BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SCOTT YOUNG and ROBIN JAMES,
Petitioners,

vs.

JACKSON COUNTY,
Respondent.

LUBA No. 2008-076

FINAL OPINION
AND ORDER

Appeal from Jackson County.

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

Gregory S. Hathaway, filed the response brief and argued on behalf of respondent. With him on the brief were Davis Wright Tremaine LLP, G. Frank Hammond and Allie O'Connor.

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

RYAN, Board Member, did not participate in the decision.

REMANDED 12/23/2008

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

Petitioners appeal a county decision denying their application to operate a church in an existing dwelling on land zoned for exclusive farm use, located within three miles of an urban growth boundary.

FACTS

The subject property is a 96.30-acre parcel zoned exclusive farm use (EFU), but which is not "high-value farmland" as that term is defined at ORS 215.710. The property is located approximately 2.2 miles from the City of Ashland's urban growth boundary (UGB), and on or near Squaw Mountain, a place of religious significance for the Native Americans in the Rogue Valley. Petitioners own an additional 1,700 acres surrounding the subject property, that are also zoned EFU. Some of petitioners' acreage is located more than three miles from the City of Ashland UGB.

In 1999, petitioners sought and obtained county approval for an 11,000-square foot single-family residence on the subject property. The dwelling has 10 bedrooms and nine baths with individual entrances, a separate master bedroom and bath, two kitchens, and a large prayer room. The dwelling was constructed in 2002. Petitioners currently use the dwelling as their primary residence, and also as a religious retreat with extended overnight stays and other religious uses.[1]

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[1] The county's decision describes petitioners' religious beliefs and how petitioners chose the site for the dwelling/church as follows:

> "The Applicants adhere to the world's largest and oldest belief system, Animism. More specifically, the Applicants subscribe to Native American Animism known as Huichol Shamanism. This belief system and the rituals utilized are based on practices of the Huichol Indians of the Sierra Madre Mountains near Ixtian in Central Mexico. Huichol Shamanism honors all of creation and maintains that everything has a spirit. This practice focuses on healing and empowerment through personal transformation and direct experiences. Members of this practice participate in rituals and ceremonies that last over a period of several days. Overnight stay is important in the ceremonies to maintain sacred space. The practice of Huichol Shamanism recognizes that power inhabits certain places and the relationship

In 2003, petitioners applied for county approval to use the dwelling as a church or religious retreat center with overnight accommodations.[2] In 2004, a county hearings officer denied the application, based on OAR 660-033-00130(2), which prohibits churches within three miles of a UGB, unless an exception is approved pursuant to ORS 197.732 and OAR chapter 660, division 4. Petitioners appealed the hearings officer's decision to LUBA, arguing that denial of the proposed religious use violated the Religious Land Use and Institutionalized Persons Act of 2000, 42 USC 2000cc (RLUIPA). LUBA upheld the county's decision, however, concluding that petitioners had not exhausted their available remedies because they had not sought an exception to the administrative rule under ORS 197.732 and OAR chapter 660, division 4. *Young v. Jackson County*, 49 Or LUBA 327 (2005).

Petitioners subsequently applied for a "reasons" exception under ORS 197.732 and OAR chapter 660, division 4. The county board of commissioners held a public hearing on the application and, on April 30, 2008, issued a decision denying the requested exception. The county found that petitioners had failed to satisfy the ORS 197.732(2)(c)(B) and OAR 660-004-0020(2) requirement for a reasons exception, to demonstrate that "[a]reas which do not require a new exception cannot reasonably accommodate the use." Specifically, the county concluded that petitioners had not demonstrated that the proposed church could not

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> between the location of the ritual or ceremony and the location of these 'places of power' is an essential component of Applicant's belief system.
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> "In this matter, the Applicants have generally identified a 'place of power' for the practice of Huichol Shamanism for themselves and others to include the location of their existing home at 3300 Butler Road and surrounding land. The Applicants refer to this area as the 'Circle of Teran.' Applicants believe that the Circle of Teran has been sited at its current location by divine spiritual guidance. The Applicants represented that the proposed church at their existing residence is not located in the center of the 'place of power' but is located in the perfect place based on its proximity to the center of the 'place of power.' The Applicants have represented that the site of the existing residence is uniquely and exclusively where the church must be located." Record 4.

[2] If the church is approved, petitioners plan to move to a different dwelling under construction on a different parcel they own in the vicinity. After that move, the existing structure would be used exclusively for religious purposes.

be located elsewhere on petitioners' lands, on sites that are beyond the three-mile boundary. With respect to RLUIPA, the county found that denial of the proposed church did not impose a "substantial burden" on petitioners' religious exercise and, to the extent it did burden religious exercise, the three-mile rule furthers a compelling governmental interest and is the least restrictive means of furthering that compelling government interest.

