

**FINAL DECISION AND ORDER of the
SNOHOMISH COUNTY HEARING EXAMINER**

DECISION DATE: December 2, 2010

PLAT/PROJECT NAME: **CLEARVIEW GOSPEL HALL ASSEMBLY**

APPLICANT/
LANDOWNER: West Woodland Gospel Hall Assembly
13110 NE 177th Place, #126, Woodinville WA 98072

FILE NO.: 09-101644 LU

TYPE OF REQUEST: CONDITIONAL USE PERMIT

DECISION (SUMMARY): **DENIED WITHOUT PREJUDICE**

BASIC INFORMATION

GENERAL LOCATION: 6726 180th Street SE, Snohomish WA, 98296

PDS STAFF RECOMMENDATION: Approve the Conditional Use Permit Application

INTRODUCTION

The Clearview Gospel Hall Assembly ("Clearview") is requesting a conditional use permit (CUP) to site a church on a substandard rural property that is 3.12 acres, in the R-5 zone. The land is designated as Rural Basic-5 Acres in the County's GMA Comprehensive Plan. A public hearing was held on November 17, 2010. Appearing for Clearview was Todd Brandt, President of the Board of Directors, Britt Hiatt-Heath, Harmsen and Associates, Brad Lincoln, Gibson Traffic Consultants, and their attorney, Tom Erlichman. Appearing for the Department of Planning and Development Services (PDS) was Monica McLaughlin, Ann Goetz, and Howard Knight.

NOTE: For a complete record, an electronic recording of the hearing in this case is available in the Office of the Hearing Examiner.

FINDINGS OF FACT

Based on a preponderance of the evidence of record, the following Findings of Fact are entered.

1. The information set forth in the introductory paragraphs is incorporated herein by this reference. All of the Exhibits shown on the master list of exhibits were entered into the record as evidence, along with the

testimony of witnesses presented at the open record hearing. The entire record was considered by the Examiner in reaching this decision.

2. Clearview is requesting approval of a CUP under Chapter 30.42C SCC to construct a church on a substandard lot which was previously used for single-family residential purposes.
3. The subject property is approximately 135,107 square feet. It is deemed a “substandard lot” because it fails to meet the minimum lot size for the R-5 zone described in the Bulk Matrix within the Zoning Regulations). The minimum lot size is 200,000 square feet. (See, Table 30.23.030(1) SCC)
4. Clearview purchased the subject property with full knowledge that it was 3.12 acres in an R-5 zone. In its Master Permit Application, Clearview completed the sections setting forth the lot size and applicable zoning on the front page. (Exhibit A1) Clearview’s Project Description dated January 7, 2009, does not disclose this and is devoid of any discussion or analysis of the fact that they are proposing a new use on a substandard lot. (Exhibit A2) Instead, Clearview asserts that PDS is to blame for failing to raise the issue prior to June of 2010. (Exhibit H2)
5. In June, 2010, PDS staff allegedly told Clearview that they would not be able to recommend approval of a CUP on a substandard lot, in light of recent state court decisions interpreting the provisions of the County’s substandard lot regulations. However, PDS changed its position and now argues that the Hearing Examiner should grant the request for a CUP. (Testimony of Howard Knight, Monica McLaughlin; Exhibit J) When asked by the Examiner why they are taking such a position, the staff essentially stated that they are concerned about litigation, based on legal issues raised by Clearview’s legal counsel. (Exhibit H2)
6. Clearview argues that the Bulk Matrix regulations are not health, safety and welfare regulations and, therefore, the Hearing Examiner must not enforce them in light of the federal law requirements found in the *Religious Land Use and Institutionalized Persons Act* (“RLUIPA”) 42 U.S.C. 21C, Section 2000cc.
7. Clearview asserted at the open record hearing that a CUP is required for churches in every zone. The Examiner finds that this is not the case. The County’s Zoning Use Matrix states that churches are *permitted* uses in many urban and rural zones. (See, SCC 30.22.100) Specifically, churches are permitted outright in the Urban LDMR, MR, NB, PCB, CB, GC, IP, BP, LI, HI and UC zones, as well as the Rural RD and CRC zones. Churches are also permitted uses in the “Other” zone category of RU.
8. Although Clearview is seeking relief from the Bulk Matrix regulations that require a minimum lot size of 200,000 square feet in the R-5 zone, Clearview did not seek a variance pursuant to Chapter 30.43(B) SCC and refused at the hearing to consider such a course of action.
9. “A variance is the mechanism by which an adjustment is made to specific regulations being applied to a particular piece of property.” (SCC 30.43B.010.) A variance applies to “...any development standard contained in subtitle 30.2 SCC, 30.31A-30.31F SCC, chapter 30.42B SCC, and chapter 30.42E SCC. A variance shall not permit uses that are prohibited by this title.” Id. The Examiner finds that a church is a conditional use in the R-5 zone, not a prohibited use and that a variance is an appropriate means of seeking relief from the Bulk Matrix standards at issue here.
10. At the open record hearing, Clearview argues they should not be required to seek a variance to the Bulk Matrix standards, because they were never told to do so by PDS, and to do so now would cause them unnecessary delay and expense. They also assert, without citation to any facts or evidence, that PDS is unlikely to grant them a variance. (Testimony of Tom Erlichman)

