BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

1000 FRIENDS OF OREGON
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent,

and

MOLALLA CHRISTIAN CHURCH,
Intervenor-Respondent.

LUBA No. 2003-129

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Edward J. Sullivan, Portland, filed the petition for review and argued on behalf of the petitioners. With him on the brief was Carrie A. Richter and Garvey Schubert Barer.

No appearance by Clackamas County.

David J. Hunnicutt, Tigard, filed the response brief and argued on behalf of the intervenor-respondent. With him on the brief was Ross A. Day, Tigard, and Oregonians in Action Legal Center.

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

REMANDED 02/05/2004

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 county determination that under the federal Religious Land Use and Institutionalized Persons Act (RLUIPA) development of a church on property zoned Exclusive Farm Use (EFU) is a permitted use, notwithstanding state and local regulations that prohibit a church on that property.

MOTION TO FILE REPLY BRIEF

Petitioner moves to file a reply brief to respond to arguments in the response brief that certain issues were waived. The reply brief is allowed.

MOTION TO STRIKE

Intervenor-respondent (intervenor) moves to strike Appendix D and E to the petition for review, on the grounds that the affidavits included in those appendices are neither in the record, nor subject to official notice. Appendix D is an affidavit from petitioner's executive director, in which he avers in relevant part that petitioner's members live and work in Clackamas County, that those members have an interest in maintaining and enforcing the statewide planning goals in the county, and that one member lives on and owns agricultural property within sight and sound of the subject property. Appendix E is an affidavit from that member, stating in relevant part that he is adversely affected by the proposed church, that he appeared during the proceedings below, but that he chose to allow petitioner to represent his interests before LUBA rather than file his own appeal.

Petitioner responds first that the motion to strike is untimely, and that its untimely filing prejudices petitioner's substantial rights. OAR 661-010-0065(2) requires that a party seeking to challenge the failure of an opposing party to comply with the Board's rules shall make the challenge by motion, "filed with the Board and served on all parties within 10 days after the moving party obtains knowledge of such alleged failure." Petitioner argues that the motion to strike was filed 21 days after the petition for review was filed, considerably more

1 than 10 days after intervenor must have learned of the disputed affidavits. Further, petitioner
2 notes that the motion to strike was filed only 11 days prior to oral argument, which gave
3 petitioner little time to prepare and file a written response prior to oral argument.
4 Considering that petitioner also had to respond to new issues raised in the response brief
5 during the same period, petitioner submits that untimely filing of the motion to strike
6 prejudiced petitioner's ability to present its position adequately in this review proceeding.
7 On the merits, petitioner argues that the challenged affidavits are necessary to
8 establish that petitioner and at least some of the members it represents are affected by the
9 county's decision and thus have standing to invoke the Court of Appeals' jurisdiction, as
10 required by *Utsey v. Coos County*, 176 Or App 524, 32 P3d 933 (2001) *rev dismissed* 335 Or
11 217 (2003). Petitioner argues that it is entitled to file the affidavits pursuant to OAR 661-
12 010-0030(4), which requires that the petition for review "state the facts that establish
13 petitioner's standing."
14 As we explained in *Friends of Yamhill County v. Yamhill County*, 41 Or LUBA 247,
15 250-251 (2002) and a number of other cases, standing before LUBA is not governed by
16 *Utsey*. As relevant here, a petitioner has standing before LUBA if the petitioner appeared
17 before the local government. ORS 197.830(2)(b). There is no dispute that petitioner in this
18 case appeared before the county. Therefore, the challenged affidavits are unnecessary for the
19 purposes of ORS 197.830(2)(b) and OAR 661-010-0030(4). With exceptions not applicable
20 here, LUBA's review is confined to the local record. ORS 197.835(2)(a). Petitioner does
21 not move to take evidence outside the record, under ORS 197.835(2)(b) and OAR 661-010-
22 0045. Under our rules such a request must be accompanied by a statement explaining how
23 the proffered facts "will affect the outcome of the review proceeding." OAR 661-010-
24 0045(2)(a). As we suggested in *Friends of Yamhill County*, OAR 661-010-0045 does not
25 allow LUBA to consider an affidavit to establish standing under *Utsey* when standing before

1 LUBA is not at issue, because such an affidavit cannot "affect the outcome" of LUBA's
2 review. 41 Or LUBA at 251.[1]

3 Intervenor's motion to strike is granted.

4 **FACTS**

5 The subject property is a 10.29-acre parcel zoned EFU and located less than one mile
6 from the City of Molalla urban growth boundary (UGB). Soils on the property are
7 predominantly high-value farmland soils. The property is currently developed with a
8 dwelling and barn.

9 Intervenor is a small church with about 230 active members, projected to grow to 350
10 members. Intervenor currently owns and occupies a building within the city limits of
11 Molalla. Intervenor's membership is drawn primarily from the City of Molalla but also
12 includes residents of nearby rural areas and rural communities such as Colton and Mulino.
13 Intervenor acquired the subject property in 1997 at a time when county zoning allowed a
14 church on the property as a conditional use.[2]

15 Current zoning restrictions, under Zoning and Development Ordinance (ZDO)
16 401.04(C)(48), prohibit a church on an EFU-zoned parcel that is (1) predominantly
17 composed of high-value farmland or (2) within three miles of a UGB. Conversely, a church
18 is allowed outright on EFU-zoned parcels that are not more than three miles outside a UGB

---

[1] In *Doty v. Coos County*, 185 Or App 233, 235, n 1, 59 P3d 50 (2002), *adhered to on reconsideration* 186 Or App 580, 64 P3d 1150 (2003), the Court of Appeals expressed its preference that demonstrations of standing for purposes of *Utsey* be made before the initial local government decision maker, although the court allowed the petitioner in that case to make that demonstration for the first time before the court. We do not understand that footnote to suggest that the court would also prefer that demonstrations of standing for purposes of *Utsey* be made before LUBA, as opposed to before the court.

[2] The hearings officer's decision recites testimony suggesting that intervenor bought the property shortly after the Court of Appeals issued its opinion in *Lane County v. LCDC*, 138 Or App 635, 910 P2d 414 (1996), which invalidated amendments to OAR Chapter 660, Division 33. Those invalidated rule amendments included the current prohibition on churches on high-value farmland and within three miles of a UGB. Record 124. The Supreme Court subsequently reversed the Court of Appeals' decision, and the rule amendments remain in effect. *Lane County v. LCDC*, 325 Or 569, 942 P2d 278 (1997).

1 and predominantly composed of high-value farmland. Those restrictions implement almost
2 identical regulations in a state administrative rule, OAR chapter 660-033-0120, Table 1. In
3 relevant part, that rule prohibits churches on high-value farmland, although it allows
4 expansion of an existing church. OAR 660-033-0130(18). The rule also prohibits new
5 churches on a parcel not composed predominantly of high-value farmland if the parcel is
6 within three miles of a UGB, unless an exception is approved pursuant to ORS 197.732 and
7 OAR Chapter 660, Division 004. OAR 660-033-0130(2).

8 Intervenor filed a request for an interpretation of the county code, to determine
9 whether construction of a new church is allowed on the subject property. Although
10 intervenor did not submit a specific design proposal, intervenor submitted evidence
11 indicating that the contemplated church will involve construction of a new 14,500-square
12 foot building, with associated parking and athletic facilities. On September 10, 2002, the
13 planning director issued an interpretation to the effect that the county code prohibited a
14 church on the subject property because it is high-value farmland and within three miles of a
15 UGB. The planning director also addressed intervenor's arguments under RLUIPA and
16 concluded that prohibiting a church on the subject property did not violate the federal
17 statute.[3]

18 Intervenor appealed the planning director's decision to the county hearings officer,
19 who conducted two hearings and issued an order dated January 22, 2003, upholding the
20 planning director's decision. In addressing RLUIPA, the hearings officer found for purposes
21 of that federal statute that the county code prohibition on churches on the subject property
22 "imposes a substantial burden" on intervenor. That conclusion was based on evidence that
23 intervenor's ability to locate the proposed church on lands where a church was permitted was

---

[3] As discussed below, the "general rule" of RLUIPA prohibits a government from applying a land use regulation that imposes a "substantial burden" on the religious exercise of any person or assembly, unless the local government demonstrates that imposition of the burden furthers a "compelling governmental interest" and is the "least restrictive means" of furthering that interest.

limited due to the geographic distribution of its members and its limited financial resources.[4] However, the hearings officer then found that the county, and state, had a "compelling interest" in restricting the uses allowed on agricultural land in general and high-value farmland in particular, for purposes of RLUIPA. Finally, the hearings officer concluded that prohibiting churches on high value farmland is the "least restrictive" means of serving that compelling interest.

