BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

TIMBERLINE BAPTIST CHURCH,
Petitioner,

vs.

WASHINGTON COUNTY,
Respondent.

LUBA No. 2006-058

FINAL OPINION
AND ORDER

Appeal from Washington County.

Ross Day, Tigard, filed the petition for review and argued on behalf of petitioner. With him on the brief was Oregonians in Action Legal Center.

Christopher A. Gilmore, Assistant County Counsel, Hillsboro, filed the response brief and argued on behalf of respondent.

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

AFFIRMED 08/10/2006

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a hearings officer's decision approving petitioner's application for a church and day-care center on rural land outside an urban growth boundary, but denying a private school on the property.

FACTS

Timberline Baptist Church (petitioner or the church) was founded in the city of Sherwood in 2001. The church currently has 267 members, and holds weekly services at which approximately 150 to 200 people attend. The church uses a converted single-family dwelling in the city for its offices and small meetings. The church currently rents space in the local high school and in other churches for its Sunday and mid-week services. In 2005, the church began operating a school in a separate leased facility. The school currently has 19 students.

In late 2004, the church purchased a 7.05-acre parcel located adjacent to the City of Sherwood urban growth boundary (UGB), for $500,000. The parcel adjoins Highway 99 on the west, Old Capitol Highway on the east, and Brookman Road on the north. Brookman Road is within the City of Sherwood UGB. The parcel is zoned AR-5, a zone that allows schools, churches and accessory day-care centers, subject to Special Use standards governing each type of use. With respect to schools, Washington County Development Code (CDC) 430-121.3 requires that "[s]chools outside an urban growth boundary shall be scaled to serve the rural population." That requirement apparently implements Statewide Planning Goal 14 (Urbanization).

In 2005, the church applied to the county for special use approval for a church, an accessory day-care center, and a school. The church proposed a 20,570-square foot, single-story structure that would include a large multi-purpose room to be used for a variety of activities, including the proposed school. The proposed school would serve a maximum of

50 students, kindergarten through 12th Grade, with five staff. County staff recommended approval of the church and accessory day-care center, but recommended denial of the proposed school. Staff cited evidence that all church members and students reside within urban growth boundaries, and argued that the church had failed to demonstrate that the school is "scaled to serve the rural population."[1]

The church responded, in part, that denial of the school on the subject property under CDC 430-121.3 would "substantially burden" petitioner's religious exercise, in violation of the federal Religious Land Use and Institutionalized Persons Act (RLUIPA). To demonstrate a violation of RLUIPA, the church submitted evidence that no properties were currently for sale within the UGB on which a combined church/school could be located that met the church's criteria for location, access, visibility, size, and price. The church also submitted similar evidence regarding properties for sale during late 2004, when the church acquired the subject property. The church also presented testimony that operating a school on the same property as the church is necessary to fulfill its religious mission.

County staff responded in part by identifying a number of parcels near the subject property not currently listed for sale that are (1) within the UGB, (2) zoned for both a church and school, and (3) appear to meet petitioner's requirements. Petitioner submitted testimony disputing that the county-identified properties are suitable and available.

The hearings officer found that petitioner had failed to demonstrate that the proposed school is "scaled to serve the rural population," and further that denial of the proposed school on the subject property did not "substantially burden" petitioner's exercise of religion.

[1] Staff relied on a previous interpretation of CDC 430-121.3 that focuses on the proportion of the student body that resides in rural versus urban areas, rather than the scale or size of the school. Under that interpretation, as a rebuttable rule of thumb, a student body composed 75 percent or more of students residing in rural areas is "scaled to serve the rural population." Because petitioner does not challenge that interpretation or its application in the present case, we do not consider it further. Petitioner focused most of its arguments below and focuses all of its arguments to LUBA on demonstrating that application of CDC 430-121.3 substantially burdens petitioner's exercise of religion.

Specifically, the hearings officer concluded that petitioner had failed to show either that (1) a church/school could not be located within the UGB, or (2) the school could not continue successful operation on a site separate from the church.

Accordingly, the hearings officer approved the church and accessory day-care center, but denied use of the proposed structure for the proposed school. This appeal followed.[2]

INTRODUCTION

Petitioner's two assignments of error challenge the hearings officer's conclusion that denial of the proposed school on the subject property under CDC 430-121.3 is consistent with RLUIPA. We provide a brief overview of that federal law, and relevant judicial cases construing RLUIPA.

RLUIPA's "general rule," at 42 USCS § 2000cc-(a), prohibits governments from applying a land use regulation in a manner that imposes a "substantial burden" on religious exercise.[3] 42 USCS § 2000cc-2(b) provides that if the plaintiff produces prima facie

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[2] On April 5, 2006, petitioner appealed the hearings officer's decision to LUBA. On April 10, 2006, Dale R. Lissner appealed the same hearings officer's decision to LUBA. *Lissner v. Washington County* (LUBA No. 2006-059). We failed to recognize that the two appeals challenge the same decision, and did not consolidate the two appeals for review, which is our usual practice when multiple appeals of the same decision are filed. OAR 661-010-0055. The county prepared two separate records, and the two appeals proceeded on very different schedules. LUBA No. 2006-058, the present appeal, proceeded to oral argument. LUBA No. 2006-059 was suspended for some time by stipulation of the parties, and is currently subject to pending record objections. Not until after oral argument in LUBA No. 2006-058 did the Board realize that the two appeals challenge the same decision.

