BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SCOTT C. YOUNG and ROBIN JAMES,
Petitioners,

vs.

JACKSON COUNTY,
Respondent,

and

LEE WEISEL, DAVID ALEXANDER,
RUTH ALEXANDER, KENT ERSKINE,
DONNA ZIMMERMAN and DEPARTMENT OF
LAND CONSERVATION AND DEVELOPMENT,
Intervenors-Respondent.

LUBA No. 2005-001

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Christian E. Hearn, Ashland, filed the petition for review and argued on behalf of the petitioners. With him on the brief was Davis Hearn Saladoff and Smith.

No appearance by Jackson County.

Lee D. Weisel, Ashland, filed a response brief and argued on his own behalf. David Alexander, Ruth Alexander, Kent Erskine and Donna Zimmerman, Ashland, represented themselves. Steven E. Shipsey, Assistant Attorney General, Salem, filed a response brief and argued on behalf of intervenor-respondent Department of Land Conservation and Development.

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

AFFIRMED 04/21/2005

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

Opinion by Davies.

NATURE OF THE DECISION

Petitioners appeal a county decision denying an application to convert an existing residence into a church.

MOTION TO INTERVENE

Lee Weisel, David Alexander, Ruth Alexander, Kent Erskine, and Donna Zimmerman, opponents below, move to intervene on the side of respondent. There is no opposition to the motion, and it is granted. The Department of Land Conservation and Development (DLCD), also moves to intervene on the side of respondent. There is no opposition to the motion, and it is granted.

FACTS

The subject property is a 96.3-acre parcel zoned exclusive farm use (EFU) located among approximately 1700 acres owned individually or in trust by petitioners in the mountains outside the City of Ashland. The property is located within three miles of the city's urban growth boundary (UGB) in a straight-line measurement, although due to topography, access by road is over four miles from the UGB. Petitioners built a county- approved single-family residence consisting of approximately 11,000 square feet, including ten bedrooms and nine baths with individual entrances, a separate master bedroom and bath, two kitchens, a prayer room, an attached atrium, a great room and entry, an art room, a library, a sitting room, laundry and mechanical facilities, and an attached garage. Petitioners built the residence with the eventual plan to convert it into a church. Petitioners are also constructing another single-family dwelling on another parcel that they plan to occupy in the near future.

Petitioners filed an application to convert the existing residence into a church or religious retreat center with overnight accommodations. Petitioners' religion, Huichol Shamanism, assigns

1 great significance to particular geographic locations that they refer to as "places of power."[1] The
2 site of the existing residence is within the "energy field" of such a place of power in the shadow of
3 Squaw Mountain, and the location also possessed religious significance for the Native Americans of
4 the Rogue Valley. According to petitioners, the spirit of their deceased son revealed the precise site
5 to petitioners, and the property is named "Circle of Teran" in his honor.

6 The county referred the application directly to the hearings officer. In general, churches may
7 be sited on EFU land. However, within three miles of an established UGB, new churches are not
8 permitted without an approved exception to the Statewide Planning Goals. Although petitioners'
9 property is within three miles of Ashland's UGB, they nonetheless argued to the hearings officer that

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[1] Petitioners describe their religion as follows:

> "[Petitioners] adhere to the study and practice of Native American spiritualism.
>
> "[Petitioners] and their congregation adhere to the globe's largest and oldest religion: Animism. The general animist belief system stems from the premise that everything has a soul (in latin: 'anima') including animals, plants, rocks, mountains, rivers, and stars. Each 'anima' is powerful and spiritual, and may include the souls of the dead, the 'ancestors.'
>
> "More specifically, [petitioners] and their congregation subscribe to Native American animism, sometimes called 'shamanism'. The form of shamanism practiced by [petitioners] is called Huichol shamanism, which is based on the religion and ritual practices of the Huichol Indians of the Sierra Madre Mountains near Ixtlan, in central Mexico. [Petitioners] are affiliated with the Dance of the Deer Foundation center for Shamanic Studies. * * *
>
> "Huichol shamanism honors all of creation, especially the spirit of nature – the power of animals, the winged ones, the minerals, and plants. This shamanistic tradition involves healing and empowerment through personal transformation and direct experience as well as the healing of our families, communities and our environment. By following the shaman's path, we can truly learn to inhabit the earth and our being with gentleness and respect.
>
> "Rather than having set hours and days on a weekly or monthly basis when practitioners devote themselves to religious practice * * * Huichol shamanists participate in religious rituals which go on for a period of consecutive days, often in an around-the-clock fashion, until the ritual is completed. * * *
>
> "Huichol life is a continuous cycle of ritual and devotional exercises designed to help them stay connected to the Ancient Ones – Tate Wari (Grandfather Fire), Takutsi Nakawey (Grandmother Growth), Kauyumari (our brother, the Deer Spirit), and Tatei Yurianaka (Mother Earth), among others. The Huichols say that during ceremony (usually several days in length), they are inviting these spirits to come into the circle of life to be with them – to help empower them and their families, and to help the universe stay in balance." Record 7-8 (citations and footnote omitted).