Intervenor requested that the board of county commissioners review the hearings officer's interpretation, and the commissioners granted that request. After conducting a hearing on May 7, 2003, the board of county commissioners issued an order concluding that the county code, interpreted in light of RLUIPA and the First Amendment to the United States Constitution, requires that the proposed church be considered a permitted use on the subject property.

This appeal followed.

INTRODUCTION

Before turning to the parties' arguments, we first set out RLUIPA's relevant terms. As applicable here, 42 USC § 2000cc-(a) establishes a "general rule" prohibiting governments from applying a land use regulation in a manner that imposes a "substantial burden" on religious exercise.[5] In addition to that "general rule," 42 USC § 2000cc-(b) (1)

---

[4] The hearings officer's decision recites testimony that intervenor began searching for a new church site within the city of Molalla in 1991, but "was unable to find a site of sufficient size to accommodate its needs at a price it could afford," and began looking outside the city. Record 125. Intervenor purchased the subject property in 1997 after a five-year search, because it "was the only available property that met [its] physical and financial needs." *Id.* The hearings officer ultimately concluded that "there is no place where [intervenor] can site its church except on high value farm land in the EFU zone and/or within three miles of an urban growth boundary." Record 132.

[5] 42 USC § 2000cc-(a) provides, in relevant part:

> "Substantial burdens
>
> "(1) General rule. 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,

1 prohibits governments from treating religious assemblies on less than "equal terms" with
2 nonreligious assemblies, (2) prohibits discrimination on the basis of religion, and (3)
3 prohibits land use regulations that exclude or unreasonably limit religious assemblies from a
4 government's jurisdiction.[6]

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

---

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.

"(2) Scope of application. This subsection 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."

[6] 42 USC § 2000cc-(b) provides:

"(b) Discrimination and exclusion.

(1) Equal terms. No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) Nondiscrimination. No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) Exclusions and limits. No government shall impose or implement a land use regulation that—

"(A) totally excludes religious assemblies from a jurisdiction; or

"(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction."

a contract or option to acquire such an interest." RLUIPA includes a definition of "religious exercise" at 42 USC § 2000cc-5(7), which 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." 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." 42 USC § 2000cc-2(b).

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).

FIRST ASSIGNMENT OF ERROR

Petitioner contends that the county misconstrued the applicable law in concluding that the proposed church is a "permitted use," in the absence of a determination that the proposed church complies with all applicable requirements. Specifically, petitioner argues that the proposed church can be approved only if the county takes an exception to at least two Statewide Planning Goals—3 (Agricultural Lands) and 14 (Urbanization)—pursuant to the exception requirements set out at ORS 197.732, Goal 2 (Land Use Planning) and OAR chapter 660, division 004. Petitioner also contends that certain ZDO standards

governing minimum lot area, street frontage, setbacks, etc. may apply to the proposed church and that the county erred to the extent its decision purports to approve the church outright without further review for compliance with such standards.

A. Goal Exceptions

We understand petitioner to argue that even if RLUIPA might allow the county to waive an absolute prohibition on churches in particular circumstances, the code and rule at issue here do not impose an absolute prohibition on new churches on high-value soils or within three miles of a UGB. According to petitioner, the code and rule contemplate that a new church can be sited on high-value soils and within three miles of a UGB if the applicant demonstrates that an exception to the prohibition is warranted under the Goal 2 exceptions process. *See, e.g.,* OAR 660-033-0130(2). Petitioner cites to a portion of the legislative history of RLUIPA for the proposition that Congress did not intend RLUIPA to relieve religious institutions from applying for "variances, special permits, *exceptions*, hardship approvals or other relief provisions in land use regulations[.]" 146 Cong Rec S7776 (July 27, 2000) (emphasis added). We understand petitioner to argue that intervenor cannot demonstrate that the challenged land use prohibition on churches imposes a "substantial burden" for purposes of RLUIPA unless and until intervenor first exhausts all available exceptions or variances to that prohibition. Absent a demonstration to that effect, petitioner argues, the county has no authority to proceed further under RLUIPA and no basis to conclude, as it did here, that the challenged prohibition imposes a "substantial burden" on intervenor, much less to waive that prohibition and conclude that the proposed church is an outright permitted use.

Intervenor responds that the foregoing issue was not raised before the county during the proceedings below, and is thus waived pursuant to ORS 197.763(1) and 197.835(3).[7] On

---

[7] ORS 197.763(1) provides:

1 the merits, intervenor argues that nothing in the text of RLUIPA indicates that Congress
2 intended to require as a condition precedent to invoking the general rule that a person,
3 assembly or religious institution exhaust exceptions, variances or other forms of relief from a
4 land use regulation that imposes a "substantial burden" on religious exercise.

5 Petitioner replies that the foregoing issue was raised by petitioner in the following
6 letter submitted to the board of commissioners:

> 7 "It is our understanding that [the applicant] has not submitted an application
> 8 to site a church at the proposed location * * * but rather that the applicant has
> 9 appealed a 'request for interpretation' made by the Clackamas County
> 10 Planning Director and upheld by the County Hearings Officer * * *.
> 11 *Therefore, [we] note that this request for interpretation does not appear to*
> 12 *apply all of the land use regulations or siting standards applicable to a land*
> 13 *use application for a permit to site a church in Clackamas County, and thus*
> 14 *neither constitutes approval to site the proposed church or the sole basis for*
> 15 *approving a future application.*
>
> 16 "The applicant desires to build a church on high-value soils within three miles
> 17 of an urban growth boundary. While churches are allowed on some
> 18 agricultural lands, both the [ZDO] and Oregon law prohibit the siting of a
> 19 church on high-value soils or within three miles of an urban growth boundary.
> 20 *See* [ZDO] 401.04 and 401.05; OAR 660-033-0120 Table 1 and *OAR 660-*
> 21 *033-0130(2)*. Accordingly, the proposed church is not an allowed use on this
> 22 site." Record 108-09 (emphasis added, footnote omitted).

23 Petitioner contends that the emphasized portions of the above-quoted passage raise
24 the issue presented here. We disagree. The above-quoted passage is insufficient to apprise
25 the parties or the county that petitioner believes that RLUIPA includes an implicit exhaustion
26 requirement or that the county must consider an exception to the prohibition on churches on

---

> "An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

ORS 197.835(3) provides:

> "Issues [before LUBA] shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable."

high-value farmland and within three miles of a UGB, before it may apply RLUIPA and reach a conclusion that the statute is violated. At best, the above-quoted passage informs the county that it is engaged solely in an interpretation of the code and that, in petitioner's view, the county cannot in the present proceeding approve a permit to construct the proposed church outright without considering other "land use regulations or siting standards" that might apply. Nothing in the passage suggests what those standards might be, much less that the exceptions process at ORS 197.732, Goal 2, and OAR chapter 660, division 004 is one of those standards, even less that such a standard must be applied prior to invoking RLUIPA. Admittedly, the second paragraph cites OAR 660-033-0130(2), which, as discussed earlier, prohibits new churches within three miles of a UGB, unless an exception is taken. However, the context clearly indicates that the citation is to the prohibition, not to the exceptions process.

Finally, petitioner argues that the record is replete with references to Goal 3, and argues that the county should have been on notice that development of the subject property must be consistent with Goal 3, or subject to an exception to that goal. However, such general references are insufficient to put the county on notice that petitioner believed that consideration of an exception to Goal 3 was a condition precedent to invoking the general rule of RLUIPA.

