BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

SHELLEY WETHERELL and MICHAEL WETHERELL,
Petitioners,

vs.

DOUGLAS COUNTY,
Respondent,

and

COLES VALLEY CHURCH,
Intervenor-Respondent.

LUBA No. 2019-051

FINAL OPINION
AND ORDER

Appeal from Douglas County.

Jeffrey L. Kleinman, Portland, filed the petition for review and argued on behalf of petitioners.

No appearance by Douglas County.

Ray D. Hacke, Salem, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Pacific Justice Institute.

ZAMUDIO, Board Member; RYAN, Board Chair; RUDD, Board Member, participated in the decision.

REVERSED 08/08/2019

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

Opinion by Zamudio.

NATURE OF THE DECISION

Petitioners appeal a decision by the board of county commissioners approving with conditions an interior remodel of an existing church to create a residence for the church's pastor.

MOTION TO INTERVENE

Coles Valley Church, the applicant below (intervenor), moves to intervene on the side of the respondent. No party opposes the motion and it is allowed.

REPLY BRIEF

Petitioners filed a reply brief to respond to arguments in the response brief. There is no opposition to the reply brief.

MOTION TO STRIKE

Petitioners move to strike Appendices A, C, and D attached to intervenor's response brief, and references to those materials in the response brief. Those items are not in the record in this appeal and intervenor has provided no legal basis for us to consider those documents. Petitioners' motion to strike is granted. ORS 197.835(2)(a) (providing that LUBA's review "shall be confined to the record").

STANDING

In their petition for review, petitioners state that they have standing to appeal because they appeared orally and in writing in the county proceeding that led to the challenged decision. In its response brief, intervenor challenges

petitioners' standing under ORS 197.830(3), which governs party standing in cases in which a local government makes a land use decision without providing a hearing or makes a decision that is different from the land use proposal described in the notice of hearing.[1] ORS 197.830(3) is inapposite to this appeal. Petitioners have standing under ORS 197.830(2), which provides that a person who appeared orally or in writing before the local government and filed a timely notice of intent to appeal has standing for purposes of LUBA review.[2]

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[1] ORS 197.830(3) provides, in part:

> "If a local government makes a land use decision without providing a hearing, except as provided under ORS 215.416 (11) or 227.175 (10), or the local government makes a land use decision that is different from the proposal described in the notice of hearing to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to the board under this section[.]"

[2] ORS 197.830(2) provides:

> "Except as provided in ORS 197.620, a person may petition the board for review of a land use decision or limited land use decision if the person:
>
> "(a) Filed a notice of intent to appeal the decision as provided in subsection (1) of this section; and
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> "(b) Appeared before the local government, special district or state agency orally or in writing."

FACTS

The decision on review is the county's decision on remand in *Wetherell v. Douglas County*, ___ Or LUBA ___ (LUBA No 2018-033, July 30, 2018). The subject building (the church) is located on a 1.44-acre parcel that is designated Agriculture (ACG) by the county comprehensive plan and zoned Exclusive Farm Use-Cropland (FC-3). Petitioners' property is adjacent to the church parcel and is currently used as a farm that grows grapes for wineries. Record 15.

The church is a 2,076 square foot structure. The pastor of Coles Valley Church submitted a letter to the county planning department proposing to convert 510 square feet of the church into a residence for the pastor, which we refer to herein as the "church dwelling." Record 80. The pastor submitted a hand-drawn plan showing a proposed 255-square-foot bedroom with an internal restroom and a separate room to be converted into a kitchen "to be shared between church and parsonage." Record 79. The letter did not identify any applicable land use criteria or propose findings. The planning department approved the church dwelling in a one-page "Planning and Sanitation Pre-Application Worksheet." Record 76–77. The county's initial approval did not identify any applicable land use criteria or include any findings and conclusions that all applicable criteria were satisfied. The county did not provide notice of the decision or an opportunity for a hearing. Petitioners appealed that decision to LUBA.