This appeal followed.

ASSIGNMENT OF ERROR

The "general rule" of RLUIPA, codified at 42 USC 2000cc-(a), prohibits local and state governments from applying a land use regulation in a manner that imposes a "substantial burden" on the religious exercise of a person, religious assembly or institution, unless the government demonstrates that the burden is in furtherance of a compelling governmental interest, and is the least restrictive means of furthering that compelling governmental interest.

A separate section of RLUIPA, the so-called "equal terms" provision at 42 USC 2000cc-(b)(1), provides that:

> "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."

Petitioners argue in relevant part that the county's application of the three-mile rule to deny the proposed church violates both the "general rule" of RLUIPA and the "equal terms" prohibition. Because we agree with petitioners that application of the three-mile rule at OAR 660-033-00130(2) to deny the proposed church violates the "equal terms" provision of RLUIPA, we do not address petitioners' challenges under the general rule.[3]

[3] A claim under the equal terms provision does not require petitioners to also demonstrate that the county has imposed a substantial burden on their religious exercise, as under the general rule. *Digrugilliers v. Consolidated City of Indianapolis*, 506 F3d 612, 616 (7th Cir 2007). Similarly, under the equal terms provision it is irrelevant that there are zones or alternative locations where the proposed religious use is allowed. *Id.* Thus, for purposes of the equal terms provision, the county's main rationale for denying the application—that petitioners could locate the church on other land they own outside the three-mile boundary—is not relevant.

A. Waiver and Law of the Case

The county argues, initially, that petitioners failed to raise any issue below regarding the equal terms provision, and therefore the issue is waived under ORS 197.763(1).[4] In addition, the county argues petitioners raised a similar equal terms challenge in *Young v. Jackson County*, LUBA correctly rejected the argument, and petitioners have offered no reason to reach a different conclusion.

With respect to ORS 197.763(1), at oral argument petitioners cited to testimony below in which their attorney argued that singling out churches to comply with the three-mile rule is unequal and discriminatory, given that the administrative rule permits a number of other uses that have similar impacts on agricultural lands. Record 61, 605-08. We agree with petitioners that that testimony is sufficient to raise the issue of whether application of the three-mile rule violates the equal terms provision.

The county is correct that in *Young v. Jackson County* we addressed an argument that we understood was based on the equal terms provision. After agreeing with the county that requiring petitioners to seek a reasons exception to the three-mile rule is not in itself a substantial burden on their religious exercise, we addressed miscellaneous other arguments, including the following:

> "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). * * * The thrust of petitioners' argument is that to allow certain other uses within three miles of a UGB, but not religious uses

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[4] ORS 197.763(1) provides:

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

> violates RLUIPA. In *1000 Friends of Oregon v. Clackamas County* [46 Or LUBA 375 (2004)], 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." *Young*, 49 Or LUBA at 342.

As discussed below, the above-quoted characterization of our holding in *1000 Friends of Oregon* is overstated; our analysis in that case was limited to the circumstances presented and in fact suggested that, in other circumstances, application of the three-mile rule would violate the RLUIPA equal terms provision. Further, our resolution of what we understood to be petitioners' equal terms argument is *dicta*, because we had already concluded that petitioners' RLUIPA claims were premature, until petitioners filed an application for a reasons exception and the county denied that application. For that reason, petitioners are not precluded from advancing a new equal terms challenge, in an appeal of the county's denial of that subsequent application for a reasons exception. *See Kingsley v. City of Portland*, 55 Or LUBA 256, 263-64 (2007), *aff'd* 218 Or App 229, 179 P3d 752 (2008) (*dicta* in earlier unappealed denial does not preclude the city from reaching a different conclusion in a subsequent related decision based on a new application).

B. State Law Governing Churches on EFU land.

Resolution of petitioners' equal terms argument requires some review of the land use scheme governing EFU-zoned lands within three miles of a UGB. ORS 215.283(1)(b) generally permits in any area zoned for exclusive farm use "[c]hurches and cemeteries in conjunction with churches." However, OAR 660-033-0120, part of the administrative rule implementing Statewide Planning Goal 3 (Agricultural Land), restricts where and under what circumstances new churches may be located on EFU land.