Petitioner may well be correct that Congress did not intend RLUIPA to relieve religious uses from seeking relief from a land use restriction or prohibition, prior to challenging application of that restriction or prohibition under the statute. However, that issue was not raised below, and is not within our scope of review in this case.

B. ZDO Requirements

Petitioner also contends under this assignment of error that the county erred in failing to consider whether the church complies with all ZDO requirements, including site design

1 requirements at ZDO 804, that arguably apply or will apply to development of the proposed
2 church.[8]

3 Intervenor disputes that ZDO 804 or the other code requirements cited by petitioner
4 apply to development of the proposed church. Intervenor argues that "[t]he only way the
5 church will be sited is under RLUIPA, which does not require the county to apply ZDO 804
6 when alleviating the substantial burden on [intervenor's] religious exercise." Response Brief
7 15. If intervenor is arguing that once the county concluded that the prohibition on churches
8 must be lifted under RLUIPA the proposed church is permitted outright without further
9 county review under site design or other land use standards that would otherwise apply to
10 uses permitted in the EFU zone, we disagree. Even assuming that the code and rule
11 prohibition on churches is a "substantial burden" that must be lifted under RLUIPA, nothing
12 in RLUIPA suggests that the county must go further and relieve intervenor from obligations
13 to comply with other applicable land use standards that do not impose a "substantial burden."

14 That said, we do not understand the county to have declared *in this decision* that site
15 design or other land use standards applicable to development in the EFU zone are
16 inapplicable to development of the proposed church. The matter before the county was not
17 an application for development but rather a request for an interpretation of the county code,
18 specifically, a request to determine whether the code prohibition on churches can be applied
19 to the subject property in light of RLUIPA. In answering that question, we do not understand
20 the county's decision to go further to determine that no other land use standards apply to
21 development of the proposed church, once the code prohibition is lifted. Certainly, we are
22 not cited to any language in the county's decision that purports to make such a
23 determination. Presumably that determination will be made when a specific application is

---

[8] In our view, this issue was adequately raised in the above-quoted portion of petitioner's letter, at Record 108.

filed and acted upon. With that understanding, petitioner's arguments under this subassignment of error do not provide a basis for reversal or remand.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner contends that the county erred in concluding that the county code and rule prohibition on churches violates (1) the free exercise clause of the First Amendment to the United States Constitution and (2) the "discrimination and exclusion" clauses of 42 USC § 2000cc-(b).

A. Free Exercise Clause

The First Amendment, made applicable to the states through the Fourteenth Amendment, provides in relevant part that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof * * *."

The county's findings do not always clearly state whether the county is applying the "general rule" at 42 USC § 2000-cc(a), the "discrimination and exclusion" requirements at 42 USC § 2000-cc(b), the free exercise clause, or some combination of the three. The county's ultimate conclusion is that "[t]he prohibition in the county code on the establishment of the proposed church facilities on the subject land is contrary to the First Amendment and to RLUIPA." Record 19. As far as we can tell, that conclusion with respect to the First Amendment is based on the same line of reasoning the county applied with respect to RLUIPA. No party disputes that general approach, or argues that there is need to provide a separate analysis of the federal statutes and the free exercise clause in this case.

We also see no need for a separate analysis under RLUIPA and the free exercise clause in this case. The history of RLUIPA cited to us indicates that Congress intended RLUIPA to subject land use regulations to, if anything, *more* rigorous scrutiny than would apply under the free exercise clause, under current judicial tests. Putting aside for the moment the question of whether RLUIPA is constitutional and within Congressional

1 authority, it is doubtful given that history that a conclusion could be reached that a land use
2 regulation violates the free exercise clause but not RLUIPA. In other words, analysis under
3 RLUIPA would seem to be dispositive of any free exercise claim, or at least analysis of the
4 latter would appear to be duplicative or unnecessary. If a land use regulation survives under
5 RLUIPA, it will also necessarily survive free exercise scrutiny under current judicial tests. If
6 a land use regulation is found to violate RLUIPA, there is no need to conduct a separate
7 constitutional analysis.[9] For that reason, we follow the parties in focusing our attention on
8 RLUIPA.

9 **B. Equal Terms and Discrimination**

10 The county's decision appears to conclude that the code and rule prohibition on
11 churches on high-value farmland and within three miles of a UGB is inconsistent with the
12 "equal terms" provisions of 42 USC § 2000cc-(b)(1), and the nondiscrimination clause of
13 (b)(2).[10]

14 Few reported cases have addressed 42 USC § 2000cc-(b)(1) and (2), and their precise
15 meaning, relationship with each other, and relationship with the "general rule" at 42 USC §
16 2000cc-(a) are unclear. Some courts view 42 USC § 2000cc-(a) and (b) to be "operatively
17 independent" of one another. *Civil Liberties for Urban Believers v. City of Chicago*, 342 F3d
18 752, 762 (7th Cir 2003). Others view the nondiscrimination and exclusion clauses of 42
19 USC § 2000cc-(b) to be a subset of the general rule, addressing specific or particularly
20 egregious instances of substantial burdens imposed on religious exercise. *Vineyard Christian*

---

[9] There would be a need for First Amendment analysis only if we find that the challenged prohibition violates RLUIPA, but that RLUIPA is unconstitutional or otherwise invalid, as petitioner urges in the sixth assignment of error. However, for the reasons expressed below, we conclude that the record in this case does not establish that the challenged prohibition violates RLUIPA. For that reason, we do not reach the sixth assignment of error, and the issue of whether the challenged prohibition violates the free exercise clause independent of RLUIPA is, at best, premature.

[10] To the extent the county also concluded that the prohibition on churches impermissibly excludes religious assemblies for purposes of 42 USC § 2000-cc(b)(3), we address that issue below, in resolving the fourth assignment of error.

1 *Fellowship v. City of Evanston*, 250 F Supp 2d 961, 992 (ND Ill 2003). It seems reasonably
2 clear that the "equal terms" and nondiscrimination clauses codify at least aspects of existing
3 equal protection and free exercise jurisprudence. *Freedom Baptist Church v. Township of*
4 *Middletown*, 204 F Supp 2d 857, 869 (ED Pa 2002).

5 In the present case, the county evaluated the county code and rule prohibitions under
6 the "equal terms" provision of 42 USC § 2000cc-(b)(1), and to some extent, the
7 nondiscrimination clause of 42 USC § 2000cc-(b)(2), by comparing the land use regulations
8 governing the subject property with respect to churches and certain nonreligious assemblies
9 or uses, and determining whether any differential treatment is reasonably related to the
10 presumed purposes of the regulation. The county's decision appears to recognize that the
11 purpose of the two code and rule prohibitions at issue in this case includes (1) preservation of
12 high-value farmland for agricultural use and (2) separation of urban and rural uses.

13 The county decision first cites to several agricultural or quasi-agricultural uses or
14 structures that are allowed or conditionally allowed under the code and rule, notwithstanding
15 that development of such uses or structures might involve removing or covering high-value
16 soils, for example agricultural barns, container nurseries, wineries, farm stands, and
17 commercial activities in conjunction with farm use.[11] Such allowed uses can cover and

---

[11] The decision states, in relevant part:

> "* * * [T]he county code allows the high value soils on the subject EFU-zoned land to be scraped off for a container nursery, paved over for a winery or community center, farm stand, commercial activity in conjunction with farm use, or an expanded golf course, including a clubhouse. The county is concerned that under the *Cam [v. Marion County*, 987 F Supp 854 (D Or 1993)] rationale there is a lack of a rational nexus between allowing the subject land to be occupied by a building just like the one the church proposes to build, but to prohibit that building simply because it will be used as a church.
>
> "* * * * *
>
> "* * * [T]he building proposed for church services in this case looks like a large barn and, in fact, has an appearance very much like the barn next door that is allowed on the identical soils types at issue here. The proposed church building would occupy about the same space that could be occupied by a pole barn. The parking to be provided for the proposed church is the same parking that could be provided to any number of uses that are authorized in the EFU

1 hence remove high-value farmland from agricultural use to the same extent that the proposed
2 church would, the county reasons, and therefore allowing such uses undermines the
3 government's interest in preserving high-value farmland for agricultural use as much as
4 would allowing churches. The decision concludes that the only meaningful difference
5 between the proposed church and these allowed uses or structures is that the former involves
6 religious exercise.

