

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 CATHOLIC DIOCESE OF BAKER,
5 *Petitioner,*

6
7 vs.

8
9 CROOK COUNTY,
10 *Respondent.*

11
12 LUBA No. 2009-071

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from Crook County.

18
19 Jeffrey M. Wilson, Prineville, filed the petition for review and argued on behalf of
20 petitioner. With him on the brief was Miller Nash LLP.

21
22 Brian I. Branch, Assistant County Counsel, Prineville, filed the response brief and
23 argued on behalf of respondent. With him on the brief were David M. Gordon and Heidi
24 T.D. Bauer.

25
26 HOLSTUN, Board Member; BASSHAM, Board Chair; RYAN, Board Member,
27 participated in the decision.

28
29 AFFIRMED

12/07/2009

30
31 You are entitled to judicial review of this Order. Judicial review is governed by the
32 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a county decision that denies its request for site plan approval for an office building in an exclusive farm use (EFU) zone.

FACTS

Petitioner Diocese of Baker is a Roman Catholic diocese comprised of 17 counties located east of the Cascade Mountains.¹ At the heart of this appeal is a dispute between petitioner and the county over a proposed 7,213 square foot “pastoral center” to be located on EFU-zoned property in Powell Butte.² Powell Butte is a rural unincorporated area located east of the City of Redmond, southwest of the City of Prineville and northeast of the City of Bend. The proposed pastoral center would house offices for a number of diocesan functions and also would house offices for the retreat center that is located at petitioner’s Powell Butte property.³

¹ A “diocese” is “the circuit or extent of a bishop’s jurisdiction.” *Webster’s Third New Int’l Dictionary*, 636 (1981).

² Petitioner refers to the proposed office building as a “pastoral center” and in this opinion we generally refer to the proposed building in that manner as well. Petitioner proposed a nearly identical office building in 2007 and at that time referred to the proposal as a “chancery.” Webster’s definitions of “chancery” include the following: “c: the office in which the business of a diocese is transacted and recorded.” *Webster’s Third New Int’l Dictionary*, 373 (1981).

³ According to the application, the pastoral center would include the following:

“Ministry to Hispanics and Immigrants

“Ministry to Youth and Young People

“Ministry to Marriage and Family Life

“Catechetical Ministry

“Pastoral Support to Catholic Schools

“Ministry of Evangelization

“Pro-Life Ministry

1 In 2007, petitioner sought approval for a “chancery” and a number of other uses on its
2 Powell Butte property. *See* n 2. In its 2007 decision the county granted petitioner approval
3 for a 3,223 square foot chapel, a 3,234 square foot bishop’s residence, an 8,216 square foot
4 retreat center conference building, a 2,112 square foot retreat center staff house, five 432
5 square foot retreat center cabins, ten recreational vehicle (RV) spaces and a bath house.⁴
6 Although the retreat center would operate on weekends and in the evenings throughout the
7 year, its operation would be busiest in the summer when it would also operate on weekdays
8 as well. The chapel would be available to retreat center attendees for religious services.
9 Other retreat center functions, including food preparation and meals, would generally occur
10 in the retreat center conference building. The other retreat center buildings would be
11 available to house permanent and temporary retreat staff and retreat attendees.

12 The county relied on several legal theories in approving the above-described proposal
13 in 2007. We list each of those legal theories and the buildings they were applied to below:

“Fostering Gospel Values in the use of Time, Talent and Treasure (Stewardship)

“Church and Retreat Center Pastoral Staff

“Church and Retreat Center Administration

“Church and Retreat Center Finance Office

“Bishop’s * * * Office

“Bishop’s * * * Secretary

“Bishop’s * * * Staff

“A Copy and Technology Center

“A filing and Record Storage component

“Shared support Staff for the above named Ministries” Record 1119.

⁴ Sometimes the retreat center conference building, retreat center staff house, the RV spaces, the cabins and the bath house are referred to collectively as the retreat center.

<u>Legal Theory</u>	<u>Building</u>
EFU zone replacement dwelling. ⁵	The bishop’s residence.
Church in an EFU zone. ⁶	The chapel.
Community Center. ⁷	The retreat center conference building.
Campground. ⁸	RV spaces, bath house, retreat center staff house, retreat center cabins.