OAR 660-033-0120, Table 1, sets out the uses that are prohibited, permitted, or permitted with restrictions in EFU zones. Table 1 imposes two relevant sets of restrictions, for present purposes. The first is a generally widespread prohibition on establishment of new

non-farm uses on high-value farm soils, including churches, golf courses, and private parks. The second relevant restriction is a more narrowly focused prohibition on establishment of new churches and schools on EFU-zoned land, without regard to the quality of the agricultural soils, that is within three miles of an urban growth boundary. Table 1 makes churches and schools—and only churches and schools—subject to OAR 660-033-0130(2), which provides that:

> "The use shall not be approved within three miles of an urban growth boundary unless an exception is approved pursuant to ORS 197.732 and OAR chapter 660, division 4. Existing facilities wholly within a farm use zone may be maintained, enhanced or expanded on the same tract, subject to other requirements of law."

In contrast, Table 1 permits a number of other non-farm uses to be established on EFU-zoned land within three miles of UGB, including (1) public and private parks and playgrounds, (2) community centers operated by and for residents of rural areas, (3) golf courses, and (4) living history museums.[5]

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[5] Table 1 is difficult to summarize. The table divides up various uses into related categories. Under the category of "Parks/Public/Quasi-Public" it lists the following uses, with symbols (omitted here) indicating whether the use is allowed, permitted with certain restrictions, or prohibited on high-value farmland and non-high-value farmland. For present purposes, it is important to note that of all the listed uses, the three-mile rule at OAR 660-033-0130(2) applies only to churches and schools, the first two uses listed. All other listed uses are allowed, some with restrictions, on non-high value farmland within three miles of a UGB.

> (1) Public or private schools, including all buildings essential to the operation of a school; (2) Churches and cemeteries in conjunction with churches consistent with ORS 215.441; (3) Private parks, playgrounds, hunting and fishing preserves and campgrounds; (4) Parks, and playgrounds; (5) Community centers owned by a governmental agency or a nonprofit organization and operated primarily by and for residents of the local rural community; (6) Golf courses; (7) Living history museum; (8) Firearms training facility as provided in ORS 197.770; (9) Armed forces reserve center as provided for in ORS 215.213(1); (10) Onsite filming and activities accessory to onsite filming for 45 days or less as provided for in ORS 215.306; (11) Onsite filming and activities accessory to onsite filming for more than 45 days as provided for in ORS 215.306; (12) A site for the takeoff and landing of model aircraft, including such buildings or facilities as may reasonably be necessary; (13) Expansion of existing county fairgrounds and activities directly relating to county fairgrounds governed by county fair boards established pursuant to ORS 565.210; (14) Operations for the extraction and bottling of water; (15) Land application of reclaimed water, agricultural or industrial process water or biosolids; and (16) A county law enforcement facility that lawfully existed on August 20, 2002, and is used to provide rural law enforcement services primarily in rural areas, including parole and post-prison supervision, but not including a correctional facility as defined under ORS 162.135 as provided for in ORS 215.283(2).

In *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375, 398-401, *appeal dismissed* 194 Or App 212, 94 P3d 160 (2004), we rejected an argument that OAR 660-033-0120, Table 1, violated RLUIPA's equal terms provision because the rule allows rural community centers, but not the proposed new church, on high-value farmland located within three miles of the City of Molalla UGB.[6] Because the property at issue in *1000 Friends of Oregon* was high-value farmland, almost all new non-farm uses comparable to churches were prohibited, including golf courses and private parks, etc., with the exception of a rural community center, which is permitted on high-value farmland. However, our conclusion that application of OAR 660-033-0130(2) did not violate the equal terms provision was based on a key factual element in that case: the rule permitted only community centers that serve a

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[6] We held in *1000 Friends of Oregon*:

> "The county code and rule generally prohibit all 'churches' within three miles of a UGB, unless an exception is taken, regardless of whether that church serves an urban or rural congregation, or some combination thereof. If it were the case that the proposed church primarily served 'residents of the local rural community' within the meaning of the rule, we would likely agree with the county and intervenor that prohibiting such a church under the county code and rule but allowing a community center on the subject property would fail to treat a religious assembly on 'equal terms' as a nonreligious assembly, and would thus violate 42 USC § 2000cc-(b)(1). * * *
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> "However, those are not the facts. We agree with petitioner that the prohibition on churches within three miles of a UGB, like the identical prohibition on schools, is intended to help preserve the urban-rural boundary protected by Goal 14, by limiting urban uses on rural land close to UGBs. The purpose of those prohibitions seems relatively clear: to support the function of UGBs by discouraging the establishment of religious assemblies and schools on rural lands just outside the UGB. Such lands are often if not invariably less expensive to acquire and develop than lands within the UGB. But for the prohibition, it is reasonable to suppose that at least some religious assemblies and schools that primarily serve an urban population and that would otherwise remain or locate within the UGB would instead choose to locate on EFU-zoned lands just outside the UGB, where schools and churches are otherwise permitted. Indeed, the present case appears to represent the very scenario that the county code and rule prohibition on churches within three miles of the UGB is designed to discourage.
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> "The rule provision for community centers 'operated primarily by and for residents of the local rural community' does not implicate these same policy concerns. Therefore, as applied to the facts of this case, the prohibition on churches within three miles of a UGB does not treat the proposed church on less than 'equal terms' with community centers, for purposes of 42 USC § 2000cc-(b)(1). * * * The county erred in concluding otherwise." 46 Or LUBA at 399-401.