1 the application must be approved under the Religious Land Use and Institutionalized Person Act
2 (RLUIPA). Petitioners argued that the requirement that they obtain an approved exception
3 imposed a "substantial burden" on their religious exercise in violation of RLUIPA. The hearings
4 officer disagreed and denied the application. This appeal followed.

5 **FIRST AND FIFTH ASSIGNMENTS OF ERROR**

6 ORS 215.283(1) provides in pertinent part:

7 "The following uses may be established in any area zoned for exclusive farm use:

8 "* * * * *

9 "(b) Churches and cemeteries in conjunction with churches."

10 OAR 660-033-0130(2) provides, however, that certain uses, including churches, cannot be
11 approved within three miles of a UGB unless an exception to the Statewide Planning Goals is
12 granted pursuant to ORS 197.732 and OAR chapter 660, division 004. Jackson County Land
13 Development Code (LDO) 280.030(12)(D) implements and is nearly identical to OAR 660-033-
14 0130(2). For purposes of these assignments of error, it is clear that petitioners cannot convert their
15 residence into a church under existing state and county law without first obtaining an exception.[2]

16 Instead of pursuing an exception under ORS 197.732, petitioners argued that their
17 application should be approved under RLUIPA. This is the third recent RLUIPA case to come
18 before this Board. In our first case, *Corporation Presiding Bishop v. City of West Linn*, 45 Or
19 LUBA 77, *rev'd* 192 Or App 567, 86 P3d 1140, *rev allowed* 337 Or 282, 96 P3d 347 (2004)

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[2] Goal 2, Part II, ORS 197.732(8), and OAR 660-004-0005(1) define "exception" to mean:

"a comprehensive plan provision, including an amendment to an acknowledged comprehensive plan, that:

"(a) Is applicable to specific properties or situations and does not establish a planning or zoning policy of general applicability;

"(b) Does not comply with some or all goal requirements applicable to the subject properties or situations; and

"(c) Complies with [the applicable provisions for approving an exception]."

1 (*Presiding Bishop*), we gave a brief overview of RLUIPA that is relevant for these assignments of

2 error:[3]

3 "42 USC § 2000cc-(a)(1) provides the general rule regarding land use regulation
4 under RLUIPA:

5 "'No government shall impose or implement a land use regulation in a
6 manner that imposes a substantial burden on the religious exercise of a
7 person, including a religious assembly or institution, unless the government
8 demonstrates that imposition of the burden on that person, assembly, or
9 institution –

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[3] We also gave the following brief review of free exercise jurisprudence leading up to the adoption of RLUIPA:

> "The first amendment to the United States Constitution provides in pertinent part that 'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof * * *.' Free exercise claims are typically analyzed under the 'compelling interest' test, under which a government regulation that imposes a 'substantial burden' on religious belief is unconstitutional unless it furthers a 'compelling governmental interest' by using the 'least restrictive' means. *Sherbert v. Verner*, 374 US 398, 83 S Ct 1790, 10 L Ed 2d 965 (1963). That approach was modified considerably in *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 US 872, 110 S Ct 1595, 108 L Ed 2d 876 (1990), in which the Supreme Court held that the compelling interest test does not apply to free exercise challenges to governmental application of 'a valid and neutral law of general applicability,' in that case a state statute criminalizing use of peyote. *Id.* at 879. In *Smith*, the Supreme Court noted one possible exception to that holding: where the government applies a law that requires an 'individualized governmental assessment.' *Id.* at 884.
>
> "In response to the *Smith* decision, Congress enacted the Religious Freedom Restoration Act (RFRA). RFRA's purpose was to restore the substantial burden/compelling governmental interest test to the analysis of free exercise claims. The Supreme Court, however, found in C*ity of Boerne v. Flores*, 521 US 507, 117 S Ct 2157, 138 L Ed 2d 624 (1997), that RFRA was unconstitutional because Congress had exceeded its authority under section 5 of the fourteenth amendment, which allows Congress to remedy constitutional violations. The court found that RFRA's legislative record lacked sufficient evidence of discriminatory laws to justify such sweeping and intrusive measures at every level of government. *Id*. at 532.
>
> "After the *City of Boerne* decision, Congress again sought to increase protection of religious exercise and enacted RLUIPA in 2000. To avoid the same deficiencies cited in *City of Boerne*, Congress confined the scope of the act to land use and institutionalized persons, and developed a massive evidentiary record documenting discrimination against religion and the need for remedial measures under section 5 of the fourteenth amendment to protect religious practices. Congress also relied on the commerce clause and spending clause as additional authority. In addition, in an apparent effort to bring RLUIPA within the ambit of the potential exception noted in *Smith* for application of laws that allow for 'individualized governmental assessment,' Congress specified that RLUIPA applies in relevant part only to application of land use regulations that allow the government to make 'individualized assessments' of the proposed land use." 45 Or LUBA at 98-99.

1 "'(A) is in furtherance of a compelling governmental interest; and

2 "'(B) is the least restrictive means of furthering that compelling
3 governmental interest.'

4 "The breadth of that general rule is limited in its scope of application by 42 USC §
5 2000cc-(a)(2), which provides in relevant part that the general rule applies in any
6 case in which:

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

12 "42 USC § 2000cc-5(5) defines 'land use regulation' broadly to include a zoning
13 law that 'limits or restricts a claimant's use or development of land * * * if the
14 claimant has an ownership, leasehold, easement, servitude, or other property
15 interest in the regulated land or a contract or option to acquire such an interest.'

16 "RLUIPA provides a specific definition of 'religious exercise' at 42 USC §
17 2000cc-5(7), that provides in relevant part that '[t]he use, building, or conversion of
18 real property for the purpose of religious exercise shall be considered to be religious
19 exercise of the person or entity that uses or intends to use the property for that
20 purpose.'

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

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

29 "'A government may avoid the preemptive force of any provision of this
30 chapter by changing the policy or practice that results in a substantial burden
31 on religious exercise, by retaining the policy or practice and exempting the
32 substantially burdened religious exercise, by providing exemptions from the
33 policy or practice for applications that substantially burden religious
34 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)." *Id.* at 99-101.

Petitioners argue that the county's denial violates RLUIPA because the three-mile rule imposes a substantial burden on their religious exercise and is not the least restrictive means of furthering a compelling governmental interest. Petitioners also argue that they fall within the scope of the general rule because the three-mile rule is imposed through an individualized assessment within the meaning of section 42 USC § 2000cc- (a)(2)(c).[4]

The hearings officer relied upon the Court of Appeals' decision in *Presiding Bishop*, and found:

> "[In *Presiding Bishop*] the applicant was categorically denied the opportunity to build the structure for religious exercise. There was no other avenue that the applicant could pursue to secure approval for that specific proposal. The determination was final, and yet it was determined not to be a substantial burden on its religious exercise. The [church] could, essentially, try again with a different proposal.
>
> "Here, the determination that the Applicants must pursue the procedure specifically identified as the means by which approval may be secured presents a less burdensome situation. First, it is not a denial of their proposal. Rather, it is a statement that the means by which they have sought approval is not the appropriate process. Far from being a categorical rejection of their interest in converting their dwelling to a church, the requirement of securing an exception redirects their approach and makes no determination at all of the suitability of the use. As such it is no more onerous a burden than the Court of Appeals imposed [in *Presiding Bishop*] – namely, 'the burden of submitting a new application for a modified proposal.'
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> "No RLUIPA issue of a substantial burden on their religious exercise or practice is presented." Record 17-18 (footnote and citation omitted).

