3 noise standards. Under these circumstances, we believe it appropriate to remand the decision to the city to allow the city to reconsider that question.

The sixth assignment of error is sustained.

The city's decision is remanded.