9 In its 2007 decision, the county denied petitioner’s request for approval of the
10 chancery. Although some of the religious and administrative functions that petitioner
11 proposed to house in the chancery would support the retreat center and chapel, in part, those
12 religious and administrative functions would also serve parish churches throughout the 17-
13 county diocese. Although the diocesan chancery was formerly located in Baker City, close
14 to the diocesan cathedral, the chancery was moved from Baker City to the City of Bend in
15 1987 and now operates in an industrial district in Bend. The effect of petitioner’s proposal
16 would be to move the diocesan chancery from its current location in Bend to the subject
17 Powell Butte property next to the retreat center, chapel and bishop’s residence. In denying

⁵ Under ORS 215.283(1)(s), certain lawfully existing dwellings in EFU zones can be replaced.

⁶ Under ORS 215.283(1)(b), “[c]hurches” are a permitted use in EFU zones.

⁷ Under ORS 215.283(2)(e), the following use is conditionally allowed in EFU zones: “Community centers owned by a governmental agency or a nonprofit community organization and operated primarily by and for residents of the local rural community.” In approving the retreat center, the county actually applied two legal theories:

“[T]he Community Center element, while not being primarily by and for local residents as required by ORS 215.283(2)(e), may serve local residents in some form and such a use would be allowed outright pursuant to ORS 215.441 as an ‘activity customarily associated with the practices of the religious activity’.” Record 1239.

ORS 215.441 is the key statute in the present appeal and we set out and discuss the text of that statute later in this opinion.

⁸ Under ORS 215.283(2)(c) “campgrounds” are conditionally allowed in EFU zones.

1 petitioner's request for approval of the chancery in 2007, the county provided the following
2 explanation for its decision:

3 "[T]he Chancery, an administration and business office of the Diocese, is not
4 an outright or conditional use in the EFU zone or an 'activity customarily
5 associated with the practices of the religious activity' under ORS 215.441.
6 * * *" Record 1239.

7 In its petition for review, petitioner explains that it chose not to appeal the county's
8 2007 denial of the chancery and attempted to operate the retreat center without the proposed
9 chancery component. However, petitioner contends that it has been unsuccessful in that
10 effort, and for that reason it again sought approval for the chancery, now called a pastoral
11 center, in 2008.

12 In its decision denying petitioner's 2008 application for approval of the pastoral
13 center, the county rejected petitioner's argument that the application must be approved under
14 ORS 215.441 or the Religious Land Use and Institutionalized Persons Act (RLUIPA). 42
15 USC §§ 2000cc to 2000cc-5 (2000). This appeal followed.

16 **FIRST ASSIGNMENT OF ERROR**

17 In its first assignment of error, petitioner contends that one of the county
18 commissioners has an actual conflict in this matter and is biased against petitioner. Given
19 that conflict and bias, petitioner alleges the county commissioner should not have
20 participated in this matter and that remand is required so that the county can render a
21 decision without that county commissioner's participation.

22 The county commissioner apparently expressed some surprise when he learned of
23 petitioner's second application in 2008.⁹ The commissioner owns property that is 700 feet

⁹ Petitioner includes the following argument in the petition for review:

 "[The commissioner] demonstrated a strong emotional commitment in opposition to the development by showing up in the Crook County Planning Director's office and expressing his opposition to the application." Petition for Review 7.

1 from petitioner's Powell Butte property, at its closest point. Record 95. The county
2 commissioner's home is approximately 1.2 miles from petitioner's Powell Butte property.
3 Record 65. The county commissioner's wife appeared before the planning commission and
4 testified in opposition to the proposal. Although the county commissioner did not appear
5 before the planning commission or oppose the proposal at the planning commission hearing
6 at which the county commissioner's wife opposed the proposal, the county commissioner
7 attended that hearing with his wife.

8 The minutes of the May 6, 2009 County Court hearing reflect the following
9 disclosure after the county commissioner's impartiality was challenged by petitioner below:

10 "[The commissioner] agreed that his wife did testify on her own accord. He
11 said his property is close, 700 feet, but his home is 1.2 miles away and has no
12 view of the property. He said he doesn't remember what he might have said
13 or gestured. He did speak with [the] Planning Director * * * and said he is
14 quoted as saying he couldn't believe it was being filed again. [The
15 commissioner] said he thinks he could say he was surprised that the Diocese
16 was filing again and that this statement should not be interpreted as a
17 negative.

18 "[The commissioner] said that regarding the effect on his property and the
19 ability to farm, he has always believed that farming and development can
20 interact together. He said he did attend the hearing at the Planning
21 Commission and believes as an officer of the County that he is better
22 informed by attending.

23 "[The commissioner] stated that he believes Crook County would not be
24 threatened by his participation, and he believes he doesn't come with bias. He
25 said that everyone has an opinion, but he has to look at the facts of the case
26 and law involved, not his personal wants and desires. [The commissioner]
27 said he has heard comments elsewhere in the community.

28 "[The commissioner] said he does not believe he should recuse himself."
29 Record 64-65.