Consolidation of the two appeals at this stage would be impractical. Further, as far as we can tell, Mr. Lissner is concerned with traffic impacts from the proposed church, not with denial of the proposed school. While there may be overlapping issues, it does not seem to us that timely resolution of the present appeal, which is focused on the school, will interfere with resolution of the issues in LUBA No. 2006-059, or that any purpose would be served in delaying the present appeal until LUBA No. 2006-059 is resolved. Accordingly, we today issue our final opinion and order in LUBA No. 2006-058. However, the parties in both cases should recognize that not all challenges to the hearings officer's decision have been finally resolved.

[3] 42 USCS § 2000cc-(a)(1) provides, in relevant part:

> "General rule. No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution--

evidence supporting a violation of the general rule, "the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law * * * that is challenged by the claim substantially burdens the plaintiff's exercise of religion."[4]

42 USCS § 2000cc-5(7) defines "religious exercise" tautologically as "any exercise of religion," but does clarify that the centrality of the exercise to a system of religious belief is immaterial, and that use of real property for the purpose of religious exercise is itself a religious exercise.[5] 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 USCS§ 2000cc-3(g).[6]

In *Corp. of Presiding Bishop v. City of West Linn*, 338 Or 453, 111 P3d 1123 (2005), the Oregon Supreme Court reviewed the legislative history of RLUIPA and cases construing

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

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

[4] 42 USCS § 2000cc-2(b) provides:

"Burden of persuasion. If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of [42 USCS § 2000cc], the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion."

[5] 42 USCS § 2000cc-5(7) provides:

"(A) In general. The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

"(B) Rule. The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose."

[6] In addition to the "general rule," 42 USCS § 2000cc-b requires governments to treat religious assemblies on equal terms with nonreligious assemblies, prohibits discrimination against religious assemblies, and prohibits land use regulations that totally exclude religious assemblies or unreasonably limit such assemblies within a jurisdiction. Petitioner does not argue that application of CDC 430-121.3 violates any provision of 42 USCS § 2000cc-b, and we do not consider those provisions further.

the statute, and held that a government regulation imposes a "substantial burden" on religious exercise "only if it 'pressures' or 'forces' a choice between following religious precepts and forfeiting certain benefits, on the one hand, and abandoning one or more of those precepts in order to obtain the benefits, on the other." *Id.* at 466.

It is also worth noting that this is not the first time LUBA has considered CDC 430-121.3. In *Christian Life Center v. Washington County*, 36 Or LUBA 200 (1999), a case that predated RLUIPA, we affirmed county denial of a proposed parochial school pursuant to CDC 430-121.3, under similar factual circumstances. We held in relevant part that application of CDC 430-121.3 did not violate the Free Exercise Clause of the First Amendment of the United States Constitution, because denial under that code provision imposed "only the minimal burden of requiring petitioner either to develop a smaller school than desired on the subject property, or to locate the school on property within the urban growth boundary." *Id*. at 213.

Finally, we note that, pursuant to ORS 215.441, the "activities customarily associated with" churches and other religious assemblies does not include private or parochial schools.[7] Pursuant to the statute, counties may, but need not, allow schools in conjunction with

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[7] ORS 215.441 provides, in relevant part:

> "(1) If 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, including worship services, religion classes, weddings, funerals, child care and meal programs, but not including private or parochial school education for prekindergarten through grade 12 or higher education.
>
> "* * * * *
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> (3) Notwithstanding any other provision of this section, a county may allow a private or parochial school for prekindergarten through grade 12 or higher education to be sited under applicable state law and rules and local zoning ordinances and regulations."

churches. Thus, under state law, schools and churches are treated as different land uses, subject to potentially different approval standards.

With that overview, we turn to petitioner's assignments of error.

FIRST ASSIGNMENT OF ERROR

As noted, the hearings officer found that petitioner had failed to demonstrate that denial of the school on the subject property "substantially burdened" petitioner's religious exercise, on two alternative grounds: (1) petitioner had not shown that a combined church/school could not be located within the UGB, and (2) petitioner had not shown that continuing to operate a school on a site within the UGB separate from the church would be a "substantial burden" on petitioner's religious exercise.[8] Petitioner challenges both conclusions.

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[8] The hearings officer found, in relevant part:

> "Application of CDC 430-121.3 is not a 'substantial burden' under RLUIPA, because of either of the following reasons:
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> "i. The applicant failed to show that the church and school could not be situated inside the UGB. Although the substantial evidence in the record on this point conflicts, the hearings officer is not persuaded that the applicant made a sufficiently diligent effort to find suitable property inside the UGB, given the apparent suitability of land inside the UGB that appears to meet the applicant's needs. Although the hearings officer agrees with [petitioner's attorney] that a property is a suitable alternative only if it is available for sale, the hearings officer finds that, to sustain a showing of a 'substantial burden' under RLUIPA, the applicant has to determine whether otherwise suitable land is available for sale based on more than a computer search, such as by making an offer to purchase or option otherwise suitable land receiving no response or a negative response to that offer.
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> "ii. The applicant failed to show that continuing to operate the school on a site separate from the church would be a 'substantial burden.' Notwithstanding the February 9 written testimony by Pastor Lindsey, the fact is that the school is and has been operating on a site separate from the church. Based on the testimony of witnesses at the hearing, the school apparently does a remarkable job for its students and their parents. What the applicant proposes is to change its existing practices. Although the church may aspire to having a single campus, and it may have many good spiritual and other reasons for doing so, it is difficult to find that requiring the applicant to maintain separate school facilities is a 'substantial burden,' when that is what it is and has been doing with success." Record 23-24.