rural population, while the proposed church served an urban congregation within the City of Molalla. We commented that if the church instead served a rural congregation we would likely agree with the county that the rule violated RLUIPA's equal terms provision, because there would then be no legally significant distinction between the prohibited religious use and the allowed non-religious use, with respect to the purpose of the three-mile rule. 46 Or LUBA at 399.

C. Federal Cases Interpreting the Equal Terms Provision

Petitioners cite three federal court decisions holding that zoning schemes that prohibit religious assemblies and institutions but allow secular assemblies and institutions violate RLUIPA's equal term provision. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F3d 1214 (11th Cir 2004); *Konikov v. Orange County*, 410 F3d 1317 (11th Cir 2005); *Lighthouse Institute for Evangelism v. City of Long Branch*, 510 F3d 253 (3rd Cir 2007), *cert den* 128 S Ct 2503, 171 L Ed 2d 787 (2008).

In *Midrash*, the zoning scheme prohibited churches and synagogues within a business district, but permitted "private clubs," among other similar secular uses. The Eleventh Circuit found that private clubs and other non-religious uses allowed in the zone were "assemblies" for purposes of RLUIPA, and that the prohibition on churches and synagogues violated the equal terms provision.

In *Konikov*, the city required that "religious institutions" obtain a special permit in a residential zone, and sought to enjoin use of a dwelling for thrice weekly religious meetings. However, the city allowed secular social organizations, such as cub scouts, to assemble in dwellings with the same frequency, and without obtaining a permit. The Eleventh Circuit held that the city's implementation of its zoning code treated religious assemblies differently than secular assemblies that met with similar frequency, and thus violated the equal terms provision.

In *Lighthouse*, the zoning ordinance for a downtown commercial district permitted a variety of uses, including an "assembly hall," but did not permit churches. The Third Circuit first construed 42 USC 2000cc-(b)(1) to require that a person asserting a claim under the equal terms provisions must show (1) it is a religious assembly or institution, (2) subject to a land use regulation, which regulation (3) treats the religious assembly on less than equal terms with (4) nonreligious assembly or institution (5) that causes no lesser harm to the interests the regulation seeks to advance. 510 F3d at 270. The Third Circuit found that "it is not apparent from the allowed uses why a church would cause greater harm to regulatory objectives than an 'assembly hall' that could be used for unspecified meetings[,]" and concluded that the zoning code violated the equal terms provision. *Id.* at 272.

As petitioners note, the Eleventh Circuit and Third Circuit differ in two particulars in their analyses of equal terms claims. First, the Third Circuit would require a showing under the fifth element listed above, that the zoning scheme permits a nonreligious assembly or institution that "causes no lesser harm to the interests the regulation seeks to advance." The Eleventh Circuit test does not require that the plaintiff make that comparative showing, although the Eleventh Circuit considers the governmental interest at stake in a subsequent step of the analysis, when applying strict scrutiny. The Third Circuit test rejects strict scrutiny in favor of "strict liability," that is, if the regulation treats religious assemblies on less than equal terms with nonreligious assemblies that are no less harmful to the regulatory objective, then the regulation fails, without more. 510 F3d at 266. According to the Third Circuit, Congress explicitly required strict scrutiny in evaluating claims under the "general rule" at 42 USC 2000cc-(a), but did not similarly specify that strict scrutiny should be applied to equal terms and discrimination claims under 42 USC 2000cc-(b). *Id.* at 269.[7]

[7] At least one district court has questioned whether there is a substantive difference between the two tests. *River of Life Kingdom Ministries v. Village of Hazel Crest*, 2008 US Dist LEXIS 53491 (ND Ill, July 14, 2008), n 10:

No Oregon state or federal court has, to our knowledge, adopted either approach. The Third Circuit's approach is somewhat more consistent with the approach we followed in *1000 Friends of Oregon*. For the reasons set out below, we conclude that under either approach the county's denial of the proposed church under the three-mile rule violates the equal terms provision.