Petitioner provides no citation to the record to support the quoted contention, so we have not been able to confirm precisely what the commissioner may have said about the application at the planning director's office. Nothing that has been called to our attention supports petitioner's contention that the county commissioner has a "strong emotional commitment in opposition to the development." The commissioner's disclosure at the May 6, 2009 County Court hearing mentions his statements at the planning director's office, and is quoted later in this opinion.

1 **A. Conflict**

2 We turn first to petitioner’s contention that the county commissioner had an actual
3 conflict of interest. Statutory definitions of “actual conflict of interest” and “potential
4 conflict of interest” appear at ORS 244.020.¹⁰ As potentially relevant here, the county
5 commissioner had an actual conflict if his participation and vote in this matter would result
6 in “private pecuniary benefit or detriment” to the county commissioner. If a public official
7 such as a county commissioner has an “actual conflict of interest,” that official must declare
8 the nature of the conflict and “refrain from participating as a public official in any discussion
9 or debate on the issue out of which the actual conflict arises or from voting on the issue,”

¹⁰ As relevant, ORS 244.020 provides:

“(1) ‘Actual conflict of interest’ means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit or detriment of the person or the person’s relative or any business with which the person or a relative of the person is associated unless the pecuniary benefit or detriment arises out of circumstances described in subsection (11) of this section.

“* * * * *

“(11) ‘Potential conflict of interest’ means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which could be to the private pecuniary benefit or detriment of the person or the person’s relative, or a business with which the person or the person’s relative is associated, unless the pecuniary benefit or detriment arises out of the following:

“(a) An interest or membership in a particular business, industry, occupation or other class required by law as a prerequisite to the holding by the person of the office or position.

“(b) Any action in the person’s official capacity which would affect to the same degree a class consisting of all inhabitants of the state, or a smaller class consisting of an industry, occupation or other group including one of which or in which the person, or the person’s relative or business with which the person or the person’s relative is associated, is a member or is engaged.

“(c) Membership in or membership on the board of directors of a nonprofit corporation that is tax-exempt under section 501(c) of the Internal Revenue Code.

“* * * * *”

1 unless the “public official’s vote is necessary to meet a requirement of a minimum number of
2 votes to take official action.” ORS 244.120(2)(b).

3 In support of its contention that the county commissioner has an actual conflict of
4 interest, petitioner offers the following argument:

5 “In this case there is an actual conflict of interest because: (1) [the
6 commissioner] owns property next to the subject property, (2) [the
7 commissioner’s] wife testified before the planning commission while the
8 planning commission was taking public testimony on the application now
9 before [LUBA] on appeal, (3) [the commissioner] was at the same hearing
10 with his wife.” Petition for Review 6 (record citations omitted).

11 The county commissioner’s wife’s testimony and the county commissioner’s
12 attendance at the planning commission hearing has no bearing that we can see on whether his
13 participation in this matter will result in a private pecuniary benefit or detriment to the
14 county commissioner. The county commissioner’s ownership of nearby property and a
15 residence that is 1.2 miles away from the subject property, without more, is not sufficient to
16 establish an actual conflict of interest. *ODOT v. City of Mosier*, 36 Or LUBA 666, 680
17 (1999). Based on the record in this appeal, the county commissioner’s ownership of nearby
18 property is at most a potential conflict of interest. A public official such as a county
19 commissioner, when faced with a potential conflict of interest, is required to “announce
20 publicly the nature of the potential conflict prior to taking any action thereon in the capacity
21 of a public official.” The county commissioner announced the circumstances that petitioner
22 believes leads to a conflict of interest, and petitioner does not challenge the adequacy of that
23 disclosure.

24 We reject petitioner’s contention that the county commissioner had an actual conflict
25 of interest.

26 **B. Bias and Prejudgment**

27 In support of its contention that the county commissioner was biased and prejudged
28 petitioner’s application, petitioner first argues the county commissioner appeared at the

1 planning commission meeting. As we have already noted, although the county commissioner
2 attended the planning commission hearing with his wife, he did not make an official
3 appearance at that hearing or take a position on petitioner's application. Petitioner suggests
4 the county commissioner was at that hearing to support his wife's opposition to the
5 application, but offers no basis for that suggestion or inferring that he shared his wife's
6 position on the application.