We remanded after we concluded that the church dwelling application is an application for a "permit" and, thus, the county was required to either a hold a public hearing on the application or provide notice of the decision and the opportunity to request a *de novo* hearing. *See* ORS 215.402(4) (defining "permit" as "discretionary approval of a proposed development of land"); ORS 215.416(3) (providing general rule that a local government must hold at least one public hearing on an application for a permit); ORS 215.416(11) (a local government may make a decision on an application for a permit without a hearing but must provide notice of the decision and an opportunity to file a local appeal). We did not identify all applicable land use criteria, but we observed that the proposed church dwelling may need to be evaluated under criteria that apply to a nonfarm dwelling. *Wetherell*, ___ Or LUBA ___ (LUBA No 2018-033, July 30, 2018) (slip op at 5). In addition, we observed the application probably would need to be evaluated under ORS 215.441(1), which provides that if a church is allowed on real property, the county must allow "the reasonable use of the real property for activities customarily associated with the practices of the religious activity," subject to a number of restrictions. *Id.* We concluded:

> "Remand is required in order for the county to process the application according [to Douglas County Land Use Development Ordinance (LUDO)] procedures that apply to permits. In doing so, the county must necessarily articulate what land use category the proposed parsonage belongs to under the LUDO and state law, and therefore what standards apply to approve or denial of that use." *Id.* (slip op at 6).

On remand, the county determined that the following land use regulations apply: (1) LUDO 3.4.075(5), governing enhancements to existing churches; (2) ORS 215.283, allowing churches in areas zoned for exclusive farm use; and (3) ORS 215.441, described above. Record 18. In addition, the county appears to have determined that the federal Religious Land Use and Institutionalized Persons Act (RLUIPA) applies by listing it under the "Applicable Law" heading in the challenged decision. 42 USC § 2000cc; Record 18–19. However, the county did not actually apply or rely on RLUIPA in reaching its decision. The county approved the church dwelling after determining that the remodel is an enhancement to the church under LUDO 3.4.075(5), and that the residential use is a "reasonable use" of the church that is "customarily associated" with the practices of the church under ORS 215.441.[3]

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[3] LUDO 3.4.075(5) provides:

> "Churches, subject to §2.065.2 and the standards of OAR 660-33-130 regarding siting and spacing for a structure or group of structures with a design capacity of greater than 100 people. Existing churches may be maintained, enhanced or expanded on the same tract, except that enclosed existing structures within a farm use zone within three miles of an urban growth boundary may not be expanded beyond the requirements of the above-cited OAR without an exception. New churches are not allowed on high value farmland. Division of land for a new church or cemetery in conjunction with a church, as provided in ORS 215.263, shall not exceed five acres, and the remaining parcel must either meet the minimum parcel size or, if less than the minimum parcel size, be consolidated with an adjoining parcel."

ASSIGNMENT OF ERROR

In the sole assignment of error, petitioners argue that the county misinterpreted and misconstrued ORS 215.441 and LUDO 3.4.075(5) and failed to make adequate findings supported by substantial evidence. Petitioners argue that the county misconstrued ORS 215.441, and to the extent that the county interpreted LUDO 3.4.075(5) to independently allow the residence as an enhancement to the church, without applying additional approval criteria, that construction of the local provision is contrary to controlling state law. ORS 197.835(9)(a)(D).

Intervenor responds that a church is a permitted use in the FC-3 zone and that "[e]ven assuming *arguendo* that the Oregon Legislature did not contemplate allowing parsonages inside church buildings when it drafted ORS 215.441, the statute does not explicitly prohibit such parsonages, either." Intervenor's Response Brief 20. Intervenor also argues that we should affirm the county's decision under RLUIPA.

For reasons explained below, we conclude that the county improperly construed the applicable law and that intervenor's RLUIPA arguments provide no basis for us to affirm the county's erroneous decision.

1. Land Use Regulations

We review the county's interpretation of state law and local law that implements state law to determine whether the county's interpretation is correct, affording no deference to the local government's interpretation. ORS

197.835(9)(a)(D); *Kenagy v. Benton County*, 115 Or App 131, 838 P2d 1076, *rev den*, 315 Or 271 (1992). We generally defer to a local government's interpretation of its own land use regulations, unless we determine that the interpretation is contrary to a state statute that the land use regulation implements. ORS 197.829(1)(d).