7 The decision also notes that the county code and rule allow or conditionally allow
8 establishment or expansion of some non-agricultural uses or structures on high-value
9 farmland, and within three miles of a UGB, with characteristics and land use impacts that are
10 similar to churches. These uses or structures include community centers and expanded golf
11 courses. Again, the county concludes that the only significant difference between the
12 proposed church and such allowed or conditionally allowed non-agricultural uses is that the
13 former involves religious exercise. For these reasons, the county concludes, the county code
14 and rule prohibition on churches not only violates the "equal terms" provision of 42 USC §
15 2000cc-(b)(1), but it also singles out and discriminates against assemblies "on the basis of
16 religion," under (b)(2)[12]

> zone—a winery, farm worker housing, farm stand. Traffic impacts between some of those uses that the county's code allows and the church are outlined and explained in the uncontroverted traffic engineer's analysis.
>
> "It is troubling under a First Amendment as well as a RLUIPA analysis, that the proposed church building could be built on the same land with no land use prohibition, but for the stated purpose of study and worship of God inside the proposed building. The *only* difference established in the evidence in this case between the proposed structure and the barn next door, in fact, is that the church is for worshippers and the barn is for building materials and vehicles, among other things. Even if the barn next door were loaded with farm products, the impact to the land is the same. * * *." Record 12-13 (emphasis in original).

[12] The findings state, in relevant part:

> "The [board of commissioners] is uncomfortable under RLUIPA that its code allows community centers on the church's land but not a church, which performs the same general function and covers the same amount of land with a building. Read literally, RLUIPA prohibits the discrimination in the code favoring rural community centers but prohibiting churches on EFU land and the [board of commissioners] so finds. Finally, this reinforces another important point. That the same church could be allowed on the subject land if only

1 Petitioner challenges the county's comparison of the proposed church and uses or
2 structures allowed or conditionally allowed on the subject property. According to petitioner,
3 in each case the county's comparisons are flawed and fail to demonstrate that the code and
4 rule prohibition on churches on high-value farmland and within three miles of a UGB is
5 inconsistent with either 42 USC § 2000cc-(b)(1) or (2).

> the people associated with the church were not involved with religious programs or activities is also evidence that, in this case, it has not been demonstrated there is a compelling interest in protecting farm land for farm uses in this case.
>
> "The [board of commissioners] also is aware that RLUIPA [(b)(3)(B)] states: '[n]o government shall impose or implement a land use regulation that * * * unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.' The Board finds that it is unreasonable to make distinctions about structures that will be allowed on EFU zoned land simply based on whether people will pray inside them. A barn or winery or commercial activity in conjunction with farm use or a farm stand, or community center, expanded golf course, that occupies the same footprint as the proposed subject building and that has the same or greater number of traffic impacts, for example, would be allowed or allowable. This makes the prohibition on the church in this case unreasonable because under the code, it cannot be allowed under the code under any circumstance. *See Cam* * * * (conversion of barn to church on high value farmland cannot be prohibited under First Amendment – even under a rational basis test – the test most deferential to government).
>
> "The [board of commissioners] further notes RLUIPA section [(b)(2)] provides that local governments shall not 'impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.' This prohibition appears to be absolute and that the RLUIPA tolerates no discrimination.
>
> "The only characteristic that causes prohibition on construction of the proposed structure is the fact that people pray, sing to God, dance to God, and meditate with their God and their fellow congregants within the proposed building. Otherwise, the church is no different than a community center that would be allowed on the subject land and has fewer impacts than other allowed uses. This appears to be discrimination based on religion." Record 17-18 (footnotes omitted).

In a footnote attached to the last sentence in the above passage, the board of commissioners added:

> "The [board of commissioners] notes that there is no ascertainable difference experienced by the subject land whether the community center is occupied by rural versus urban people. While the evidence establishes that the church's congregation here is mostly from the small town of Molalla, its congregation [is] outside of the reach of the boundaries of the Metropolitan Portland area and is indisputably a rural congregation, and serves a function that is virtually no different than a rural community center is likely to serve in the same area." *Id.* n 6.

1 **1. Agricultural or Related Uses and Structures**

2 As the county's findings note, the county code and rule allow or conditionally allow a
3 number of farm uses and uses or structures related to farm use on high-value soils, including
4 barns, wineries, farm stands, and commercial activities in conjunction with farm use.[13]
5 Because development of such structures may cover as much high-value soil as would the
6 proposed church, the county reasons, the regulatory scheme irrationally treats churches on
7 unequal terms with non-religious uses, and in fact discriminates against religious uses.[14]

8 Petitioner argues that the county's reasoning fails to recognize that each of the cited
9 structures or uses directly or indirectly support agricultural use of agricultural land, and thus
10 development of such uses supports the policy underlying the challenged prohibition, to
11 preserve agricultural soils and particularly high-value farmland for agricultural use. Unlike
12 the cited structures or uses, petitioner argues, development of the proposed church neither
13 involves agricultural use nor supports such use, and is indeed inconsistent with such use.

14 We agree with petitioner that the comparisons drawn by the county fail to
15 demonstrate that the code and rule fail to treat religious uses on "equal terms" with

---

[13] The administrative rule provisions governing uses allowed in the EFU zone are contained in a table and are difficult to summarize. OAR 660-033-0120, Table 1. For present purposes, it is sufficient to note that the rule allows or conditionally allows establishment of the following agricultural or agriculture-related uses or structures on high-value soils and within three miles of a UGB: (1) farm use, (2) buildings customarily provided in conjunction with farm use, (3) wineries, (4) farm stands, (4) facilities for the processing of farm crops, and (5) commercial activities in conjunction with farm use.

[14] The county's comparisons of the proposed church with barns and other agriculture-related structures is accompanied by its comparison of the present facts with the facts and reasoning applied in *Cam v. Marion County*, 987 F Supp 854 (D Or 1993), a decision predating RLUIPA that evaluates under the free exercise clause an application of the same prohibition on churches on high-value soils at issue here. As discussed above, RLUIPA is *at least* as rigorous in protecting religious land uses as the free exercise clause under current jurisprudence, so the result and rationale in *Cam* have at least a potential bearing on resolution of the RLUIPA issues in this case. However, we agree with petitioner that the facts in *Cam* are sufficiently distinguishable that *Cam* is not particularly instructive in this case. *Cam* involved a proposal to use an existing barn as a church. The District Court reasoned that the barn already existed, so its conversion to a church would not involve further loss of high-value farmland to agricultural uses, and thus there was no rational connection to the policy of preserving high-value farmland for agricultural use and no rational basis to apply the prohibition on churches in that case. The present case involves establishment of a large new building with associated parking lots and athletic facilities that will indisputably result in the loss of high-value farmland on the property to future agricultural use.

1 nonreligious uses, or that the regulatory scheme to protect high-value farmland discriminates
2 against religious uses, within the meaning of 42 USC § 2000-cc(b). An agricultural structure
3 such as a barn has an obvious supportive and perhaps necessary relationship to agricultural
4 use of the property, including the high-value soils that must predominate on the subject
5 property in order for that property to constitute "high-value farmland," under the definition
6 of that term at OAR 660-033-0020(8). The fact that such a barn may have to cover a portion
7 of high-value soils in order to fulfill that supportive role does not detract from its primary
8 purpose in supporting agricultural use of the high-value soils that predominate the property.
9 Similarly, the wineries, farm stands and commercial activities in conjunction with farm use
10 that are allowed under ORS Chapter 215 are necessarily supportive of agricultural use of the
11 subject property and nearby agricultural lands.[15] In contrast, as petitioner points out,
12 development of a church and associated parking and recreational facilities on high-value
13 farmland has nothing to do with supporting agricultural use of farmland and, at least on a
14 relatively small property such as the subject property, is necessarily inconsistent with
15 agricultural use of the property. Prohibiting uses that are inconsistent with agriculture on
16 high-value farmland while allowing agricultural-supportive structures on high-value
17 farmland is rational and neither treats religious assemblies on unequal terms nor
18 discriminates against assemblies on the basis of religion.