D. Analysis

As we indicated in *1000 Friends of Oregon*, the apparent purpose of the three mile rule at OAR 660-033-00130(2) is to help preserve the urban-rural boundary that is required by Statewide Planning Goal 14 (Urbanization). The rule seeks to further that purpose by prohibiting certain uses (churches and schools) that often serve an urban or suburban population, but which due to particular land needs and financial constraints, are often drawn to locate on cheaper agricultural land close to urban areas and the urban populations served by those uses. The question, for purposes of the equal terms provision, is whether the rule permits non-religious uses within the three mile boundary that can fairly be characterized as "assemblies or institutions," and if so whether those non-religious assemblies or institutions, as compared to religious assemblies or institutions, cause "no lesser harm to the interests the regulation seeks to advance." *Lighthouse*, 510 F3d at 270.

As noted, OAR 660-033-0120, Table 1 allows on EFU-zoned land within three miles of a UGB a number of uses, including public and private parks and playgrounds, golf courses, and living history museums. Petitioners argue that, like churches, these uses serve various social and recreational functions and qualify as secular "assemblies and institutions"

> "The court is not certain there is a real difference between the Equal Terms tests used by the Eleventh and Third Circuits. The Third Circuit rejects any strict scrutiny analysis, but in essence adds a strict scrutiny perspective in its analysis of comparability. It looks to the government interest at stake in determining whether religious and non-religious uses are comparable. The Eleventh Circuit applies strict scrutiny after adopting an extremely superficial analysis of comparability. The court questions whether this is a real difference or only an apparent difference emerging from excessive attention to counting and refining 'prongs.'"

for purposes of RLUIPA. Petitioners cite to statements in the legislative record of RLUIPA as evidence that Congress intended non-religious assemblies and institutions to encompass a broad scope, including "places of amusement" and "museums."[8] In addition, petitioners argue that some federal courts have recognized that golf courses, parks, playgrounds and similar recreational facilities may be non-religious "assemblies or institutions" for purposes of RLUIPA. *Covenant Christian Ministries, Inc. v. City of Marietta,* 2008 US Dist LEXIS 54304 (ND Ga, March 31, 2008) (private parks and playgrounds, and neighborhood recreation centers, are assemblies within the meaning of RLUIPA); *River of Life Kingdom Ministries,* 2008 US Dist LEXIS 53491, at 26-27 (same); *Congregation Kol Ami v. Abington Twp,* 309 F3d 120, 141 (3rd Cir 2002) (suggesting an equal terms violation would exist if a low density residential zone prohibited a synagogue but allowed a "country club" with a full-scale golf course).

The county does not dispute that golf courses, parks, playgrounds and living history museums could constitute assemblies or institutions for purposes of RLUIPA. Although it is a debatable question, we agree with petitioners that these uses constitute "assemblies" for purposes of comparison under the RLUIPA equal terms provision.

OAR 660-033-0130(20) defines "golf course" and associated facilities to permit not only the golf course itself, but also accessory facilities such as a clubhouse, pro shop and food and beverage services.[9] OAR 660-033-0130(31) permits "public parks" in EFU zones

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[8] Petitioners quote the following passage from the House Report on the Religious Liberty Protection Act of 1999, which petitioners assert was incorporated into the legislative history of RLUIPA:

> "Significantly, non-religious assemblies need not follow the same rules. This survey revealed that uses such as banquet halls, clubs, community centers, funeral parlors, fraternal organizations, health clubs, gyms, **places of amusement**, recreation centers, lodges, libraries, **museums**, municipal buildings, meeting halls, and theatres are often permitted as of right in zones where churches require a special use permit, or permitted on special use permit where churches are wholly excluded." Petition for Review 11 (emphasis in original).

[9] OAR 660-033-0130(20) provides, in relevant part:

including the uses specified under OAR 660-034-0035 (state parks) or 660-034-0040 (local parks). In turn, the list of uses allowed in state and local parks under OAR chapter 660, division 034 is extensive, potentially including campground and day use areas, recreational

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"'Golf Course' means an area of land with highly maintained natural turf laid out for the game of golf with a series of 9 or more holes, each including a tee, a fairway, a putting green, and often one or more natural or artificial hazards. A 'golf course' for purposes of ORS 215.213(2)(f), 215.283(2)(f) and this division means a 9 or 18 hole regulation golf course or a combination 9 and 18 hole regulation golf course consistent with the following:

"(a) A regulation 18 hole golf course is generally characterized by a site of about 120 to 150 acres of land, has a playable distance of 5,000 to 7,200 yards, and a par of 64 to 73 strokes;