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[4] The hearings officer addressed the individualized assessment first and found that RLUIPA did not apply because enforcement of the three-mile rule was not an individualized assessment. Because we conclude that the resolution of this case turns, ultimately, on the "substantial burden" determination, we decline to address the hearings officer's conclusion that the three-mile rule is not an individualized assessment.

1 **A. Availability of Exceptions Process**

2 Petitioners first argue that they are precluded from even attempting to obtain an exception, 3 because a church is a permitted use in the EFU zone. Petition for Review 31 (citing *DLCD v.* 4 *Yamhill County*, 183 Or App 556, 53 P3d 462 (2002)). In *DLCD v. Yamhill County*, the 5 applicant sought an exception to EFU zoning to rezone their property to rural residential. Because 6 their property was only approximately ten acres, and they sought to rezone their property to a rural 7 residential zone with a 10-acre minimum, under the proposed zoning they would be able to build 8 one house. The court held that because the applicants could have sought approval for a nonfarm 9 dwelling, they could not seek approval through the exception process. *Id*. at 562.

10 We explained the meaning of that decision in *Friends of Yamhill County v. Yamhill* 11 *County*, ___ Or LUBA ___ (LUBA No. 2004-089, September 21, 2004) slip op 8-12, and we 12 will not reiterate that entire explanation here. Briefly, in that case, we explained that the Court's 13 opinion in *DLCD v. Yamhill County* cannot be read to prohibit an applicant from seeking an 14 exception in every case in which the applicable statewide planning goal allows the proposed use in 15 the applicable zone. Rather,

> 16 "The Court of Appeals' decision was based on the court's understanding that the 17 applicant, who sought approval for a single dwelling on an existing 10-acre parcel, 18 could just as easily have applied for a nonfarm dwelling under the applicable EFU 19 zoning without seeking an exception to Goal 3 to allow the property to be rezoned 20 for rural residential use." *Friends of Yamhill County v. Yamhill County*, slip op 21 11.

22 Under *DLCD v. Yamhill County*, if a church could theoretically be approved without seeking an 23 exception then the exceptions process would be precluded. For instance, if petitioners' property 24 were more than three miles from a UGB and not high-value farmland, where a church is permitted 25 pursuant to ORS 215.283(1), then petitioners would indeed be precluded from seeking an 26 exception under *DLCD v. Yamhill County*.[5] The three-mile rule, however, specifically states that

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[5] Churches are also not allowed on high-value farmland without an exception. OAR 660-033-0130(2).

1 churches are prohibited unless an exception is granted. Thus, not only are churches not permitted
2 uses without an exception, the rule specifically requires an exception to be taken.[6] Therefore,
3 *Yamhill County* is not applicable.

4 **B. Is Exception Process a Substantial Burden**

5 Petitioners argue that because of the cumbersome and open-ended nature of exceptions,
6 forcing petitioners to pursue that process constitutes unfair delay and, thus, constitutes a substantial
7 burden. Petition for Review 32 (citing *Petra Presbyterian Church v. Village of Northbrook*,
8 No. 03-C-1936, 2003 WL 22048089 (ND Ill 2003) (although religious institutions are not relieved
9 from applying for variances or exceptions, those processes must be available without "discrimination
10 or unfair delay"). Although neither the parties nor we are aware of any case law expounding upon
11 what constitutes "discrimination or unfair delay," we need not explore the boundaries of that
12 restriction because the Court of Appeals' decision in *Presiding Bishop* answers the question in this
13 case.