A. Substantial Burden on Religious Exercise

Identifying the precise burden that a land use regulation allegedly imposes is an analytical necessity in applying RLUIPA. *See Corp. of Presiding Bishop*, 192 Or App 567, 587, 86 P3d 1140 (2004) (identifying the relevant burden in denial of a conditional use permit to construct a church as "the burden of being prevented from implementing the particular design proposal at issue plus, logically, the burden of submitting a new application for a modified proposal"). In turn, identifying the burden may require some identification of the religious exercise that is allegedly burdened. It is important to recognize, however, that it is "beyond judicial ken" to determine the plausibility of a religious claim or to evaluate claims of religious truth. *Elsinore Christian Center v. City of Lake Elsinore*, 291 F Supp 2d 1083, 1086 (2003) (citing *Employment Division v. Smith*, 494 US 872, 879, 110 S Ct 1595, 108 L Ed 2d 876 (1990) and other federal cases). Nonetheless, a court can and must determine the sincerity of a professed belief, that it is "truly held." *Id.* (*quoting United States v. Seeger*, 380 U.S. 163, 185, 85 S. Ct. 850, 13 L. Ed. 2d 733 (1965)). In *Elsinore Christian Center*, for example, the district court rejected as insincere the church's claim that it was called to assemble on the specific parcel on which it proposed relocating a church. *Id.*

There is no possible question that construction of a church or use of a structure for religious assembly is a "religious exercise" as that term is defined at 42 USC§ 2000cc-5(7). Because the county approved the proposed structure and its use for a church, and denied only the proposed use of the structure for a school, we must consider whether the record demonstrates that operation of the proposed school is a "religious exercise" under RLUIPA, either in conjunction with the church at the same site, or at a separate site. Petitioner provided testimony, and no party disputes, that operating a parochial school is a part of the church's religious mission, and a necessary element to petitioner's religious exercise, if not a religious exercise in itself.

Petitioner further provided testimony that "it is a requirement of the exercise of the religion practiced at Timberline" for the church to "operate a school on its church property[.]"[9] We do not understand that statement and similar statements to mean that operating a church and school *on the same site* is a matter of religious belief or itself a religious exercise. Rather, we understand petitioner to assert that operating a parochial school is a religious exercise, and that as a matter of necessity and not just convenience the school must be operated in close proximity to the church facility and church staff in order for the school to adequately fulfill its part of petitioner's religious mission.

Based on the arguments presented to him, the hearings officer apparently understood the relevant burden at issue to be the burden of requiring petitioner either to (1) find land within the UGB on which to construct a combined church and school, or (2) operate the school at a separate site within the UGB, where it is not subject to CDC 430-121.3. The

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[9] Jerry Lindsey, Petitioner's pastor, testified as follows:

> "Though the school has its own staff, we believe it is important for the students to have access to the church staff who lead by example in the educational institution. The spiritual and moral character set forth by the church staff provides the right atmosphere for the highest academic and spiritual standards. In order to establish an adequate foundation in the students' educational program it is vital our church and school be at the same location. As we have discussed in previous submissions, if we are unable to operate a school in conjunction with our church, our ability to fulfill our religious mission and objectives will be severely burdened. Actually, our ability to engage in our religious exercise will be eviscerated.
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> "* * * * *
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> "Our previous submissions have amply explained why it is necessary for Timberline to operate a school on its church property—it is a requirement of the exercise of the religion practiced at Timberline. As a part of our religious doctrine, we must be able to offer an integrated educational experience involving both secular and Christian principles. In order to offer the curriculum our faith requires, students must have access to both classrooms as well as the sanctuary in order to receive a full Christian education in line with the edicts of our faith.
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> "This requires a church sanctuary to be adjacent to the classrooms. As a matter of necessity and convenience, students must have access to the Church at all times. If Timberline were required to locate its school off-site, the ability of students to engage in the Christian Education that Timberline strives to provide would be severely burdened, because access to the church building would be denied except for times when students could possibly find their way to the church." Record 62-63.

hearings officer found that petitioner had failed to demonstrate that either burden was "substantial," given the apparent supply of land within the UGB that appears to meet petitioner's needs, and given that petitioner currently operates a separate school facility with apparent success.