Oregon land use law preserves land for agricultural uses by restricting uses allowed in exclusive farm use (EFU) zones to farm uses and certain non-farm uses that the legislature has determined are compatible with farming. ORS 215.203 defines "farm use" and provides:

> "Zoning ordinances may be adopted to zone designated areas of land within the county as exclusive farm use zones. Land within such zones *shall be used exclusively for farm use except as otherwise provided* in ORS 215.213 [uses permitted in exclusive farm use zones in counties that adopted marginal lands system prior to 1993], 215.283 [uses permitted in exclusive farm use zones in nonmarginal lands counties] or 215.284 [dwelling not in conjunction with farm use (non-farm dwellings)]. Farm use zones shall be established only when such zoning is consistent with the comprehensive plan." ORS 215.203(1) (emphasis added).

ORS 215.283 allows "[c]hurches and cemeteries in conjunction with churches" and certain dwellings to be established on farmland but does not provide for any dwelling in the church or in conjunction with the church. ORS 215.283(1)(a).

ORS 215.441(1) provides that "[i]f a church, synagogue, temple, mosque, chapel, meeting house or other *nonresidential place of worship* is allowed on real property *under state law and rules and local zoning ordinances and regulations*,

a county shall allow the reasonable use of the real property for activities customarily associated with the practices of the religious activity[.]" (Emphases added.) ORS 215.441(1) provides a list of such customarily associated activities, including religious gatherings such as religion classes, weddings, and funerals. In addition, ORS 215.441(1)(g) provides that a church may provide housing "in a building that is detached from the place of worship," so long as (1) the real property is located within the urban growth boundary and is zoned for residential use; (2) "[t]he housing * * * complies with applicable land use regulations and meets the standards and criteria for residential development for the underlying zone"; (3) and at least one-half of the residential units are affordable. There is no dispute that the approved church dwelling does not and cannot satisfy ORS 215.441(1)(g). Instead, we understand the county to have implicitly determined that the list of uses in ORS 215.441(1) is not exclusive and approved the church dwelling as an unenumerated "reasonable use" of church property. Record 25.

ORS 215.441 does not provide an independent basis to approve a dwelling on property zoned for exclusive farm use. *See Central Oregon Landwatch v. Deschutes County*, 75 Or LUBA 284, 289, *aff'd*, 287 Or App 239, 400 P3d 325 (2017) (observing that "ORS 215.411 is not an independent source of authority" to approve development on property zoned for exclusive farm use). The county erred in construing ORS 215.441 to provide an independent basis to approve the dwelling within a church on property zoned for exclusive farm use.

LUDO 3.4.075(5) provides, "Existing churches may be maintained, enhanced or expanded on the same tract[.]"[4] The county approved the church dwelling after determining that the remodel is an enhancement to the church under LUDO 3.4.075(5), and that the residential use is a "reasonable use" of the church that is "customarily associated" with the practices of the church under ORS 215.441. To the extent that the county interprets LUDO 3.4.075(5) to independently allow the residential use of the church as an enhancement to the church, that construction of the local provision impermissibly conflicts with ORS 215.203, ORS 215.283, and ORS 215.441.

Under Oregon land use law, only certain uses can be developed on land reserved exclusively for farm use. ORS 215.203(1); *see also A Walk on the Wild Side v. Washington County*, ___ Or LUBA ___ (LUBA No 2018-067, Nov 5, 2018) (slip op at 8) ("land that is planned and zoned for *exclusive* farm use must be used *exclusively* for defined 'farm uses' or listed exceptions" (emphases in original)). State law has expressly enumerated the limited circumstances that allow a dwelling on property zoned for exclusive farm use.[5] The church dwelling

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[4] OAR 660-033-0130(1)(c) provides: "Existing facilities wholly within a farm use zone may be maintained, enhanced or expanded on the same tract, *subject to other requirements of law*, but enclosed existing structures within a farm use zone within three miles of an urban growth boundary may not be expanded beyond the requirements of this rule." (Emphasis added.)