7 In *Wal-Mart Stores, Inc. v. City of Central Point*, 49 Or LUBA 697, 709-10 (2005),
8 we explained the standard that public officials are held to with regard to deciding quasi-
9 judicial land use matters based on the evidence and arguments that are presented to them and
10 putting aside any prejudgment they may have:

11 "As we have explained on many occasions, local quasi-judicial decision
12 makers, who frequently are also elected officials, are not expected to be
13 entirely free of any bias. *Friends of Jacksonville v. City of Jacksonville*, 42
14 Or LUBA 137, 141-44, *aff'd* 183 Or App 581, 54 P3d 636 (2002); *Halvorson-*
15 *Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 702, 710 (2001); *Oregon*
16 *Entertainment Corp. v. City of Beaverton*, 38 Or LUBA 440, 445-47 (2000),
17 *aff'd* 172 Or App 361, 19 P3d 918 (2001). * * * Local decision makers are
18 only expected to (1) put whatever bias they may have to the side when
19 deciding individual permit applications and (2) engage in the necessary fact
20 finding and attempt to interpret and apply the law to the facts as they find
21 them so that the ultimate decision is a reflection of their view of the facts and
22 law rather than a product of any positive or negative bias the decision maker
23 may bring to the process."

24 Given the nature of land use contested case hearings and the role played by public
25 officials, LUBA does not lightly infer bias. The county commissioner's attendance at a
26 planning commission hearing in this matter with his wife who opposed the application falls
27 far short of the evidence that LUBA has required to support an allegation of bias. *Woodard*
28 *v. City of Cottage Grove*, 54 Or LUBA 176 (2007); *Friends of Jacksonville*, 42 Or LUBA at
29 141-44; *Halvorson-Mason Corp.*, 39 Or LUBA at 711. In all of those cases, there was
30 evidence of a strong emotional commitment by a decision maker to approve or to defeat an
31 application for land use approval. There simply is no such evidence in this case.

1 We reject petitioner’s contention that county commissioner was biased or prejudged
2 its application.

3 The first assignment of error is denied.

4 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

5 In these assignments of error, petitioner contends the county erroneously interpreted
6 and applied ORS 215.441 and adopted findings that are not supported by substantial
7 evidence.

8 The parties’ arguments concerning ORS 215.441 unnecessarily complicate the
9 question of whether the county erred in concluding that it was not obligated under ORS
10 215.441 to grant the requested site plan approval for the pastoral center. The parties argue at
11 length regarding how the already-approved chapel, bishop’s residence, retreat center
12 conference building, retreat center staff house and cabins, RV park and bath house should be
13 characterized under ORS 215.441. Since those buildings have already been approved and we
14 do not understand the challenged decision to withdraw or otherwise affect the 2007 decision
15 that approved them, it is not necessary to address all of the parties’ arguments concerning the
16 buildings that have already been approved. The issue in this appeal is whether petitioner
17 demonstrated that ORS 215.441 requires that the county approve the pastoral center and
18 whether the county therefore erred by concluding that ORS 215.441 does not require that the
19 county approve the proposed pastoral center. We begin with a brief discussion of the
20 statutory language. ORS 215.441(1) provides:

21 *“If a church, synagogue, temple, mosque, chapel, meeting house or other*
22 *nonresidential place of worship is allowed on real property under state law*
23 *and rules and local zoning ordinances and regulations, a county shall allow*
24 *the reasonable use of the real property for activities customarily associated*
25 *with the practices of the religious activity, including worship services,*
26 *religion classes, weddings, funerals, child care and meal programs, but not*
27 *including private or parochial school education for prekindergarten through*
28 *grade 12 or higher education.” (Italics and underlining added.)*

29 The easiest way to understand ORS 215.441 is to break its requirements into two steps.

1 In step one, the italicized language requires the county to determine whether its
2 zoning ordinance allows a “church, synagogue, temple, mosque, chapel, meeting house or
3 other nonresidential place of worship” on the property. The words “or other nonresidential
4 place of worship” were added when the original legislation, which referred only to “church”
5 was amended to add the words “synagogue, temple, mosque, chapel, meeting house.” The
6 words “or other non-residential place of worship” presumably were the legislature’s attempt
7 to recognize that the words “church, synagogue, temple, mosque, chapel, meeting house”
8 might not adequately describe all religions’ places of worship. If the zoning ordinance
9 allows a “church, synagogue, temple, mosque, chapel, meeting house or other nonresidential
10 place of worship” on the property, the county then proceeds to step two.