B. Evidence of Alternative Sites within the UGB

Petitioner disputes, initially, the hearings officer's understanding of the relevant burden. According to petitioner, properly viewed the burden at issue is the burden of not being able to operate a school *on the subject property*. Where the local government denies a religious use proposed on a particular property, petitioner argues, it is irrelevant under RLUIPA whether there are alternative properties in the area on which the religious use could be located, and it is irrelevant whether the religious use currently operates or could operate on a different unit of land.[10] We understand petitioner to contend that the focus of analysis under RLUIPA is the particular land on which religious use is proposed, and accordingly the applicant need not submit evidence regarding the availability of other lands for the proposed use, in order to demonstrate that the land use regulation that prohibits or impinges on use of the subject property imposes a "substantial burden" on religious exercise. In support of that proposition, petitioner relies on *Elsinore Christian Church*.

Elsinore Christian Church involved denial of a conditional use permit to relocate a church from an existing site in downtown Elsinore to a site three blocks away with better parking, that was then occupied by a grocery store. The city denied the permit on several grounds, including loss of a needed service (the grocery store), loss of tax revenue, and

[10] The county notes that it was petitioner, not the county, who framed the substantial burden analysis below to focus on the availability of suitable alternative properties within the UGB, by presenting evidence that no such alternative properties were available, and arguing that such evidence demonstrated that CDC 430-430-121.3 imposed a substantial burden on petitioner. The county further argues that the hearings officer initially was skeptical that any such evidence was necessary under RLUIPA, but was persuaded otherwise by petitioner. Record 458. However, the county does not argue that petitioner's framing of the issues below affirmatively waived any issue presented in the petition for review, or otherwise affects our review.

insufficient parking at the subject property. The district court, without much analysis, found that the denial imposed a substantial burden.[11] Petitioner points out that the court's substantial burden analysis did not consider whether the church could be located on other properties in the downtown area, or whether it could remain where it was. According to petitioner, denying the proposed use of a specific unit of land for religious exercise is *always* a substantial burden, and therefore the only remaining questions under RLUIPA is whether the local government can demonstrate that the land use regulation is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest.

In response, the county argues that *Elsinore Christian Center* is factually distinguishable. The county notes that in *Elsinore Christian Center*, the applicable zoning district allowed a church subject to a conditional use permit, whereas here CDC 430-121.3 effectively prohibits the proposed school. The county also notes that the subject site in *Elsinore Christian Center* had special religious significance, as the district court accepted the church's representation that it was called to minister in the downtown area, limiting the scope of alternative options to consider. There is no religious significance to the subject property in the present case, the county argues.

RLUIPA provides no definition of "substantial burden," however it is apparent from legislative history that the term is intended to have the same meaning as used in judicial

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[11] The District Court found, in relevant part:

> "The Court begins by considering Plaintiffs' narrowest ground of attack: the City's denial of the CUP. With regard to this action, the substantial burden question is easily answered in the affirmative. The burden on the Church's use of land in this case is not only substantial, but entire. By denying the conditional use permit, the City has effectively barred *any* use by the Church of the real property in question. This is not a case where the Church's proposed use of land - equated with 'religious exercise' by RLUIPA - is restricted in a minor or 'unsubstantial' way (e.g., by limiting a building's size or occupancy). Rather, the denial of the CUP bars the Church's use altogether, thereby imposing the ultimate burden on the use of that land." 291 F Supp 2d at 1090 (footnote omitted).

cases construing the Free Exercise Clause. *Corp. of Presiding Bishop*, 338 Or at 464. It is also apparent from those Free Exercise cases that the substantial burden hurdle is high and that the issue is "intensely fact-specific." *Mintz v. Roman Catholic Church*, 424 F Supp 2d 309, 319 (D. Mass, 2006).

We agree with the county that, depending on the circumstances, evidence of the availability of alternative properties zoned to allow the proposed religious use may be relevant, indeed critical, in attempting to demonstrate that denial of a proposed religious use substantially burdens religious exercise under RLUIPA. Perhaps the most obvious circumstance where such evidence would *not* be necessary or relevant is where the record establishes that the specific property at issue has a particular religious significance. *See Midrash Sephardi, Inc. v. Town of Surfside*, 366 F3d 1214, 1228 (11th Cir. 2004), *cert den* 543 US 1146, 125 S Ct 1295, 161 L Ed 2d 106 (2005) (no substantial burden in requiring congregation to relocate from a leased site to nearby zone that allows religious assemblies, at least where the congregation does not claim that the current location has some religious significance).

We also agree with the county that it makes a difference whether the zoning regulation under which the application is denied *prohibits* the proposed use, or whether the regulation *allows* the use subject to conditional use, site design or similar discretionary standards that the local government found were not met. In the latter case, the reason for denial may have to do with the characteristics of the proposed use rather than the limitations of the subject property, in which case evidence that alternative sites are or are not available may be immaterial. On the other hand, the reason for permit denial may concern the characteristics or limitations of the subject property, in which case evidence regarding the lack of more suitable alternative sites may be an essential element in demonstrating a substantial burden.