11. The Examiner takes official notice of the County's Zoning Map. The Map reveals that there are numerous places within the County where a church is a permitted use. In particular, the Clearview Rural Commercial (CRC) zone, is located within several blocks of the subject property at 180th and Highway 9.
12. The majority of the parcels in the immediate vicinity around the subject property are zoned R-5 and are presently used for single-family residential purposes. (Exhibits D1, D2 and D3)
13. Several citizens residing in the immediate vicinity of the subject property appeared and stated their opposition to the granting of a CUP for the church. Most of their complaints were related to concerns over increased traffic in the rural area, the incompatibility of a church with the surrounding single-family uses, its potential for growth and intensified use if the church membership should grow in the future; and stormwater runoff concerns from adding impervious surfaces to the subject property. Two members of the church appeared and testified in support of the application, as well as a citizen working with the local clothing bank, who will use the church one day a week for a clothing distribution center for low income families if the CUP is granted. The church members stated that their religious beliefs require them to be active neighbors and participants in the local community and that they do this by giving back to others through charitable works. They stated their intent to be a positive influence in the area and good neighbors to the surrounding residents.
14. Clearview does not claim there are insufficient properties available within the surrounding area on which a church could be permitted. They do not claim that the permitting process discriminates against their church or churches in general, nor do they allege that they are unlikely to be granted a permit. Instead, Clearview argues that they should be exempted from the minimum lot size standards by order of the Hearing Examiner and they should not be required to seek a rezone or variance to the standards, citing delay and expense as the reason that they should not be required to follow the County's permitting procedures. They claim that a decision otherwise would violate their state and federal constitutional rights and the provisions RLUIPA.
15. In support of their state constitutional claim, Clearview argues that Article I, Section 11 of the Washington State Constitution grants more protection than the U.S. Constitution with regard to the free exercise of religion, however they did not perform a *Gunwall* analysis.
16. The Hearing Examiner is not authorized to render decisions on constitutional claims, although the Examiner does allow such argument for purposes of making a record for further review by the courts, if necessary. However, the Examiner must consider the requirements of state and federal law, including constitutional principles, where applicable.
17. PDS and Clearview argue that the Examiner has the inherent authority to relax or waive zoning standards for the subject application based on RLUIPA. However, neither party cites to specific legal authority granting the Examiner such power, absent an express delegation of authority from the County Council or within the County Code.
18. The Examiner finds that, although the proposal fails to meet the minimum lot size standards found in the Zoning Code, Clearview's proposed development of the property for a church otherwise meets the County's development regulations applicable to the project.