14 In *Presiding Bishop*, a church applied to the city for a conditional use permit to build a
15 church meetinghouse in an R-10 zone, a zone in which church buildings are permitted subject to
16 conditional use approval. The city denied the application based in part on the size and topography
17 of the parcel, the scale and mass of the proposed building and the size of the proposed parking lot,
18 concluding that there was insufficient light, vision and noise buffering between the proposed uses and
19 the neighboring residential properties. 192 Or App at 596. The Court held that for the following
20 reasons, the city's ordinances did not impose a substantial burden on the church's religious exercise:
21 (1) the members of the church were able to worship at the existing place of worship and were not
22 dependent on obtaining the requested approval in order to worship; (2) the city merely denied a
23 particular design of the proposal and the record did not indicate "that the particular building size or

[6] The Court of Appeals has strongly hinted, in *dicta*, that *Yamhill County* would not prevent seeking an exception for a church within three miles of a UGB or on high-value farmland. *1000 Friends of Oregon v. Clackamas County*, 194 Or App 212, 217-18, 94 P3d 160 (2004).

1 design proposed by he church was required by its religious beliefs;" (3) the city's ordinances did not
2 suggest an animus towards religion; and (4) the need to submit a second application is not a
3 substantial burden. *Id*. at 597-99. The Court concluded in *Presiding Bishop*:

4 "* * * leaving for another day the question whether repeated denials and
5 reapplications eventually can constitute a substantial burden on religious exercise * *
6 * we conclude that the denial of the church's first and only application here, and the
7 resulting need by the church to submit a second application, does not constitute
8 such a burden." 192 Or App at 598.

9 In *Presiding Bishop,* the church had already submitted an initial conditional use application,
10 and the court found that it was not a substantial burden to require another application. Therefore,
11 unless there is a significant, qualitative difference between conditional use applications and
12 exceptions applications, we cannot see that requiring petitioners in this case to file an initial
13 application for approval of an exception is a substantial burden on their religious exercise.

14 Petitioners point out that the county is not required to render a decision on an exception
15 application within a specified period of time, as it is for conditional use applications, and could
16 theoretically never make a decision at all. Even though the hearings officer rejected petitioners'
17 argument on this point, he noted that the exceptions process is burdensome, "perhaps even
18 'Herculean.'" Record 18. We agree with petitioners that the exceptions process is probably
19 generally more burdensome than is the usual conditional use process; however, it is a process that is
20 commonplace in Oregon's land use system and does not, in and of itself, cause "undue" delay.[7]
21 Under the facts of this case and the Court's reasoning in *Presiding Bishop*, we cannot say that
22 requiring an application for approval of an exception is a substantial burden.

23 The first and fifth assignments of error are denied.

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[7] We note that petitioners could have filed their application for an exception when they filed their application to convert their dwelling on December 19, 2003, but instead chose to challenge the three-mile rule under RLUIPA. Any further delay in processing the exception is due, at least in part, to choices petitioners made in proceeding as they did.

1 **SECOND ASSIGNMENT OF ERROR**

2 Petitioners argue that the administrative rule and county implementing ordinance do not 3 prohibit petitioners from converting an *existing* home into a church. OAR 660-033-0130(2) and 4 (18) provide that in establishing a church on EFU land

> 5 "The use shall not be approved within three miles of an urban growth boundary 6 unless an exception is approved * * *. Existing facilities wholly within a farm zone 7 may be maintained, enhanced, or expanded on the same tract, subject to other 8 requirements of law."

9 Petitioners argue that their *existing home* is also an *existing facility* for purposes of OAR 660- 10 033-0130 and that they may therefore maintain, enhance, or expand the use to a church.

11 Critical to petitioners' argument is the proposition that existing facilities may also change 12 their use, even to a prohibited use. That proposition, however, is inconsistent with the text of the 13 rule and our prior case law. In *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 14 375 (2004), we found that the rule applied to the existing *use* of the facilities:

> 15 "* * * OAR 660-033-0130(2) also prohibit[s] establishment of (1) public or 16 private schools or (2) churches within three miles of a UGB on any kind of 17 farmland, unless an exception is approved. *Existing schools and churches can be* 18 *expanded on the same tract*." 46 Or LUBA at 397, n 16 (emphasis added).

> 19 "The code and rule allow certain non-agricultural *uses* such as golf courses, 20 churches and schools that already exist on high-value soils to expand on the same 21 tract." 46 Or LUBA at 397 (emphasis added).

22 The term "existing facilities" in OAR 660-033-0130 is limited to a facility that retains the 23 same use. Petitioners are certainly free to maintain, enhance, or expand their residential use, 24 "subject to other requirements of law." If they wish to change the use, however, they are subject to 25 rules regarding that use, in this case the three-mile rule. OAR 660-033-0130 does not allow 26 petitioners to convert their residence to a church merely because it is an existing facility.