In our view, the strongest case under RLUIPA for requiring evidence on alternative sites arises where the land use regulation effectively *prohibits* the proposed use of a specific parcel, particularly an undeveloped parcel, as in the present case.[12] In that circumstance, the burden, properly speaking, is the burden of acquiring suitable property where the proposed use is allowed. *See Midrashi Sephardi, Inc.* (requiring congregation to relocate from leased facility in zone that does not allow religious assemblies to a zone that does is not a substantial burden); *Lighthouse Institute for Evangelism v. City of Long Branch*, 406 F Supp 2d 507, 515-16 (D NJ 2005) (a denial of a permit for a church on grounds that applicable zoning does not allow churches is not a substantial burden under RLUIPA, where suitable alternative sites are available in 90 percent of the city); *Shepherd Montessori Center Milan v. Ann Arbor Charter Township*, 259 Mich App 315, 333, 675 NW 2d 271 (2003) (no substantial burden in denying permit for religious school in a zone where a school is not permitted, absent evidence regarding "alternative locations in the area that would allow the school"); *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375, *appeal dismissed* 194 Or App 212, 94 P3d 160 (2004) (demonstration that a zoning prohibition on a particular property owned by a religious assembly imposes a substantial burden requires evidence that the jurisdiction's zoning scheme as a whole fails to provide adequate opportunity to site a church within the jurisdiction).

In sum, we disagree with petitioner that denying religious use of a specific parcel of land is *per se* a substantial burden, or that evidence of the availability of alternative sites is irrelevant and unnecessary under RLUIPA. It is not clear to us why the court in *Elsinore*

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[12] Undeveloped land is generally a more marketable commodity than land already developed for a religious use. The availability of alternative sites might be a less critical factor if the land at issue is already developed with an existing religious use, and the proposal is to expand or add onto that existing use. *See, e.g., Living Water Church of God v. Charter Township of Meridian*, 384 F Supp 2d 1123 (WD Mich 2005) (denial of permit to expand existing church to include 35,000-square foot school facility is a substantial burden). Presumably, that is because the burden of selling an existing religious structure to construct a new, expanded structure elsewhere is greater than the burden of selling undeveloped land to acquire other undeveloped land.

Christian Church confined its substantial burden analysis to the property at issue. It may be that no party raised that issue or identified alternative sites within the downtown area. Or the court may have given the substantial burden analysis short shrift, since it ultimately wound up declaring parts of RLUIPA beyond Congress' authority to enact.[13] Whatever the case, we find more persuasive the cases cited above, indicating that evidence regarding alternative sites may be essential in demonstrating a substantial burden under RLUIPA, particularly where the applicable zoning scheme prohibits the proposed use, as here.

We turn then to petitioner's challenge of the hearings officer's two bases for concluding that denial of the proposed school is not a substantial burden.

C. Availability of Sites within the UGB for combined Church/School

To demonstrate that denial of the school under CDC 430-121.3 "substantially burdens" petitioner's exercise of religion, petitioner submitted evidence intended to demonstrate that, at the time of the proceedings below as well as during the period in which petitioner acquired the subject property, there were no properties within the UGB listed for sale that met petitioner's criteria for location, access, visibility, size, and price. That evidence consisted, initially, of a list of properties in the Sherwood area greater than three acres in size and on the market at some unspecified date in January 2006. Record 503-511. The list was generated by the real estate broker who represented the church during the 2004 acquisition of the subject property. In an accompanying memorandum, the broker states that most of the identified properties are already developed with residences, and none of the remainder have "ease of access off a main thoroughfare." Record 503.[14] On February 2,

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[13] A conclusion that few other courts have reached. Almost all courts that have considered RLUIPA's constitutionality and validity have concluded that it is constitutional and within Congress' authority to enact. *See, e.g., Cutter v. Wilkinson*, 544 US 709, 125 S Ct 2113, 161 L Ed 2d 1020 (2005) (upholding Section 3 of RLUIPA prohibiting imposition of substantial burden on the religious exercise of institutionalized or confined persons).

[14] The undated memorandum states, in relevant part:

2006, petitioner submitted additional evidence consisting of (1) a list of 28 properties that sold in the City of Sherwood area during the period July 2004 to December 2004, the period in which petitioner acquired the subject property, and (2) an updated list of 29 properties that were currently on the market as of January 2006. For both lists, the broker used a filter of 4 acres and $10,000,000.00 upper price range. Record 64. All but one property on the first list, those sold between July 2004 and December 2004, are outside the urban growth boundary, and apparently rejected for that reason. Record 71-72. The remaining property bears only the notation "11/5/02 Property Pending Sale." Record 72. The second list, those on the market in January 2006, includes notations that reject each of the 29 properties for various reasons, including "outside the urban growth boundary," "limited access to the property," "limited exposure of property," "out of price range," and "parcel size too small." Record 73-75.

On the same date, county staff submitted a memorandum responding to petitioner's initial evidence. The staff memorandum identified 16 parcels within the UGB near the subject property that appear to meet petitioner's size requirements.[15] On February 7, 2006,

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> "The attached property evaluation of currently available properties in Sherwood demonstrates the excellent location of property that the church currently owns. I set parameters of lots greater than 3 acres, as the size of the proposed building looks as though it will need at least that much space. The attached report shows what is available in a size of greater than 3 acres, and a price up to $10,000,000.00. As you can see most of the acreage currently available in Sherwood is already developed as residences. Of the five commercial/land listings, only one could support a church with ease of access, and that is located close to Wilsonville, in the Wilsonville Urban growth boundary. The rest of the properties are remote with rural road access. I have found no currently available properties that are [either in or out] of the urban growth boundary that have ease of access off a main thoroughfare." Record 503.