11 Under step two, the underlined language requires that the county allow “activities
12 customarily associated with the practices of the religious activity.” Two points are worth
13 making here. The words “the practices of the religious activity” introduce an ambiguity.
14 However, in context, it is reasonably clear that the underlined language protects activities
15 customarily associated with the “church, synagogue, temple, mosque, chapel, meeting house
16 or other nonresidential place of worship” that was identified in step one. The words “the
17 practices of the religious activity” in ORS 215.441(1) do not encompass religious or other
18 activities that a particular religion may engage in, if those activities are not customary at the
19 “church, synagogue, temple, mosque, chapel, meeting house or other nonresidential place of
20 worship” that is identified in step one. And the “activities” that are protected by the
21 underlined language of ORS 215.441(1) are activities that are “customarily associated with”
22 the “church, synagogue, temple, mosque, chapel, meeting house or other nonresidential place
23 of worship” that was identified in step one. So if an activity is customary at a “church,
24 synagogue, temple, mosque, chapel, meeting house or other nonresidential place of worship,”
25 ORS 215.441(1) requires that the county allow that activity. Under step two, the custom of
26 the particular place of worship dictates the scope of the protected activities. The underlined

1 language expressly recognizes that such custom may include activities that are commonly
2 thought of as religious activity (“worship services” and “religious classes”), but also may
3 include other kinds of activities (“weddings, funerals, child care and meal programs”).

4 **A. The Proposed Pastoral Office is not a “Church * * * or Other Non-
5 Residential Place of Worship”**

6 While it may be that there will be cases where it is difficult to determine whether a
7 particular building proposal qualifies as a “church, synagogue, temple, mosque, chapel,
8 meeting house or other nonresidential place of worship,” this is not such a case. The
9 proposed pastoral center would support churches throughout the diocese; it is not limited to
10 serving the retreat center or the chapel on site. *See* n 3. As the diocese forthrightly
11 explained in 2007, the chancery it proposed in 2007 was to be the diocesan administrative
12 office building, albeit an administrative office building that provides both secular and
13 religious support and included support for the retreat center as well.¹¹ The proposed pastoral

¹¹ During the 2007 proceedings, the director of religious education for the diocese provided the following description of the function of chancery:

“A diocese is simply a geographical area in which the Vatican placed a bishop to oversee the spiritual and pastoral life of the Roman Catholic [church] in that geographical area. * * * [T]he original chancery was established in Baker City in 1903, which is where the cathedral is, which is where the Bishop [is], that is the Bishop’s parish. And, * * * the chancery is the diocesan administrative offices that run the Diocese.

“So yes, there is a business component to the running of the Diocese, but there’s also the spiritual component which is equally important in it and equally a part of a chancery office. Mrs. Burke, who was just up here, attends to the financial aspects of the Diocese, where I, among other people * * * deal with the * * * spiritual aspects.

“* * * Because of the population developing in, in Central Oregon in Bend, where Baker City was rather stagnant in terms of population as well as the difficulties of getting to Baker City and so forth, [the bishop] moved the chancery office to Bend in October of 1987.

“[O]ur offices are currently in the industrial area * * * of the City of Bend.

“* * * * *

“* * * And * * * I can speak - - I don’t want to use the word ‘expert’ because I’m not, but I can, I can speak – we are the only diocese in the United States of America where our chancery office is separated from the cathedral.

1 center is materially identical to the chancery that was proposed in 2007 and would serve both
2 administrative and religious support functions. While activity that can accurately be termed
3 “religious” or “worship” may occur in the pastoral office, it is most accurately described as
4 the church’s administrative office building, albeit an office building that mixes secular and
5 religious functions. The pastoral center is not a “church, synagogue, temple, mosque, chapel,
6 meeting house or other nonresidential place of worship,” as those words are used in ORS
7 215.441(1).

8 **B. The Pastoral Center is not an Activity Customarily Associated With the**
9 **Practices of the Chapel and Retreat Center on the Church’s Rural Powell**
10 **Butte Property**

11 Petitioner argued below that even if the disputed pastoral center does not qualify as a
12 “church * * * or other nonresidential place of worship” the pastoral center must be approved
13 under the second prong of ORS 215.441(1), which requires that the county approve
14 “activities customarily associated with the practices of the religious activity” on the church’s
15 Powell Butte property.

16 The conference center on the Powell Butte property generally would be utilized for
17 summer camps, marriage encounters and other church meetings. Record 208-211. It would
18 operate full time during the summer months and largely be limited to weekends at other
19 times of the year. *Id.* Catholic attendees would come from throughout the diocese. The
20 conference center might also be leased to non-Catholic organizations. Record 211. The
21 chapel on the Powell Butte property would be available for religious services for conference
22 center attendees.¹² Petitioner contends that it is customary for Catholic parish churches to

“Every chancery office is either literally connected to the cathedral or within a block or two of the cathedral. That’s * * * the traditional, you know, configuration of our diocese and a cathedral and so forth. So we are literally five hours away from our cathedral.” Record 199-200.