"(b) A regulation 9 hole golf course is generally characterized by a site of about 65 to 90 acres of land, has a playable distance of 2,500 to 3,600 yards, and a par of 32 to 36 strokes;

"* * * * *

"(d) Counties shall limit accessory uses provided as part of a golf course consistent with the following standards:

"(A) An accessory use to a golf course is a facility or improvement that is incidental to the operation of the golf course and is either necessary for the operation and maintenance of the golf course or that provides goods or services customarily provided to golfers at a golf course. An accessory use or activity does not serve the needs of the non-golfing public. Accessory uses to a golf course may include: Parking; maintenance buildings; cart storage and repair; practice range or driving range; clubhouse; restrooms; lockers and showers; food and beverage service; pro shop; a practice or beginners course as part of an 18 hole or larger golf course; or golf tournament. Accessory uses to a golf course do not include: Sporting facilities unrelated to golfing such as tennis courts, swimming pools, and weight rooms; wholesale or retail operations oriented to the non-golfing public; or housing.

"(B) Accessory uses shall be limited in size and orientation on the site to serve the needs of persons and their guests who patronize the golf course to golf. An accessory use that provides commercial services (e.g., pro shop, etc.) shall be located in the clubhouse rather than in separate buildings.

"(C) Accessory uses may include one or more food and beverage service facilities in addition to food and beverage service facilities located in a clubhouse. Food and beverage service facilities must be part of and incidental to the operation of the golf course and must be limited in size and orientation on the site to serve only the needs of persons who patronize the golf course and their guests. Accessory food and beverage service facilities shall not be designed for or include structures for banquets, public gatherings or public entertainment."

facilities of various kinds, interpretative centers, natural history and cultural museums and educational facilities, and in certain circumstances, lodging and park retreat facilities. OAR 660-034-0010(12) defines "park retreat" as "an area of a state park designated for organized gatherings" that includes a meeting hall.[10]

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[10] OAR 660-034-0035(2) provides:

> "The park uses listed in subsection (a) through (i) of this section are allowed in a state park subject to the requirements of this division, OAR chapter 736, division 18, and other applicable laws. Although some of the uses listed in these subsections are generally not allowed on agricultural lands or forest lands without exceptions to Statewide Planning Goals 3 or 4, a local government is not required to adopt such exceptions in order to allow these uses on agricultural or forest land within a state park provided the uses, alone or in combination, meet all other applicable requirements of statewide goals and are authorized in a state park master plan adopted by OPRD, including a state park master plan adopted by OPRD prior to July 15, 1998:
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> "(a) Campground areas: recreational vehicle sites; tent sites; camper cabins; yurts; teepees; covered wagons; group shelters; campfire program areas; camp stores;
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> "(b) Day use areas: picnic shelters, barbecue areas, swimming areas (not swimming pools), open play fields, play structures;
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> "(c) Recreational trails: walking, hiking, biking, horse, or motorized off-road vehicle trails; trail staging areas;
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> "(d) Boating and fishing facilities: launch ramps and landings, docks, moorage facilities, small boat storage, boating fuel stations, fish cleaning stations, boat sewage pumpout stations;
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> "(e) Amenities related to park use intended only for park visitors and employees: laundry facilities; recreation shops; snack shops not exceeding 1500 square feet of floor area;
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> "(f) Support facilities serving only the park lands wherein the facility is located: water supply facilities, sewage collection and treatment facilities, storm water management facilities, electrical and communication facilities, restrooms and showers, recycling and trash collection facilities, registration buildings, roads and bridges, parking areas and walkways;
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> "(g) Park Maintenance and Management Facilities located within a park: maintenance shops and yards, fuel stations for park vehicles, storage for park equipment and supplies, administrative offices, staff lodging;
>
> "(h) Natural and cultural resource interpretative, educational and informational facilities in state parks: interpretative centers, information/orientation centers, self-supporting interpretative and informational kiosks, natural history or cultural resource museums, natural history or cultural educational facilities, reconstructed historic structures for cultural resource interpretation, retail stores not exceeding 1500 square

There are no comparable administrative rules for *private* parks or playgrounds, and there is some uncertainty over what uses are permitted in a private park. *See Utsey v. Coos County*, 176 Or App 524, 573, 32 P3d 933 (2001) (Deits, dissenting) (opining that a proposed motocross racetrack is not a permissible component of a "private park" allowed under ORS 215.283(2)). It is reasonable to presume, however, that at a minimum what is permitted in a public park on EFU land under the applicable statewide planning goals would also be permitted in a private park on EFU land.[11]

OAR 660-033-0130(21) defines a "living history museum" as "a facility designed to depict and interpret everyday life and culture of some specific historic period using authentic buildings, tools, equipment and people to simulate past activities and events."[12] A living history museum may include limited commercial activities and facilities to be located in a

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feet for sale of books and other materials that support park resource interpretation and education;

"(i) Visitor lodging and retreat facilities in state parks: historic lodges, houses or inns and the following associated uses in a state park retreat area only:

"(A) Meeting halls not exceeding 2000 square feet of floor area;

"(B) Dining halls (not restaurants)."