[5] OAR Chapter 660 Division 33 implements Statewide Planning Goal 3 (Agriculture) and agricultural lands statutes. A table at OAR 660-033-0120 sets

proposed in this case has not been approved pursuant to any of those limited pathways.

The assignment of error is sustained.[6]

2. RLUIPA

Intervenor argues that the county's decision should be affirmed under RLUIPA. We recently described RLUIPA in *Central Oregon Landwatch v. Deschutes County*, ___ Or LUBA ___ (LUBA No 2018-095, Dec 14, 2018) (*Shepherd*), *aff'd*, 296 Or App 903, 439 P3d 1060 (2019). We reiterate that understanding of federal law here. RLUIPA at 42 USC section 2000cc(b)(1) provides: "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." We refer to that provision as the equal terms provision. RLUIPA at 42 USC section 2000cc(a) prohibits local and state governments from applying a land use regulation in a manner that imposes a "substantial burden" on the religious exercise of a person, religious assembly, or

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out residential uses that are allowed or may be allowed on agricultural land. Those limited residential uses include: farm dwellings; relative farm help dwellings; accessory farm dwellings for year-round and seasonal farm workers; lot of record dwellings; temporary hardship dwellings; non-farm dwellings; residential home in existing dwellings; room and board arrangements for a maximum of five unrelated persons in existing dwellings; and replacement dwellings.

[6] We conclude that the county misconstrued the applicable law. Accordingly, we need not and do not resolve petitioners' findings and substantial evidence challenges.

institution, unless the government demonstrates that the burden is in furtherance of a compelling governmental interest, and is the least restrictive means of furthering that compelling governmental interest. We refer to that provision as the substantial burden provision.

This case is unlike *Shepherd*, where we affirmed the county's conclusion that RLUIPA prohibited the county from applying a provision of the local code that would require the denial of the application because the local code provision treated religious assembly on less than equal terms with non-religious assembly. We explained:

> "Churches are not treated equally in the [Wildlife Area (WA)] overlay zone, because churches, which encompass elements of both a religious institution and a religious assembly, are prohibited in the WA overlay zone. The provisions of the [Deschutes County Code] cited above allow properties like intervenors'—that are zoned EFU and located in the WA overlay zone—to be used for assemblies and institutions that are not religious, such as secular weddings and wedding receptions, but that have similar impacts on agricultural lands and on the wildlife corridor that is protected by the WA overlay zone. For example, property in the EFU/WA overlay zone is allowed to be used by a 'winery' for weddings and other commercial events in conjunction with agricultural activities, which are secular assemblies, but is not allowed to be used by a church for religious assembly. * * * While the county presumably has a legitimate governmental interest in preserving wildlife migration corridors, under RLUIPA the county cannot treat religious assemblies in the WA Overlay zone on less favorable terms than non-religious assemblies with similar impacts on wildlife." *Shepherd*, __ Or LUBA __ (LUBA No 2018-095, Dec 14, 2018) (slip op at 12) (footnote omitted).

Differently, in this case, intervenor has not identified any applicable provision of law that the county applied in this appeal that treats religious and nonreligious residential uses on land zoned FC-3 on unequal terms, or in a manner that imposes a substantial burden on intervenor's religious exercise. Intervenor's arguments regarding RLUIPA do not demonstrate any basis for us to affirm the county's otherwise erroneous approval.

DISPOSITION

LUBA shall reverse a land use decision when the decision "violates a provision of applicable law and is prohibited as a matter of law." OAR 661-010-0071(1)(c); ORS 197.835(1) ("The board shall adopt rules defining the circumstances in which it will reverse rather than remand a land use decision or limited land use decision that is not affirmed."). Intervenor's application, the county's challenged decision, and intervenor's arguments on appeal provide no basis for us to conclude that the church dwelling may be approved as proposed. The county will not be able to correct "the identified errors by adopting new findings [or] by accepting additional evidence, or both." *Seitz v. City of Ashland*, 24 Or LUBA 311, 314 (1992). Accordingly, we conclude that the decision is prohibited as a matter of law.

The county's decision is reversed.