¹² The following testimony was entered in support of the 2007 application:

1 have related mixed pastoral and administrative functions to support the church's ministry to
2 its parish. Petitioner appears to contend that because the retreat center and its related chapel
3 serve the entire Diocese of Baker (and not a single parish) and because the proposed pastoral
4 center will include pastoral and administrative support to the retreat center and the entire
5 diocese, the pastoral center is protected by the second prong of ORS 215.441(1).¹³

6 The county rejected petitioner's argument under the second prong of ORS 215.441.

7 The county's findings include the following:

8 "[Petitioner] explains how [it] believes the [proposed pastoral center] is
9 'customarily associated with the practices of the religious activity.'
10 [Petitioner] takes a very broad view of the practices of the religious activity
11 [on the Powell Butte property] in that the Retreat Center and the chapel serve
12 the entire Diocese of Baker and thus anything having to do with the Diocese is
13 'customarily associated with the practices of the religious activity.'

14 *** **

*** The intention of this chapel is not to serve as a Sunday parish, and that will never be [the] purpose.

"It is there solely for, to be used for the celebration of mass and other liturgical services during times that we have retreats, camps, marriage encounters, those sorts of activities. But it will *** not be utilized as a parish church. ***" Record 198.

¹³ Petitioner argued below:

"As I pointed out in my August 8 letter, 'The Catholic Church is extremely well defined. Every residential parish Plant (Church) in Eastern Oregon is comprised of the place of worship, the priest's residence, offices, a gathering hall, classrooms, and ancillary storage buildings.' The Diocesan Chancery *** serves the same function as the Offices of a typical Parish Church. There can be no question that such offices are 'customarily associated with the practices' of the Catholic Church. The Parish Offices are both Pastoral and Administrative. It is in these offices that counseling, education, spiritual direction and guidance is given. It is in these same offices that the Administrative affairs of the Parish are managed. The Diocesan Church *** likewise has Pastoral Offices as well as Administrative Offices ***. The Pastoral Offices assist individuals at the Parish level with the fulfillment of their local Parish duties ***. In the case of our Catholic Retreat Center these same Pastoral Offices will provide staff, coordination, training and supervision for the variety of Retreats, educational activities and seminars hosted at the Catholic Center. The difference is the extent of the boundaries of the Church. A Parish Church is concerned with the needs and administration of a very localized community whereas the particular Diocesan Church *** is responsible for overseeing the needs and administration, certainly of the local community, but also of the entire territory entrusted to the Bishop by the Holy See ***." Record 1268.

1 “The County Court finds that the ‘practices of the religious activity’ are more
2 narrow and straight forward in this instance in that they directly relate to the
3 practices of the religious activity of the ‘church, synagogue, temple, mosque,
4 chapel, meeting house or other non-residential place of worship * * * allowed
5 on real property under state law and rules and local zoning ordinances and
6 regulations.’ Here the ‘[religious] activity’ is a Retreat Center and/or a chapel
7 that serves the Retreat Center. *The County Court finds that accessory offices
8 in some form to serve the chapel would more than likely be allowed under
9 ORS 215.441. The County Court further finds that accessory offices to serve
10 the entire Retreat Center might be allowed under ORS 215.441 or through a
11 conditional use modification request. However, that is not what has been
12 proposed in this application so the County Court does not reach a definitive
13 decision in those matters.*

14 “[Petitioner] has not provided evidence that it is ‘customary’ in its retreat
15 centers and/or chapels either in its organization (or in any other organization
16 for that matter) to have an administrative office building * * * for the entire
17 Diocese (or equivalent) associated with it.” Record 27 (emphasis added).

18 We understand the county to have found that the “religious activity” on the subject
19 property encompasses the chapel and the retreat center but does not encompass ministries
20 and administrative activities that the Diocese of Baker provides throughout the diocese.¹⁴
21 The findings go on to explain that if the proposed pastoral center included only pastoral and
22 administrative support for the chapel and retreat center, such a pastoral center may be
23 protected under the second prong of ORS 215.441(1). But the county found that the
24 proposed pastoral center is not limited to activities customarily associated with the practices
25 of the chapel and retreat conference center, because it also includes offices for ministries and
26 other functions for the entire diocese.¹⁵ It might well be that ORS 215.441(1) would require
27 that Baker City approve a chancery/pastoral center that would serve the entire Diocese of

¹⁴ The county is almost certainly correct that the chapel qualifies as a “religious activity,” as those words are used in ORS 215.441(1). It is less clear to us whether the retreat center qualifies as “religious activity” as opposed to “activities customarily associated with the practices of the religious activity.” However, we need not and do not consider that question further here, and for purposes of this opinion we assume that the county correctly found that the Powell Butte chapel and retreat center both qualify as “religious activity,” as those words are used in ORS 215.441(1).