27 Although most of petitioners' second assignment of error is devoted to the proposition that 28 their existing residence is an "existing facility" for the purposes of OAR 661-033-0130, it concludes 29 with a catchall tie-in to RLUIPA:

1 “* * * discriminating against the use of an existing structure for religious training and
2 worship, apparently because the occupants will now be pursuing spiritual
3 enlightenment rather than watching television like a typical extended family, is
4 exactly the type of discrimination RLUIPA was enacted to prevent. If OAR 660-
5 033-0130 is interpreted to prevent religious use of an existing structure, then it
6 violates RLUIPA Section 2(a) and (b).” Petition for Review 37.[8]

7 By “RLUIPA Section 2(a) and (b),” we take petitioners to mean 42 USC § 2000cc-(a) and (b),
8 the “substantial burdens” subsection discussed in the first and fifth assignments of error, and the
9 “discrimination and exclusion” subsection quoted and discussed below. Petitioners' discrimination
10 argument is not well developed. To the extent we are able to discern allegations of error from the
11 petition for review, we will consider them. *Freedom v. City of Ashland*, 37 Or LUBA 123, 124-
12 25 (1999). In the present case, we cannot tell whether petitioners are making their argument under
13 the substantial burden provision or under the discrimination and exclusion provision and if under the
14 discrimination and exclusion provision, under which subsection of that provision.[9] Under either

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[8] By RLUIPA Section 2(a) and (b), we take petitioners to mean 42 USC § 2000cc-(a) and (b), the “substantial burdens” subsection discussed in the first and fifth assignments of error, and the “discrimination and exclusion” subsection quoted and discussed below.

[9] 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

provision, there are elements that must be established to prevail, and petitioners have not undertaken the requisite analysis to allow us to evaluate their potential argument.[10] Accordingly, we decline to entertain this undeveloped argument further.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioners argue that the county misconstrued the applicable law by calculating distances under the three-mile rule by linear miles as opposed to travel distance. As stated earlier, although the property is less than three miles in a straight line from the UGB, by road it is over four miles to the property. The hearings officer found:

> "There is no basis for [petitioners'] interpretation independent of the Applicants' understandable interest in avoiding the [three-mile rule]. The argument is not supported by reference to any authority. In fact, if it were the standard for measuring the required distance, the Rule would be reduced to meaninglessness. Under the Applicants' interpretation, for example, if an EFU zoned property (not on high value farmland) were in a field only 500 yards linearly from an urban growth boundary and were it to enjoy access only by a 3.5 mile long circuitous route – say, because of the layout of public roads – the Rule would be satisfied. This outcome would nullify the purpose of the Rule to protect close in EFU zoned lands and to separate urban from rural uses Further, the Planning Manager testified during the hearing that such an interpretation would violate the County's customary practice for similar limitations – measuring the distance linearly on a map. Road miles are not the appropriate standard for measuring the distance limitation in this provision." Record 12-13.

We cannot say it any better than the hearings officer and affirm his interpretation.

The third assignment of error is denied.[11]

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

[10] Although no party cites the case, we note that the present situation is similar to the facts presented in *Cam v. Marion County*, 987 F Supp 854 (D Or 1997). Although the case predated RLUIPA, it was analyzed under the same free exercise jurisprudence that was incorporated and expanded upon in RLUIPA. In *Cam*, the Russian Old World Believers Church sought to establish a new church on high-value farmland within three miles of an established UGB. The church sought to convert an existing approved agricultural building into a church. The county denied their application because the building was on high-value farmland and was within three miles of a UGB. *Id*. at 859. Although it did not address the obligation or right to seek approval of an exception, the court struck down the regulation as a violation of the Cams' free exercise rights.