OAR 660-034-0040 incorporates by reference the above list of permissible uses, with respect to local parks.

[11] Table 1 permits "campgrounds" as part of a private park. OAR 660-033-0130(19) has a special, limited version of the three-mile rule that is applicable only to private campgrounds. The rule prohibits private campgrounds within three miles of a UGB, unless located on a lot or parcel that is contiguous to a lake or reservoir.

[12] OAR 660-033-0130(21) provides, in relevant part:

> "'Living History Museum' means a facility designed to depict and interpret everyday life and culture of some specific historic period using authentic buildings, tools, equipment and people to simulate past activities and events. As used in this rule, a living history museum shall be related to resource based activities and shall be owned and operated by a governmental agency or a local historical society. A living history museum may include limited commercial activities and facilities that are directly related to the use and enjoyment of the museum and located within authentic buildings of the depicted historic period or the museum administration building, if areas other than an exclusive farm use zone cannot accommodate the museum and related activities or if the museum administration buildings and parking lot are located within one quarter mile of an urban growth boundary. * * *"

museum administrative building if the building and parking lot are located within one-quarter mile of an urban growth boundary.

An "assembly" for purposes of the equal terms provision has been defined as places where groups or individuals dedicated to similar purposes, whether social, educational, recreational or otherwise, meet together to pursue their interests. *Midrash Sephardi, Inc.*, 366 F3d at 1230-31. In our view, a golf course, a private or public park, and a living history museum permitted under the administrative rule fall into that definition, because they are places or facilities where groups or individuals gather to pursue common social or recreational interests. The county does not contend these uses are not "assemblies" within the meaning of the equal terms provision.

While there are obvious functional differences between a religious assembly and a golf course, private or public park, or a living history museum, the focus under the equal terms provision (at least as the Third Circuit construes it) is less on functional similarities or dissimilarities and more on whether the secular assembly "causes no lesser harm to the interests the regulation seeks to advance." *Lighthouse*, 510 F3d at 270. As we explained in *1000 Friends of Oregon*, a rural community center allowed within three miles of the city's UGB does not implicate the same policy concerns as the proposed church, because it is expressly limited to serving a rural population and therefore does not harm the primary regulatory purpose behind the three-mile rule: to protect the integrity of the UGB against uses that primarily serve an urban population but which often tend to locate, usually for financial reasons, on less expensive agricultural lands close to UGBs. However, golf courses, private and public parks and living history museums allowed under the rule are not similarly limited to serving rural populations. The rule permits golf courses, private and public parks and living history museums on EFU land within three miles of a UGB, even if those uses primarily attract or are intended to serve the nearby urban population.

The county's main response on the merits is an argument that petitioners failed to present any evidence below that golf courses, parks or living history museums create similar adverse impacts as churches. 42 USC 2000cc-2(b) provides that "[i]f the plaintiff produces prima facie evidence to support a claim alleging a violation of [42 USC 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 * * * substantially burdens the plaintiff's exercise of religion." We understand the county to argue that petitioners failed to present "prima facie" evidence supporting their claim that the three-mile rule violates the equal terms provision.

However, it is not clear what kind of evidence the county believes is necessary with respect to a claim alleging violation of the RLUIPA equal terms provision. In the posture of this case, the issue is primarily a legal one: does the applicable zoning scheme allow religious assemblies on EFU lands within three miles of a UGB on less equal terms than non-religious assemblies? That issue is resolved primarily if not exclusively by examining the text of the relevant statutes, administrative rules and implementing code provisions. The applicable rules allow golf courses, parks and living history museums on EFU lands within three miles of the UGB, while at the same time prohibit churches in the same area. We have determined that those non-religious uses are "assemblies" for purposes of the equal terms provision, and the county does not contend otherwise. The rules do not limit non-religious assemblies on EFU lands within three miles of a UGB to use by residents of rural areas, or include any other limitation that would ensure that those uses cause "no lesser harm to the interests" the three-mile rule seeks to advance. If there is some legally significant factual variable the evidence of which must be present in the record in order to resolve petitioners' equal term claim, the county does not identify what it is.[13]