¹⁵ It is important to emphasize that petitioner does not dispute this point. Petition for Review 18.

1 Baker, if petitioner wished to relocate the chancery near the diocesan cathedral in Baker City,
2 since collocation of the diocesan cathedral and chancery appears to be customary in the
3 Catholic Church. *See* n 11. Similarly, it might be that the county would be required to
4 approve the proposed pastoral center if the diocesan cathedral were located on the Powell
5 Butte site. But ORS 215.441(1) does not require that Crook County approve a
6 chancery/pastoral center that would serve the entire Diocese of Baker, simply because it
7 would be located next to a rural retreat center and chapel that also happens to serve the entire
8 Diocese of Baker. There is no substantial evidence in the record of this appeal that it is
9 customary for Catholic dioceses to site their diocesan chancery/pastoral centers next to rural
10 diocesan retreat centers or the chapels that serve those rural retreat centers, simply because
11 those rural retreat centers serve the entire diocese.

12 Bishop Vasa testified below in support of the disputed pastoral office:

13 “* * * It seems to me that the question before the Commission is whether the
14 proposed pastoral offices are in fact *customarily associated with the activities*
15 *of the Catholic Church.*

16 “In my view, as one who has been employed exclusively by the Catholic
17 Church for the past 32 years and as one who has worked in such pastoral
18 offices for at least 25 of those years, I can categorically state that the pastoral
19 offices of the type and region for the Powell Butte retreat campus are
20 customarily and even *essentially associated with the practices of the Catholic*
21 *faith.*” Record 521.

22 However, under ORS 215.441(1) the question is not whether chanceries or pastoral centers
23 such as the one that is proposed in this case are customarily associated with the Catholic
24 Church or Catholic faith in general. It seems undisputed that they are. The question under
25 ORS 215.441(1) is whether a chancery or pastoral center for a 17-county Catholic Diocese
26 like the Diocese of Baker is customarily located at the site of a rural retreat center and
27 chapel. Petitioner has not established that such collocation is customary.

28 The second and third assignments of error are denied.

1 **FOURTH AND FIFTH ASSIGNMENT OF ERROR**

2 Under these assignments of error, petitioner challenges the adequacy of the county’s
3 findings concerning the “substantial burden” and “equal terms” prongs of RLUIPA, and the
4 evidentiary support for those findings. We address each of petitioner’s RLUIPA arguments
5 separately below.

6 **A. Substantial Burden**

7 42 USC Section 2000cc provides, in part:

8 “(a) Substantial burdens

9 “(1) General rule

10 “No government shall impose or implement a land use regulation in a manner
11 that imposes a substantial burden on the religious exercise of a person,
12 including a religious assembly or institution, unless the government
13 demonstrates that imposition of the burden on that person, assembly, or
14 institution-

15 “(A) is in furtherance of a compelling governmental interest; and

16 “(B) is the least restrictive means of furthering that compelling
17 governmental interest.”¹⁶

18 As the Oregon Court of Appeals has explained:

19 “Under RLUIPA, ‘religious exercise’ includes ‘any exercise of religion,
20 whether or not compelled by, or central to, a system of religious belief.’ 42
21 USC § 2000cc-5(7)(A). RLUIPA expressly defines ‘religious exercise’ to
22 include ‘[t]he use, building, or conversion of real property for the purpose of
23 religious exercise * * *.’ 42 USC § 2000cc-5(7)(B). See also 42 USC §
24 2000cc-2(b) (plaintiff has burden to show that regulation substantially
25 burdens religious exercise; where plaintiff produces *prima facie* evidence,

¹⁶ RLUIPA provides that the substantial burden prong at 42 USC 2000cc(a)(1) applies when:

“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(a)(2)(C).

For purposes of this appeal, we assume the alleged substantial burden was imposed through an “individualized assessment” under “a system of land use regulations.”

1 burden shifts to government as to other elements of claim).” *Timberline*
2 *Baptist Church v. Washington County*, 211 Or App 437, 447-48, 154 P3d 759,
3 *rev den* 343 Or 224, 168 P3d 1155 (2007).

4 As interpreted by the Oregon Supreme Court, a land use regulation imposes a substantial
5 burden on religious exercise “only if it ‘pressures’ or ‘forces’ a choice between following
6 religious precepts and forfeiting certain benefits, on the one hand, and abandoning one or
7 more of those precepts in order to obtain the benefits, on the other.” *Corp. of Presiding*
8 *Bishop v. City of West Linn*, 338 Or 453, 466, 111 P3d 1123 (2005).