FOURTH AND SIXTH ASSIGNMENTS OF ERROR

Petitioners argue generally that applying the three-mile rule to churches but not to other uses with similar impacts is arbitrary and suggests an animus towards religion. While petitioners do not specifically couch it as such, this is an argument under RLUIPA's equal terms and discrimination provisions at 42 USC § 2000cc-(b)(1) and (2). *See* n 9. The thrust of petitioners' argument is that to allow certain other uses within three miles of a UGB, but not religious uses violates RLUIPA. In *1000 Friends of Oregon v. Clackamas County*, we addressed a more comprehensive argument on this precise issue. We do not repeat our analysis here, but only add that we found that the three-mile rule does not violate the equal terms and discrimination provisions of RLUIPA and that nothing in this petition for review convinces us to change our opinion. *See* 46 Or LUBA at 391-401.

The fourth and sixth assignments of error are denied.[12]

SEVENTH ASSIGNMENT OF ERROR

Petitioners argue that the county never offered any evidence to meet its burden of proof under RLUIPA. Under RLUIPA, the government bears the burden on each element except whether there is a substantial burden on the petitioner's exercise of religion. Thus, only if a petitioner establishes such a substantial burden does the government need to carry its burden on the other elements. Because petitioners have not established such a substantial burden, petitioners' arguments under this assignment of error provide no basis for reversal or remand.

The seventh assignment of error is denied.

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[11] Petitioners' assignment of error is only one paragraph long. The last sentence of that paragraph states that " * * * the air mile method of setback calculation is not the least restrictive means of serving the interests expressed in either Goal 3 or Goal 14." Petition for Review 38. If the mention of "least restrictive means" is meant as a veiled reference to RLUIPA then it is insufficiently developed for our review. *Sparks*, 30 Or LUBA at 330. In any event, we do not reach the "least restrictive means" analysis because we conclude that petitioners have not demonstrated that the law substantially burdens their exercise of religion.

[12] Petitioners also make arguments regarding the state's alleged lack of a compelling interest and that the least restrictive means of furthering that interest were not used. Because we do not find that the regulations impose a substantial burden on petitioners' religious exercise, we need not address the compelling interest or least restrictive means issues.

1 **INTERVENOR'S RESPONSE BRIEF**

2 Intervenor-respondent Weisel's (intervenor) response brief joins in the response brief filed
3 by DLCD "regarding the procedural issues." Response Brief 3.[13] In addition to agreeing with
4 DLCD, intervenor raises two of his own assignments of error. Intervenor argues that the hearings
5 officer erred in: (1) concluding that petitioners' "shamanistic beliefs constitute a religion"; and (2)
6 finding that there was a "connection between the location of the hotel and [petitioners'] religious
7 beliefs." Response Brief 3, 10.[14]

8 Even though the hearings officer ruled in intervenor's favor, intervenor is nonetheless
9 challenging two aspects of that decision that were resolved in petitioners' favor. Intervenor did not
10 file his own appeal of the decision, he merely intervened in petitioners' appeal. In such situations,
11 our rules provide that an intervenor may file a cross petition to challenge the decision. The cross
12 petition, however, is different from a response brief and is subject to the time deadlines for a
13 petition for review.[15] Intervenor did not comply with the requirements for a cross petition, and we
14 do not treat it as such. We have held, however, that when respondents or intervenor-respondents
15 do not seek to overturn the challenged decision, but rather seek contingent review of alleged errors
16 that are harmless only so long as the challenged decision is affirmed, they may make such arguments
17 in their response briefs as cross-assignments of error. *Copeland Sand & Gravel, Inc. v. Jackson*
18 *County*, 46 Or LUBA 653, 667, *aff'd* 193 Or App 822, 94 P3d 913 (2004). Although not
19 described as cross-assignments of error, that is what intervenor's arguments are. Because we do

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[13] The county did not file a brief. We understand intervenor to agree with all of DLCD's arguments responding to the petition for review.

[14] Intervenor consistently refers to petitioners' residence as a "hotel."

[15] OAR 661-010-0030(7) provides:

> "Cross Petition: Any respondent or intervenor-respondent who desires to file a petition for review may do so by filing a cross-petition for review. * * * The cross petition shall be filed within the time required for filing the petition for review and must comply in all respects with the requirements of this rule governing the petition for review, except that a notice of intent to appeal need not have been filed by such party."

1 not sustain any of petitioners' assignments of error, we need not reach intervenor's cross-

2 assignments of error.

3 The county's decision is affirmed.