[13] The county does not identify what kind of evidence of comparative "adverse impacts" petitioners must submit. If the county is suggesting that petitioners must submit, for example, traffic studies comparing the

The county offers no other arguments on the merits. For the above reasons, we conclude that petitioners have adequately demonstrated the elements of an equal terms claim under the Third Circuit approach described in *Lighthouse*. Specifically, petitioners have demonstrated that the administrative rules treat the proposed church on "less than equal terms" with several nonreligious assemblies that cause "no lesser harm to the interests the regulation seeks to advance." 510 F3d at 270. Under the Third Circuit's strict liability approach, the result is that the county cannot apply the administrative rule to deny the proposed church.

As noted, under the Eleventh Circuit's approach, there is a subsequent step of the analysis under which the rule may still be applied to prohibit the proposed religious assembly, if the rule survives review under the strict scrutiny standard. Under the strict scrutiny standard, the government must demonstrate that non-equal treatment is in furtherance of a compelling governmental interest, and is the least restrictive means of furthering that compelling governmental interest. 42 USC 2000cc(a). The county argues, in responding to petitioners' arguments under the "general rule" at 42 USC 2000cc(a), that the county's findings adequately demonstrate that the three-mile rule furthers a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.

We assume for purposes of analysis that the state has a compelling interest in preserving agricultural land and the integrity of urban growth boundaries. However, it does not follow that there is a compelling state interest in restricting the location of religious assemblies on agricultural lands within three miles of a UGB, while not similarly restricting

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traffic impacts of a golf course on the subject property versus the proposed church, we disagree. The salient issue for purposes of an equal terms analysis is whether the land use regulations treat religious assemblies on less equal terms than non-religious assemblies, with respect to the regulatory objective. The purpose of the three-mile rule is only indirectly related, if related at all, to traffic impacts. As noted, the purpose of the three-mile rule is to help preserve the integrity of the UGB and to preserve agricultural land by preventing urban uses from locating on EFU land near UGBs.

comparable non-religious assemblies that, on their face, appear to impact the same state interests to no less degree. *Konikov*, 410 F3d at 1329 (by applying different standards for religious gatherings and non-religious gatherings having the same impact, the county impermissibly targets religious assemblies without compelling justification).

Because the county has not established that there is a compelling governmental interest in prohibiting churches but allowing other uses that also impact the state's interest in protecting the function of the UGB, we need not address whether the rule is the "least restrictive" means of furthering that interest.[14] Accordingly, we conclude that even if the strict scrutiny test applies, the county has not demonstrated that the three-mile rule can be permissibly applied as a basis to deny the proposed church.

The assignment of error is sustained, in part.

CONCLUSION

OAR 661-010-0071(1) provides that LUBA shall reverse a land use decision that violates a provision of applicable law and is prohibited as a matter of law. The county's primary basis for denial is the three-mile rule, and that is the exclusive focus of the parties' arguments in their briefs. However, the county argued at oral argument that the county's findings identify several local approval criteria that the proposed church does not comply with. According to the county, those unchallenged findings may constitute independent bases for denial, regardless of whether the three-mile rule violates the equal terms provision.

The county is correct that the county's decision addresses various comprehensive plan and land use regulations and found that some of them are not met. However, it appears

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[14] However, we note that the three-mile rule could probably be narrowed in a manner that would both treat religious and non-religious assemblies on equal terms and further the state's interest in preserving the function of the UGB from the threat of uses located on rural agricultural lands that serve urban populations. The rule could be amended to treat churches and other uses that constitute "assemblies" in the same manner as it treats community centers, which are allowed on EFU land within three miles of a UGB if they are "operated primarily by and for residents of the local rural community." However problematic such a rule might be in practice, it would not violate the equal terms provision. *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA at 399-401.

to us that most if not all of the findings of noncompliance with local plan and code regulations are based on the county's denial of the reasons exception, or are based on plan and code provisions that apply only if the reasons exception is granted. It is not clear if there is any basis for denial under the county's plan or zoning ordinance that is independent of the reasons exception. The parties' briefs do not address the question. Under these circumstances, we deem it more appropriate to remand the county's decision rather than reverse it, because it is not clear whether or not the county's denial is "prohibited as a matter of law." On remand, the county may consider whether the proposed church fails to comply with any plan or zoning ordinance provision that is independent of the three-mile rule and the reasons exceptions standards, and that applies on equal terms to other uses allowed on EFU-zoned land.

The county's decision is remanded.