9 Petitioner’s descriptions of the “religious exercise” and the alleged “substantial
10 burden” are not clearly stated. However, it seems clear to us that the church’s operation of a
11 chancery/pastoral center qualifies as a “religious exercise,” within the meaning of RLUIPA.
12 Even though much of the activity at the chancery/pastoral center is probably more accurately
13 characterized as secular activity, rather than religious activity, the Catholic ministries to be
14 housed in the chancery/pastoral center clearly constitute a religious exercise. We conclude
15 the operation of the chancery/pastoral center is a “religious exercise,” and we reject the
16 county’s arguments to the contrary.

17 We assume that the alleged “substantial burden” on that “religious exercise” is the
18 county’s refusal to grant the required site plan approval to allow petitioner to relocate the
19 church’s chancery/pastoral center from Bend to its rural Powell Butte property where the
20 diocesan retreat center is located. Petitioner’s substantial burden argument appears to reduce
21 to two arguments. First, petitioner appears to contend that it is customary to locate diocesan
22 chanceries or pastoral centers next to rural retreat centers. As we have already explained,
23 petitioner has not established that there is any such custom. Second, petitioner may be
24 arguing that requiring the chancery/pastoral center to remain in Bend results in an economic
25 or operational impact that causes a substantial burden on petitioner. If that is petitioner’s
26 argument, the evidentiary record does not support the argument. The parts of the
27 chancery/pastoral office that are not devoted exclusively to the retreat center serve the entire

1 17-county diocese. Given the size of the territory included in the Catholic Diocese of Baker
2 and the relative close proximity of the Powell Butte property and the City of Bend, it seems
3 the proposed relocation is unlikely to have any net economic or operational affect on the
4 operations of the chancery/pastoral center that are directed at the entire diocese. As for the
5 operations of the chancery/pastoral center devoted largely or exclusively to the retreat center
6 and chapel, the county expressly recognized that petitioner might be able to make a case for
7 relocating some or all of those operations to the Powell Butte property to allow them to be
8 sited close to the retreat center and chapel they support and thereby avoid the need to travel
9 between Bend and Powell Butte. The county expressly left open the possibility that a smaller
10 administrative building for those these more limited purposes might be approvable under
11 ORS 215.441(1). If such a more limited administrative building were approved, any
12 economic or operational difficulties posed by the current lack of on-site office space for the
13 retreat center presumably would be eliminated. Petitioner has not established that the
14 county’s decision in this matter results in a “substantial burden” on any “religious exercise”
15 that is protected under RLUIPA.

16 **B. Equal Terms**

17 RLUIPA also provides that no governmental body “shall impose or implement a land
18 use regulation in a manner that treats a religious assembly or institution on less than equal
19 terms with a nonreligious assembly or institution.” 42 USC § 2000cc(b)(1). RLUIPA further
20 provides that no governmental body “shall impose or implement a land use regulation that
21 discriminates against any assembly or institution on the basis of religion or religious
22 denomination.” 42 USC § 2000cc(b)(2). Petitioner contends that the county’s decision
23 violates the “equal terms” prong of RLUIPA because the EFU zones allows a variety of uses
24 that can have more significant impacts on farm land than the proposed pastoral center will
25 have.

1 Under ORS 197.835(3), LUBA’s scope of review is limited to issues that were
2 “raised by any participant before the local hearings body as provided by ORS 197.195 or
3 197.763, whichever is applicable.” ORS 197.763(1) applies here.¹⁷ Respondent contends
4 that petitioner raised no issue regarding the RLUIPA “equal terms” prong in the proceedings
5 below and therefore waived its right to raise this issue at LUBA.

6 Where a respondent raises a waiver defense under ORS 197.763(1) and 197.835(3),
7 the party against whom the waiver defense is asserted must identify where in the record the
8 disputed issue was raised. If the party against whom a waiver defense is asserted fails to cite
9 evidence in the record that establishes that the disputed issue was raised below, LUBA will
10 not consider the issue on appeal. *Graser-Lindsey v. City of Oregon City*, 56 Or LUBA 504,
11 510 (2008); *Cummins v. Washington County*, 22 Or LUBA 129, 137 (1991). Petitioner has
12 not responded to the county’s waiver defense. We therefore do not consider petitioner’s
13 RLUIPA “equal terms” argument.

14 The fourth and fifth assignments of error are denied.

15 The county’s decision is affirmed.

¹⁷ ORS 197.763(1) provides:

“An issue which may be the basis for an appeal to the Land Use Board of Appeals 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.”