[15] In a February 2, 2006 memorandum, county staff stated, in relevant part:

> "* * * Staff believes that there is land available inside the UGB on which the church and school could be located. Specifically, Staff notes that the land north of SW Brookman Road has a land use designation of FD-20, which would permit both a church and school. Using the applicant's 3-acre minimum lot size stated in Mr. Clarey's letter Staff has identified 16 parcels inside the UGB between SW Brookman Road and the City of Sherwood [city limits] that meet the applicant's three acre minimum criteria. (See attached copy of the Community Plan of the area, FD-20 District standards from the [CDC], and tax maps 3S 1A, 3S1 6BB, 3S1 6B, and 3S1 6). The applicant testified that the land in this area would someday be

petitioner submitted a final response from the real estate broker. The response lists 16 properties zoned FD-20, presumably the same 16 properties identified in the staff report. For 12 properties, the list states only that "No Market Data Available," meaning apparently that the property has not been sold in the last five years. Four properties have sales data, with listed or sales prices ranging from $1.9 to 2.7 million dollars. Record 65-66. The response also states that the four properties with sales data are unacceptable for access, visibility and price reasons.

Finally, on February 9, 2006, staff weighed in again, identifying two additional FD-20-zoned properties in the area that sold in July and August 2005 for $125,000 to $160,000 per acre that appear to meet petitioner's criteria. Record 41.

As noted, the hearings officer reviewed this evidence and concluded that petitioner failed to make "a sufficiently diligent effort to find suitable property inside the UGB, given the apparent suitability of land inside the UGB that appears to meet the applicant's needs." Record 23; *see* n 8. In particular, the hearings officer disagreed with petitioner that only properties marketed or listed for sale are "available." *Id.* According to the hearings officer, petitioner must do more than conduct a computer search of properties listed for sale. To disqualify unlisted but otherwise apparently suitable properties, the hearings officer concluded that petitioner must demonstrate, for example, that an offer to purchase was made and no response or a negative response is received. *Id.*

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residential and that the owners were waiting to develop their land as residential. Staff is unsure how the applicant knows that this is the case. Did they contact each of these owners and ask if they were willing to sell their property, if not then what process did they use to make this conclusion? (Staff notes that the 4.67-acre parcel to the north of the site (tax lot 3S2 1A 500), which also abuts Pacific Highway (99W), SW Brookman Road, and SW Old Capitol Highway and meets the applicant's minimum lot area requirement of larger than 3 acres has a 2005 assessed value of $303,490. * * * Staff notes that the assessed value of that parcel is less than the $500,000 the applicant paid for the subject parcel). [That parcel] is also zoned rural residential, and the Code also authorizes schools in urban residential zones from R-5 to R-9." Record 146-47.

Petitioner challenges the hearings officer "sufficient diligence" test, arguing that it is ambiguous, nearly impossible to satisfy, and subject to the unfettered whims of local government decision makers. It is unclear under that test, petitioner argues, what constitutes "sufficient" diligence, how many offers to purchase must be made, when the offers should be made (before, during, after the application is submitted?), and how long the applicant must wait before no response is presumed to be a negative response. Given the ambiguity and lack of clarity in the hearings officer's test, petitioner argues that the only reasonable standard for determining substantial burden in this case must be based on evaluation of properties that were marketed or listed for sale at the time of the application, or perhaps at the time petitioner purchased the subject property in 2004. Under that standard, petitioner argues, the evidence is undisputed that no properties were available within the UGB that met petitioner's access, visibility, size and price criteria.

The county responds that the hearings officer correctly concluded that petitioner failed to present prima facie evidence that application of CDC 430-121.3 imposes a substantial burden on petitioner's exercise of religion.[16] According to the county, at best the

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[16] The county makes several other responses that we discuss briefly. First, the county argues that petitioner ignores an incorporated finding adopted by the hearings officer that provides a different and broader basis for concluding that RLUIPA is not violated than the findings that apply the "sufficient diligence" standard. The allegedly incorporated finding is in a memorandum attached to the February 2, 2006 staff report authored by assistant county counsel. The memorandum concludes in relevant part that the proper inquiry under the substantial burden test, where the applicant proposes a religious use on land not zoned for that use, focuses on whether the zoning scheme as a whole provides opportunities to site the proposed use, not on the state of the local real estate market on a given date, or the particular needs or financial resources of the applicant. Record 159 (citing *Midrash Sephardi*). The county argues that petitioner's failure to challenge this incorporated finding means that the decision must be affirmed, regardless of any error in applying the "sufficient diligence" standard. We decline to consider this argument, because it is not at all clear to us that the hearings officer in fact incorporated the cited passage at Record 159. The hearings officer incorporated the staff reports, Record 16, but did not expressly incorporate the many attachments to those staff reports.