---

[15] Development of a winery in the EFU zone is governed by standards at ORS 215.452, which require in relevant part that the winery be associated with either an on-site vineyard or a contiguous vineyard of specified sizes. Farm stands allowed by rule and statute must sell crops and livestock grown on the property or other farms in the local agricultural area. ORS 215.213(1)(u); 215.283(1)(r); OAR 660-033-0130(23). Commercial activities in conjunction with farm use must be in conjunction with farm use, or at least must enhance the farming activities of the local agricultural community. *Craven v. Jackson County*, 308 Or 281, 289, 779 P2d 1011 (1989).

1 **2. Non-Agricultural Uses and Structures**

2 As the findings note, the code and rule allow on high-value soils and within three
3 miles of a UGB a variety of permitted uses or conditionally permitted uses.[16] The county's
4 decision focuses on perceived similarities between the proposed church and some of these
5 allowed uses, particularly community centers and expansions of existing golf courses.

6 **(a) Expansion of Existing Uses**

7 The code and rule allow certain non-agricultural uses such as golf courses, churches
8 and schools that already exist on high-value soils to expand on the same tract. OAR 660-
9 033-0120, Table 1; OAR 660-033-0130(2) and (18). The county's decision concludes that
10 because both establishment of a new church and expansion of an existing golf course on
11 high-value soils would remove high-value farmland from agricultural use, there is no rational
12 basis to prohibit one but allow the other, for purposes of 42 USC § 2000cc-(b)(1) and (2).

13 We disagree. The county code and rule treat churches and golf courses precisely the
14 same with respect to location on high-value farmland. Establishment of either a church or
15 golf course is prohibited on high-value farmland, while expansion of an existing church or
16 golf course on the same tract is allowed. The county' s decision fails to establish that the
17 rule and county code treat churches on less than equal terms with golf courses or
18 discriminate against religious assemblies.

---

[16] Again, the administrative rule provisions governing non-agricultural uses allowed in the EFU zone are difficult to summarize. For present purposes, it is sufficient to note that the rule allows or conditionally allows establishment of the following non-agricultural uses or structures on high-value farmland: (1) public parks and playgrounds, (2) living history museum, (3) fire stations providing rural fire protection, and (4) community centers owned by a government agency or nonprofit organization and operated primarily by and for residents of the local rural community. The rule prohibits on high-value farmland the establishment of the following uses otherwise allowed in the EFU zone: (1) breeding, kenneling and training of greyhounds for racing, (2) dog kennels, (3) destination resorts, (4) solid waste disposal sites, (5) composting facilities, (6) public or private schools, (7) churches, (8) private parks, playgrounds, hunting and fishing preserves and campgrounds, and (9) golf courses. Notwithstanding the prohibition, each of the foregoing uses may be expanded on the same tract, if already existing. OAR 660-033-0130(18).

Table 1 together with OAR 660-033-0130(2) also prohibit establishment of (1) public or private schools or (2) churches within three miles of a UGB on any kind of farmland, unless an exception is approved. Existing schools and churches can be expanded on the same tract. OAR 660-033-0130(2).

1 **(b) Community Centers**

2 According to the county, the characteristics and land use impacts of the proposed
3 church and community centers are virtually identical, the only difference being that the
4 former involves religious exercise. The decision acknowledges that "community centers"
5 allowed by the county code and rule on high-value farmland and within three miles of a UGB
6 must be "operated primarily by and for residents of the local rural community," and that the
7 membership of the proposed church primarily resides within the city of Molalla. However,
8 the county attempts to minimize this distinction by finding that residents of cities outside the
9 metropolitan Portland area, such as the city of Molalla, are rural residents, and therefore
10 intervenor's congregation is "indisputably a rural congregation." Record 18, n 6. That being
11 the case, the county concludes, there is no rational basis to allow community centers but not
12 the proposed church.

13 Petitioner argues the record is clear that intervenor's membership is overwhelmingly
14 drawn from the city of Molalla and other non-rural areas, and thus the county erred in
15 concluding that the proposed church serves a "rural congregation." We agree. The county's
16 apparent conclusion that all lands outside the Portland metropolitan area are rural and the
17 residents of cities other than Portland are members of rural rather than urban communities is
18 inconsistent with the use of the term "rural" in the statewide planning goals and related
19 statutes. As a general matter, land outside a UGB is considered rural land, while land inside
20 a UGB is either urban or urbanizable.[17] *1000 Friends of Oregon v. LCDC (Curry Co.)*, 301
21 Or 447 498-99, 724 P2d 268 (1986). There is no dispute in the present case that the
22 intervenor's membership is primarily drawn from and serves residents of the city of Molalla.
23 Molalla may be a small city, but its residents are not considered "rural" for purposes of land
24 use planning under the statewide planning goals. Therefore the proposed church is different

---

[17] The statewide planning goals define "rural land" in relevant part as those lands "which are outside the urban growth boundary."

1 in one important respect from a community center, which is allowed only if "operated
2 primarily by and for residents of the local rural community."

3 The question then becomes whether, despite that distinction, the challenged land use
4 regulation can be said to treat intervenor's church on less than "equal terms" with community
5 centers allowed within three miles of the UGB, or otherwise discriminates on the basis of
6 religion, for purposes of 42 USC § 2000cc-(b)(1) and (2).

7 The county code and rule generally prohibit all "churches" within three miles of a
8 UGB, unless an exception is taken, regardless of whether that church serves an urban or rural
9 congregation, or some combination thereof. If it were the case that the proposed church
10 primarily served "residents of the local rural community" within the meaning of the rule, we
11 would likely agree with the county and intervenor that prohibiting such a church under the
12 county code and rule but allowing a community center on the subject property would fail to
13 treat a religious assembly on "equal terms" as a nonreligious assembly, and would thus
14 violate 42 USC § 2000cc-(b)(1). The same circumstances might also allow the conclusion
15 that application of the code and rule prohibition would discriminate against intervenor's
16 assembly "on the basis of religion" under 42 USC § 2000cc-(b)(2), because there would then
17 be no meaningful distinction between a community center and the proposed church other
18 than the fact that the latter is devoted to religious exercise.[18]

19 However, those are not the facts. We agree with petitioner that the prohibition on
20 churches within three miles of a UGB, like the identical prohibition on schools, is intended to

---

[18] The relationship between 42 USC § 2000cc-(b)(1) and (2) is not entirely clear to us. Arguably, the "equal terms" provision of 42 USC § 2000cc-(b)(1) is concerned with unequal treatment between *religious* and *nonreligious* assemblies or institutions, while the nondiscrimination provision of 42 USC § 2000cc-(b)(2) is concerned only with favorable or unfavorable treatment between assemblies or institutions "on the basis of religion or religious denomination." In other words, 42 USC § 2000cc-(b)(2) may be concerned with differential treatment among *religious* assemblies or institutions, not differential treatment of religious and nonreligious assemblies or institutions. Because we need not resolve this issue, we assume for purposes of this opinion that the regulatory concerns of 42 USC § 2000cc-(b)(1) and (2) at least partially overlap, and that unequal treatment of religious and nonreligious assemblies in violation of 42 USC § 2000cc-(b)(1) may also violate 42 USC § 2000cc-(b)(2).