Second, the county argues that LUBA's holding in *Christian Life Center* that CDC 430-121.3 does not violate the Free Exercise Clause is dispositive of petitioner's RLUIPA claim. The county claims that we found in *1000 Friends of Oregon* that the Free Exercise Clause is "more rigorous" than RLUIPA. Therefore, the county reasons, if application of CDC 430-121.3 on similar facts did not violate the Clause, then application of CDC 430-121.3 in the present case cannot violate RLUIPA. One flaw in that argument is that, contrary to the county's understanding of *1000 Friends of Oregon*, we held that RLUIPA is intended to be, if anything, more rigorous than the Free Exercise Clause, not less. 46 Or LUBA at 390. In any case, while our decision in

record demonstrates only that petitioner may have some difficulty in obtaining property zoned to allow a church/school that also meets petitioner's self-defined "criteria." That difficulty, the county argues, falls far short of demonstrating that CDC 430-121.3 imposes a substantial burden on petitioner's religious exercise, *i.e.*, that it pressures or forces a choice between "following religious precepts and forfeiting certain benefits, on the one hand, and abandoning one or more of those precepts in order to obtain the benefits, on the other." *Corp. of Presiding Bishop*, 338 Or at 466.

We agree with the county and the hearings officer that petitioner failed to meet its burden of proof and persuasion under the RLUIPA general rule. While we do not endorse the hearings officer's formulation of "sufficient diligence," we agree with the hearings officer that to show a "substantial burden" under RLUIPA in the present circumstances, petitioner must do more than present a computer-generated list of properties that are listed for sale on a certain date or range of dates, and attempt to disqualify that limited list of properties based on ill-defined "criteria."

Denial of the proposed school under CDC 430-121.3 does not pressure or force petitioner to choose between following a religious precept and forfeiting approval of the proposed school, or abandoning any religious precept in order to obtain approval of the school. If petitioner wishes to locate the school on the same site as the church, it simply has to acquire property within the UGB that is zoned to allow a church and school.[17] Such property may be more expensive than petitioner would prefer to pay, and may require trading

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Christian Life Center may be instructive, because the substantial burden analysis under RLUIPA is so fact-specific, we decline to view it as dispositive of the present case.

[17] In our view, it is immaterial that petitioner already possesses a parcel that is suited for the proposed use (but for CDC 430-121.3). As noted, undeveloped land is relatively fungible, and petitioner does not cite any reason why the subject property could not be sold for at least its purchase price. In any case, as staff noted below, petitioner knew or should have known when it acquired the property in 2004 that the property was subject to CDC 430-121.3. Record 40 ("Staff believes that the correct zoning for the proposed uses must be [a] key factor in choosing to purchase a parcel and yet the applicant appears to have overlooked this fundamental attribute in the criteria for parcel selection"). Either petitioner did not plan to develop a school on the subject property when it acquired the property in 2004, or it failed to realize at the time that CDC 430-121.3 would apply and would prohibit any school not "scaled to serve the rural population."

off one desired characteristic against other desired characteristics, such as paying more for convenient access or high visibility, or sacrificing access or visibility for a lower price. But if so, such trade-offs stem from petitioner's financial circumstances and market forces that affect all land users, not CDC 430-121.3. Neither the Free Exercise Clause nor RLUIPA require local governments to shield religious assemblies from the sometimes "harsh reality" of the marketplace. *Midrash Sephardi*, 366 F.3d at 1227, n 11 (quoting *Love Church v. City of Evanston*, 896 F.2d 1082, 1086 (7th Cir. 1990).

There is no dispute that the UGB includes a number of zones, including the FD-20 zone, that would allow the proposed church and school. Staff identified at least 12 parcels zoned FD-20 within the UGB in the area of the subject property (which presumably is only a portion of the Sherwood-area UGB) that are zoned to allow the proposed church and school and that appear to meet at least petitioner's size criterion. We agree with the hearings officer that it is immaterial that these parcels (and others, presumably, that are suitably zoned) are not currently listed for sale. As staff noted, it is common for urbanizable property within the UGB to be sold without being marketed, based on contacts initiated by interested purchasers. Record 41-42. Petitioner offers no reason to doubt that if it contacted the owners of suitable property and made market-value offers, it could find and acquire suitable property. The burden of undertaking that process of seeking out suitable properties and contacting owners, as other land developers frequently must do, is not a substantial one.

We need not, and cannot, attempt to describe here what specific facts petitioners must show in order to demonstrate a "substantial burden" under the foregoing analysis. It bears repeating, however, that whatever considerations are used to disqualify alternative properties must be based on religious exercise or property characteristics necessary to support religious exercise, and not mere convenience or desirable but unnecessary features. Importantly, as we understand the above-cited Free Exercise and RLUIPA cases, petitioner's financial circumstances and its ability or inability to afford otherwise suitable and available properties

is not a basis to conclude that denial of a religious use on property not zoned for that use substantially burdens petitioner's free exercise.[18]

For the foregoing reasons, we reject petitioner's challenges to the hearings officer's first basis for concluding that petitioner had failed to demonstrate that denial under CDC 430-121.3 imposes a substantial burden on petitioner's religious exercise.

D. Continuing Operation of the School on a Separate Site

As a second basis, the hearings officer also ruled that petitioner had failed to demonstrate that denial of the proposed school under CDC 430-121.3 imposes a substantial burden, because petitioner currently operates a school with apparent success on a separate site from its other religious activities, and presumably could continue to do so.[19] According to the hearings officer, petitioner merely proposes to "change its existing practices[,]" and regulations that merely prevent a change in existing religious practices do not substantially burden those practices.