1 help preserve the urban-rural boundary protected by Goal 14, by limiting urban uses on rural
2 land close to UGBs. The purpose of those prohibitions seems relatively clear: to support the
3 function of UGBs by discouraging the establishment of religious assemblies and schools on
4 rural lands just outside the UGB. Such lands are often if not invariably less expensive to
5 acquire and develop than lands within the UGB. But for the prohibition, it is reasonable to
6 suppose that at least some religious assemblies and schools that primarily serve an urban
7 population and that would otherwise remain or locate within the UGB would instead choose
8 to locate on EFU-zoned lands just outside the UGB, where schools and churches are
9 otherwise permitted. Indeed, the present case appears to represent the very scenario that the
10 county code and rule prohibition on churches within three miles of the UGB is designed to
11 discourage.
12 The rule provision for community centers "operated primarily by and for residents of
13 the local rural community" does not implicate these same policy concerns. Therefore, as
14 applied to the facts of this case, the prohibition on churches within three miles of a UGB
15 does not treat the proposed church on less than "equal terms" with community centers, for
16 purposes of 42 USC § 2000cc-(b)(1).[19] For the same reason, we do not believe that the
17 prohibition on churches within three miles of a UGB discriminates against intervenor "on the
18 basis of religion," for purposes of 42 USC § 2000cc-(b)(2). The county erred in concluding
19 otherwise.
20 The second assignment of error is sustained.

[19] Given that conclusion, we need not address whether a different conclusion might be reached on different facts, for example, if only the prohibition on churches on high-value farmland were involved here, and the prohibition on churches within three miles of a UGB did not apply. Those prohibitions rest on different, but congruent policy bases, and if either one passes muster under 42 USC § 2000cc-(b)(1) and (2), there is no need to address the other.

THIRD ASSIGNMENT OF ERROR

Petitioner contends that the county erred in applying the "general rule" at 42 USC § 2000cc-(a). According to petitioner, the "general rule" applies by its terms only when triggered by one or more of the following circumstances: (1) the substantial burden is imposed by a program receiving federal financial assistance, (2) the burden affects interstate commerce, or (3) the 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." (Emphasis added).

Petitioner argues that the code and rule prohibition on churches on high-value farmland and within three miles of a UGB does not require or allow the county to make an "individualized assessment" of the proposed church, and thus there is no trigger or basis to apply the general rule. Petitioner notes that, unlike the discretionary site design and conditional use criteria found to require an "individualized assessment" and trigger the general rule in *Corporation of the Presiding Bishop v. City of West Linn*, 45 Or LUBA 77 (2003) *appeal pending* (A122194), the code and rule prohibition at issue here is a flat prohibition that requires no discretionary assessment whatsoever. Only if the applicant sought an exception to that prohibition under ORS 197.732, Goal 2 and OAR chapter 660, division 004, petitioner argues, would the county make an "individualized assessment" and thus potentially trigger application of the general rule. Because the general rule has not been triggered in this case, petitioner contends, the only potentially applicable provisions of RLUIPA are the discrimination and exclusion clauses of 42 USC § 2000cc-(b).

Intervenor responds that the county relied not only on the "individualized assessment" prong of 42 USC § 2000cc(a)(2)(C) to trigger the general rule, but also the "federal financial assistance" and "commerce" provisions. According to intervenor, the

county made an unchallenged finding that the present case "involves all three of these triggers." Record 8, note 2.

On the merits, intervenor argues that the county properly concluded that the present case involves a land use regulation or system of land use regulations under which the county makes an "individualized assessment" of the proposed use of land on the subject property. According to intervenor, the application of EFU zoning itself to the subject property was a discretionary decision that was sufficient to trigger scrutiny under RLUIPA. Further, intervenor argues that it sought an interpretation of the county code under county land use procedures that required a quasi-judicial hearing, adoption of findings, and application of law to the facts submitted during that hearing. In providing that interpretation, intervenor argues, the county necessarily made an "individualized assessment" within the meaning of 42 USC § 2000cc-(a)(2)(C). Finally, intervenor argues among the issues raised below was whether the proposed church qualified as a "community center" or an expansion of the existing dwelling on the subject property, both of which are allowed or conditionally allowed. While the hearings officer rejected those arguments and the board of commissioners did not reach them, intervenors contend that resolution of those issues necessarily requires the type of "individualized assessment" that triggers the general rule.

Petitioner may well be correct that a flat zoning code prohibition is not the type of land use regulation that requires the local government to make an "individualized assessment" of the proposed uses of the property, for purposes of 42 USC § 2000cc-(a)(2)(C), and therefore the general rule is not triggered in this case by that statutory provision. However, the county made an unchallenged finding that all three triggers at 42 USC § 2000cc-(a)(2) are present in this case. While it is not at all clear to us that the "federal financial assistance" and "commerce" triggers are applicable here, absent some explanation from petitioner as to why they are not, or some challenge to the county's finding that they are, we have no sufficient basis to conclude otherwise. Accordingly, petitioner's

argument that the challenged prohibition does not require "individualized assessment" and thus does not trigger the general rule under 42 USC § 2000cc-(a)(2)(C), even if correct, does not provide a basis for reversal or remand in this case.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioner argues that even if the general rule at 42 USC § 2000cc-(a) is triggered, the county erred in concluding that the code and rule prohibition on churches on high-value soils and within three miles of a UGB placed a "substantial burden" on intervenor's religious exercise.

RLUIPA does not define the term "substantial burden." However, that term is a familiar one under free exercise jurisprudence. *See, generally, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 US 520, 124 L Ed 2d 472, 113 S Ct 2217 (1993). Petitioner cites to legislative history of RLUIPA indicating that Congress did not intend that term to be given a larger scope than accorded it under free exercise jurisprudence. *See* 146 Cong Rec 7774-01, 7776 ("The term 'substantial burden' as used in this Act is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden or religious exercise"). Under free exercise jurisprudence, petitioner argues, a "substantial burden" on religion is one that "necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—effectively impracticable." *Civil Liberties for Urban Believers*, 342 F3d at 761.

In the present case, petitioner argues, the county's finding of "substantial burden" rests entirely on its conclusion that intervenor cannot locate the proposed church on any other property that is not subject to the county code and rule prohibition.[20] In turn, that

---

[20] The county's decision recites testimony that the site and building in which intervenor currently conducts functions and services are inadequate in size and capability. The county found that intervenor requires a new

1 conclusion rests on testimony from intervenor's representatives to the effect that the scarcity
2 of suitable lands (1) within the City of Molalla UGB or elsewhere not subject to the
3 prohibition and (2) within intervenor's price range makes it impossible for intervenor to
4 locate the proposed church within the UGB. Petitioner contends that that evidence boils

---

14,500-square foot facility, with more adequate parking and athletic facilities not available at its current site. In addition, the county found:

> "The record establishes that there is no other land upon which the church can build its required religious facilities that meets the church's space and location requirements, that does not also suffer from the same EFU-related zoning problems as the subject land. The hearings officer specifically found based on substantial evidence in the record the church has no choice but the subject land on which to build its church and there is no evidence in the record to the contrary. * * * The [board of commissioners] concurs with this finding of the hearings officer based on the evidence in the record in this case. The [board of commissioners] is persuaded that there is simply no other land available that meets the church's location and site specification needs.
>
> "* * * The church has established (1) it bought the subject property for the purpose of constructing a church and needed facilities, such as youth activity space, (2) its existing facility is overcrowded, people are leaving and not attending church because they cannot find a place to park and a new facility is desperately needed, (3) there is no other property that would also meet the church's needs that is now for sale and no such alternative property was for sale when the church purchased the subject property, (4) what land that is now for sale is either [high-value farmland] or ill-suited for the church's needs as to be unable to satisfy the church's needs or suffers the same zoning challenges as the subject [property]." Record 5-6.

In addition, the county found:

> "If the church is not allowed to be built on the subject land, the evidence establishes the church will not be able to achieve its mission. It will be unable in its existing space to accommodate its members, bring in new people, to serve the needs of both for religious guidance and religious programs and activities. Further, the county finds that the burden of delay in this case, in not allowing the church to be built on the subject land or in demanding the church sell its land it acquired to build a church, find another place to build a church on and gain approval at such other site, is a heavy one—even assuming there was somewhere else for the church to be built. As the evidence establishes, there is no other location that meets the church's needs that is not also burdened by the same or similar EFU zoning problems as the subject [property]. The county will not second guess or supply the criteria for the selection of land needed for construction of a church. The county accepts the church's locational and size criteria." Record 9.

The hearings officer's findings state in relevant part:

> "* * * The Applicant's ability to locate its church is very limited due to the geographic distribution of its members and the limited financial resources of the church. See attachments C and Q of Exhibit 20. Based on a preponderance of the substantial evidence in the record, there is no place where the Applicant can site its church except on high value farmland in the EFU zone and/or within three miles of an urban growth boundary." Record 132.

1 down to the assertion that land within the UGB with the size and characteristics the church
2 desires is too expensive for the church to purchase. According to petitioner, that evidence is
3 insufficient as a matter of law to establish that the code and rule prohibition impose a
4 "substantial burden" on intervenor's free exercise rights.[21]

---

[21] The evidence cited by the hearings officer and relied upon by the county consists of a letter from intervenor's pastor, with attachments. The letter describes the church's locational needs, its financial constraints, and the search it underwent for a suitable site it could afford:

> "With the beginning of 1991, [we] began to recognize the seriousness of our land-locked position and realized the need to relocate. A task force was mobilized. In March of 1991 we acknowledged the need for a larger facility. We looked at the possibility of buying adjacent property [to the current church site] but the cost for such a small area was not feasible and nothing was available in any event. * * * The task force established the specific geographic and locational needs for our new church in order to serve our members and to grow as we know we should in Christ. We decided that our needs were to locate on the western edge of the city, and still remain close to Molalla. We want our families and the youth * * * to find it convenient to use our facility. It is also imperative that we be highly visible to drive-by traffic.
>
> "We absolutely do not want our children and grandchildren to go through this same legal process in a decade or two. Therefore, we require a minimum of 10 acres for our current program and the future needs of our descendents. The market value of suitable-sized property prohibits us from locating within the [UGB]. We searched for over 5 years and could find nothing within our financial ability. We were totally unable to pay more than what we paid for our existing real estate. [The subject property] that we own is ideal.
>
> "* * * * *
>
> "* * * On May 10, 1992, three pages were presented of potential sites (attached), most of which were not for sale. What was found was 6.21 acres in the Liberal area with 900 ft. of frontage on Molalla Ave. (price $115,000); Ridings Estate property on Molalla Ave. and Vick Rd.; Property on 213 near Keegan's corner; and a few others. None of these properties met our needs. The subject property met our needs perfectly. It was large enough for a pastoral setting to provide a sense of sanctuary to our members; for a new building large enough for our church's existing and projected growth; for play areas for our youth, and adequate parking. It is a location about .83 miles from the existing UGB of Molalla. It is visible from the Highway in and out of Molalla, it is visible from the area where the city has stated its UGB could go (Vick Road).
>
> "Our church has an annual budget of approximately $160,000 with two full-time and two part-time staff members. We give 15% of our offerings away to help others. When the subject [property] was purchased in 1997, we paid $250,000. Our payment is around $2,100 per month. The house and property rents for $1,400 per month when we can rent it. It has been very difficult for us to make up the $700+ per month difference. Our present Church property at 3rd and Berkeley in Molalla is given a real estate market value of $848,795 by Clackamas County. If we were to sell our current Church property, which is debt free, for 70% of [real-market value], we would have approximately $600,000 to pay off the $190,000

1 Petitioner is correct that under current free exercise jurisprudence, most courts have
2 declined to find that financial and other market-related difficulties a religious institution may
3 have in acquiring property within a jurisdiction to construct a religious building constitute a
4 "substantial burden." In *Civil Liberties for Urban Believers*, a consortium of churches
5 challenged a city zoning scheme that allowed churches within a majority of the zoning
6 districts in the city. The plaintiffs argued that the "scarcity of affordable land" in such zones,
7 combined with the costs of obtaining required permits, imposed a substantial burden on
8 religious exercise under the free exercise clause and the 42 USC § 2000cc-(a) "substantial
9 burden" test. The court disagreed:

10 * * * [W]e find that these conditions--which are incidental to any high-density
11 urban land use--do not amount to a substantial burden on religious exercise.
12 While they may contribute to the ordinary difficulties associated with location
13 (by any person or entity, religious or nonreligious) in a large city, they do not
14 render impracticable the use of real property in Chicago for religious exercise,
15 much less discourage churches from locating or attempting to locate in
16 Chicago. *See, e.g., Love Church v. City of Evanston*, 896 F2d 1082, 1086 (7th
17 Cir 1990) ('Whatever specific difficulties [plaintiff church] claims to have
18 encountered, they are the same ones that face all [land users]. The harsh
19 reality of the marketplace sometimes dictates that certain facilities are not
20 available to those who desire them'). Significantly, each of the five individual
21 plaintiff churches has successfully located within Chicago's city limits. That
22 they expended considerable time and money so to do does not entitle them to
23 relief under RLUIPA's substantial burden provision. *See, e.g., Stuart Circle
24 Parish v. Board of Zoning Appeals of Richmond*, 946 F Supp 1225, 1237 (ED
25 Va 1996) ('It is well established that there is no substantial burden placed on
26 an individual's free exercise of religion where a law or policy merely
27 'operates so as to make the practice of [the individual's] religious beliefs more
28 expensive.'') (quoting *Braunfeld v. Brown*, 366 US 599, 605, 6 L Ed 2d 563,
29 81 S Ct 1144 (1961) (plurality opinion)). Otherwise, compliance with

---

mortgage on the subject [property] and have money for the improvements we plan to make to build a church.

"However, it would be a tremendous burden to us to not be able to use our property to build a new church home. We cannot afford to buy other property and the market for the property we own now is non-existent. * * * We can only move to the land we own because we cannot afford to buy another property. As also noted, our financial situation reflects our modest member demographics. If we do not move to our new location we fear our congregation will diminish, potentially to the point where it is not feasible for us to worship together as God requires. This is a serious matter." Record 319-323.

1 RLUIPA would require municipal governments not merely to treat religious
2 land uses on an equal footing with nonreligious land uses, but rather to favor
3 them in the form of an outright exemption from land-use regulations.
4 Unfortunately for Appellants, no such free pass for religious land uses
5 masquerades among the legitimate protections RLUIPA affords to religious
6 exercise." 342 F3d at 761-62.

7 Similarly, in *Vineyard Christian Fellowship*, the plaintiff church acquired property on
8 which it proposed to build a church, in a zoning district that prohibited churches. The city's
9 zoning code allowed churches in other zones comprising about 90 percent of the city. The
10 plaintiff argued that the scarcity of affordable land with the desired characteristics in zones
11 where churches were allowed imposed a "substantial burden" under the free exercise clause
12 and 42 USC § 2000cc-(a), and therefore the city could not apply the regulations governing
13 the subject property to prohibit the proposed church. Citing a number of free exercise cases,
14 the court disagreed, holding that neither the free exercise clause nor RLUIPA provide a
15 religious congregation the right to build a church in a zone where it is prohibited, where
16 churches are allowed in other zones, notwithstanding the expense or inconvenience of
17 locating the church where it is allowed. 250 F Supp 2d at 986, 991-92. *See also Petra*
18 *Presbyterian Church v. Village of Northbrook*, 2003 US Dist LEXIS 15105, No. 03 C 1936,
19 2003 WL 22048089 (ND Ill Aug. 29, 2003) (notwithstanding financial and other difficulties
20 of acquiring property in the 70 percent of the city where churches are allowed, a zoning
21 prohibition on churches on property owned by plaintiff does not constitute a substantial
22 burden under the free exercise clause or RLUIPA).

23 Under these cases, petitioner argues, it is clear that the relative expense or difficulty
24 of obtaining land to construct a church in areas zoned for churches is not itself a substantial
25 burden under RLUIPA's general rule, and that such circumstances do not provide a religious
26 institution a free pass to build a church on land where that use is prohibited. According to
27 petitioner, there is no evidence in the present record establishing that, if intervenor's
28 particular financial constraints are removed from consideration, suitable land within the city

1 of Molalla UGB or outside the UGB not subject to the code and rule prohibition is
2 unavailable. Absent such evidence, petitioner argues, intervenor has not and cannot establish
3 that the prohibition on developing a church on the subject property "substantially burdens"
4 intervenor's religious exercise, within the meaning of 42 USC § 2000cc-(a)(1).