Petitioner cites to testimony that operation of the school on the same premises as the church is essential to fulfill the school's religious mission. *See* testimony of Pastor Lindsey, at n 9. According to petitioner, the hearings officer erred in assuming the current temporary

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[18] It seems to us that the affordability of property zoned for the proposed use might be an appropriate consideration, if evidence in the record established that the jurisdiction had so limited the supply of land available for that use that only exceptionally well-heeled religious assemblies could afford land necessary to site the proposed use. In that circumstance, it would not be the particular financial means of the petitioner, nor general market forces, that made land unavailable. It is possible, in that circumstance, that a religious assembly could also make a case out under the "unreasonable restriction" element of 42 USCS § 2000cc-b, as well as the general rule.

[19] We repeat the relevant part of the hearings officer's findings from n 8, above:

> "The applicant failed to show that continuing to operate the school on a site separate from the church would be a 'substantial burden.' Notwithstanding the February 9 written testimony by Pastor Lindsey, the fact is that the school is and has been operating on a site separate from the church. Based on the testimony of witnesses at the hearing, the school apparently does a remarkable job for its students and their parents. What the applicant proposes is to change its existing practices. Although the church may aspire to having a single campus, and it may have many good spiritual and other reasons for doing so, it is difficult to find that requiring the applicant to maintain separate school facilities is a 'substantial burden,' when that is what it is and has been doing with success." Record 23-24.

operation of the school on a separate site is evidence that petitioner is currently fulfilling its religious mission.

The above-quoted language suggesting that denial of "change in existing practices" is not a substantial burden appears to be based on similar language in *Christian Gospel Church v. City and County of San Francisco*, 896 F2d 1221 (9th Cir. 1990), a case that predates RLUIPA. *Christian Gospel Church* involved denial of a conditional use permit to relocate worship services then conducted in a leased hotel banquet room to a single-family residence in a residential zone. The Ninth Circuit held, in relevant part, that "[t]he burden on religious practice is not great when the government action, in this case the denial of a use permit, does not restrict current religious practice but rather prevents a change in religious practice." *Id.* at 1224.

It is not clear to us that the Ninth Circuit would necessarily apply the same phrasing or reach the same conclusion under RLUIPA, which as noted, defines the term "religious exercise" in different and broader ways than that term is used in cases under the Free Exercise Clause. In any case, it seems to us that at least one critical element distinguishes the circumstances in *Christian Gospel Church* from the present case. Here, petitioner's pastor offered specific testimony describing why the church's religious mission requires operating the school and church on the same site, or at least reasonably proximate sites.[20] We are offered no reason to doubt the sincerity of that testimony, and accordingly must accept it at face value. Given that testimony, the fact that the church currently operates a separate school facility might not be a sufficient basis to reject petitioner's claim that denial

[20] The pastor's testimony that the students require access to the sanctuary and to church leaders during school hours is sufficient, in our view, to establish that the school and church must be in relatively close proximity. It is less clear that the testimony establishes that the school and church must be operated on the same site. If a school could be sited on nearby property within short enough distance from the subject property to practicably allow students to visit the sanctuary and church leaders to visit the school during the course of the school day, that circumstance might militate against a finding that denial of the school on the subject property is a substantial burden.

of the school on the same site as the church is a substantial burden. *See also Living Water Church of God*, 384 F Supp 2d at 1133 (finding that operating a church and school at separate sites to be "not feasible," given transportation, cost and shared employee issues).

However, we need not decide that issue, because we have affirmed the hearings officer's alternative finding that petitioner had failed to demonstrate that a combined church/school could not be located within the UGB on land zoned to allow for both churches and urban schools. Therefore, even if the hearings officer erred in concluding that continued separate operation of the school would not be a substantial burden, a point we do not decide, that error would not provide a basis to reverse or remand the county's decision.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that, if LUBA sustains the first assignment of error and rejects the hearings officer's finding of no substantial burden, LUBA should also reject the county's finding that CDC 430-121.3 furthers a compelling governmental interest, and is the least restrictive means of furthering that interest.[21]

Having affirmed the hearings officer's conclusion that application of CDC 430-121.3 does not impose a substantial burden on petitioner's religious exercise, we need not address

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[21] The hearings officer's findings state, in relevant part:

> "If the application of CDC 430-121.3 to the applicant in this case amounts to a 'substantial burden' under RLUIPA, the hearings officer finds that it does not violate RLUIPA, because CDC 430-121.3 furthers a rational or compelling governmental purpose; that is, to protect rural lands for rural intensity uses, to comply with Statewide Planning Goal 14, and to maintain the integrity of the UGB.
>
> "i. The hearings officer disagrees with the suggestion [by petitioner] that the school does not conflict with that purpose because it will use the same physical facilities as the church. The hearings officer finds that the school will conflict with that purpose, because it will serve only children from the urban area who will generate traffic and will be there when the site would otherwise not be active for that purpose (i.e. on weekdays between 8:00 a.m. and 4:00 p.m.)." Record 24.

petitioner's arguments under this assignment of error, which presume that CDC 430-121.3 imposes a substantial burden.

The county's decision is affirmed.