5 Intervenor responds that it met its burden of proof to establish that the challenged
6 prohibition "substantially burdens" intervenor's exercise of religion. Intervenor first argues
7 that, whatever the state of evidence with respect to alternative locations, the mere fact that
8 the code and rule prohibit establishment of a church on the subject property is itself a
9 "substantial burden" on religious exercise. According to intervenor, RLUIPA departs from
10 traditional free exercise jurisprudence in defining "religious exercise" to include the "use,
11 building or conversion of real property for the purpose of religious exercise[.]" 42 USC §
12 2000cc-(5)(7)(B). *See Elsinore Christian Center v. City of Lake Elsinore*, 2003 US Dist
13 LEXIS 24058, No. CV 01-04842 SVW (CD Cal Aug. 21, 2003) (the broad RLUIPA
14 definition of "religious exercise" establishes a new and different standard than employed
15 under free exercise clause jurisprudence; under that new standard, the city's denial of a
16 conditional use permit to relocate a church is a "substantial burden").

17 Even if the code and rule prohibition is not *per se* a "substantial burden," intervenor
18 argues that the record supports the county's finding that there is no other suitable property in
19 the area, and that forcing intervenor to sell the subject property and start searching anew
20 would, itself, be a substantial burden.

21 We disagree with intervenor that the county code and rule prohibition is *per se* a
22 substantial burden under RLUIPA. Nothing in the statute supports that view, which would
23 go far beyond free exercise jurisprudence, and eliminate much of the traditional discretion
24 local governments have exercised in enacting zoning regulations. Indeed, by negative
25 inference 42 USC § 2000cc-(b)(3) allows local governments to impose "reasonable" limits
26 on religious assemblies within its jurisdiction, as long as the local government does not

1 totally exclude such assemblies. Whatever the relationship between the general rule and the
2 discrimination and exclusion provisions of 42 USC § 2000cc-(b), that language does not
3 suggest that Congress intended RLUIPA to require local governments to allow churches in
4 all zones within its jurisdiction, or to prohibit local governments from excluding churches
5 from some zoning districts.
6 Finally, although we do not need to address the constitutionally of RLUIPA in this
7 opinion, as we suggested in *Corporation of the Presiding Bishop*, the more RLUIPA is
8 interpreted to depart from free exercise jurisprudence and to mandate preferential treatment
9 for religious uses, the more likely RLUIPA is to run afoul of the First Amendment
10 establishment clause, and other limitations on Congressional authority.
11 Turning to the question of the meaning of "substantial burden" under RLUIPA,
12 nearly all of the federal cases cited to us that have addressed that question have resolved it
13 based on free exercise jurisprudence. As we understand those cases, a demonstration that a
14 zoning prohibition on a particular property owned by a religious assembly imposes a
15 substantial burden under the general rule requires evidence that the jurisdiction's zoning
16 scheme as a whole fails to provide adequate opportunity to site a church within the
17 jurisdiction. The actual financial circumstances of the assembly, or its financial ability to
18 acquire land on which churches are allowed, has no particular bearing on that issue as long as
19 the zoning scheme as a whole provides an adequate opportunity to site a church. *See*
20 *Vineyard Christian Fellowship*, 250 F Supp 2d at 987 (monetary and logistical burdens in
21 renting facilities to conduct services in one of the many zones where churches are allowed is
22 not a substantial burden that would require the city to allow a church on land where churches
23 are prohibited). Similarly, market-based constraints that apply equally to religious and
24 nonreligious land users, such as the burden and cost of searching for and acquiring suitable
25 land within a jurisdiction, are insufficient to constitute a substantial burden. *See Petra*
26 *Presbyterian Church*, slip op 31 (the cost of finding suitable land zoned for church use

1 within a city does not demonstrate a substantial burden, where such costs equally affect non-
2 religious membership organizations). While it is reasonably clear that a local government
3 has an obligation under the free exercise clause and RLUIPA to adopt a zoning scheme that
4 provides adequate opportunities for siting religious assemblies within its jurisdiction, it is
5 much less clear that, having done so, a local government has the *further* obligation to ensure
6 that religious assemblies can acquire land they desire at a price they desire.[22]

7 We agree with petitioner that, under traditional free exercise jurisprudence and
8 RLUIPA, the fact that intervenor may have to compete in the market place with other
9 potential developers of land within or outside the UGB, and that intervenor may have to pay
10 more than it might wish for such land, or obtain a less than ideal property due to its financial
11 circumstances, has no particular bearing on the question of whether a zoning prohibition on
12 churches imposes a substantial burden on intervenor's religious exercise. As explained, the
13 proper question is whether the zoning scheme as a whole provides an adequate opportunity to
14 site a religious assembly within the pertinent jurisdiction. Similarly, that intervenor has
15 already bought the subject property and might have to sell it if it cannot develop the land for
16 a church is not a proper consideration. That is a consequence of intervenor's choice.
17 Additionally, the fact that an otherwise suitable property is or is not listed for sale at the time
18 intervenor made its purchase or at the time the county made its decision has no bearing on
19 the question.

20 The county's finding that there is no other property on which intervenor could build
21 its church, and hence that the prohibition "substantially burdens" intervenor, is based on
22 evidence that is deficient and misdirected, under the foregoing cases. There is no evidence
23 regarding the zoning scheme of the City of Molalla, or the supply of land within its UGB that

---

[22] We note that a dissent filed in *Civil Liberties for Urban Believers* argues, based on equal protection principles, that local governments may have such an obligation, as otherwise the zoning scheme inadvertently discriminates against newly established religious sects and in favor of well-established religious sects, which may have acquired land cheaply generations ago. 342 F3d at 770 (J. Posner, dissenting).

could be developed or redeveloped with churches. Similarly, there is no evidence regarding the county's zoning scheme, or the supply of land zoned for churches within a reasonable distance of intervenor's congregation. At best, the evidence submitted by intervenor demonstrates that in the early 1990s intervenor examined a number of properties within and outside the UGB, and rejected all of them except the subject property for a variety of (largely unstated) reasons, including cost. Record 325-328. Intervenor later examined an additional seven properties that were for sale in November 2002, and rejected them for several reasons, including cost. Record 472. That evidence is insufficient as a matter of law to demonstrate that the challenged prohibition on establishing a church on intervenor's property "substantially burdens" intervenor's religious exercise rights under the general rule.[23]

The fourth assignment of error is sustained.

FIFTH ASSIGNMENT OF ERROR

Petitioner challenges the county's findings that the county lacks a compelling governmental interest in the prohibition or that, even if it does, the prohibition does not further that interest. Given our conclusions under the fourth assignment of error that intervenor failed as a matter of law to establish that the challenge prohibition "substantially burdens" intervenor under the general rule, there is no need to reach or resolve these assignments of error.

SIXTH ASSIGNMENT OF ERROR

Finally, petitioner argues that RLUIPA is unconstitutional or exceeds Congressional authority. Given our conclusions under the second and fourth assignments of error that the county erred in waiving the challenged prohibition under RLUIPA, there is no need to reach or resolve the sixth assignment of error.

---

[23] To the extent the county also concluded that the prohibition "unreasonably limits religious assemblies, institutions, or structures within a jurisdiction" under 42 USC § 2000cc-(b)(3)(B), the cited evidence is also insufficient to support that conclusion.

1 **CONCLUSION**

2 Petitioner requests that the county's decision be reversed or remanded. LUBA must
3 reverse a land use decision when the local government exceeds its jurisdiction, the land use
4 decision is unconstitutional, or the decision "violates a provision of applicable law and is
5 prohibited as a matter of law." OAR 661-010-0071(a)-(c). LUBA must remand a land use
6 decision where, in relevant part, the decision "improperly construes the applicable law, but is
7 not prohibited as a matter of law." OAR 661-010-0071(2)(d). While the county made
8 several interpretational errors and the current record does not support a conclusion under
9 RLUIPA that the challenged prohibition substantially burdens intervenor, we cannot say that
10 the county's decision is "prohibited as a matter of law." Accordingly, remand is the
11 appropriate disposition.

12 The county's decision is remanded.