CONCLUSIONS OF LAW

1. The Hearing Examiner has jurisdiction to decide this Type 2 permit application pursuant to SCC 30.72.060 and Chapter 30.42C SCC.
2. In order to obtain a CUP, the development proposal here must comply with the requirements of Chapter 30.42C SCC. The Hearing Examiner may approve, approve with conditions, or deny a CUP only when all the following criteria are met: (a) The proposal is consistent with the comprehensive plan; (b) The proposal complies with applicable requirements of Title 30 SCC; (c) The proposal will not be materially detrimental to uses or property in the immediate vicinity; and (d) The proposal is compatible with and incorporates specific features, conditions, or revisions that ensure it responds appropriately to the existing or intended character, appearance, quality of development, and physical characteristics of the site and surrounding property. The Examiner considers each requirement in turn.
3. Consistency with the Snohomish County GMA Comprehensive Plan. The proposal must be consistent with the Comprehensive Plan. Here, Clearview asserts that the Comprehensive Plan ("Plan") does not directly address churches. The Examiner disagrees. The Comprehensive Plan contains several land use policies relating to churches on lands within Urban Growth Areas (UGAs), where it is assumed that most will be placed. In addition, churches may be included in the Public/Institutional Use land use designation on the Future Land Use Map (FLUM). However, there are no specific land use policies guiding the siting of churches in lands designated as rural in the Comprehensive Plan. As a long-term planning document, the Plan is neutral as to the siting of churches on rural lands; it neither promotes nor discourages their placement on these lands. To determine where churches are permitted, prohibited or conditional uses, one must look to the County's Zoning Code. Here, the testimony in the record was that the proposed church is consistent with Policy LU 6(e) of the Plan. The church design and operation will protect rural character. Churches are a traditional part of rural communities across Snohomish County. They are part of a rural lifestyle. The prior use of the subject property for single-family purposes with a mobile home was not a positive influence in the community because it frequently was the site of illegal activities such as the ignition of fireworks, noisy ATVs, junk and other problems. The church will provide a stable, attractive use with architectural features that give it a rural look and feel, compatible with the surrounding neighborhood. Based on these facts, the Hearing Examiner concludes that the proposal is consistent with the Plan, specifically Policy LU 6(e) because it will protect rural character in the area.
4. Compliance with Title 30 SCC. Based upon the facts in the record and testimony received at the public hearing, the Examiner concludes that the project meets the traffic mitigation and road design standards of Chapter 30.66B SCC, Title 13 SCC and the EDDS, the drainage and grading regulations set forth in Chapters 30.63A, 30.63B and 30.63C SCC, the Critical Areas Regulations (CAR) set forth in Chapter 30.62A SCC, the requirements of SEPA set forth in Chapter 30.61 SCC, the International Fire Code regulations set forth in Chapter 53A.SCC and the utility regulations specified by the Snohomish Health District. (Exhibits A-J)

However, the application fails to comply with the minimum lot size requirements of the Zoning Code set forth in Table 30.23.030(1) SCC. Clearview has failed to seek a rezone or variance, which would potentially grant relief from the standard, if approved. Clearview refuses to consider it now, alleging that it is inconvenient, expensive, unduly burdensome and too late. Absent a rezone or variance, the use of a substandard lot is limited to residential use and only under the circumstances set forth in SCC 30.23.240. Accordingly, the Hearing Examiner concludes that the proposal does not meet the requirements of Title 30 SCC.

As noted above, Clearview claims that various state and federal laws excuse Clearview from having to apply for such regulatory relief. The Examiner considers each of these claims.

5. State Law Claims.

- A. Free Exercise Clause. Clearview alleges that they are not subject to the minimum zoning regulations based on the free exercise clause of the Washington State Constitution. The Washington State Supreme Court has stated that article I, section 11 "absolutely protects the free exercise of religion, [and] extends broader protection than the first amendment to the federal constitution...." *First Covenant Church v. City of Seattle*, 120 Wash.2d 203, 229-30, 840 P.2d 174 (1992). The Church has more protection under Washington's constitution. *City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 642, 211 P.3d 406, 410 (2009).

In proceeding under article I, section 11, a party challenging government action must show two things: that the belief is sincere and that the government action burdens the exercise of religion. *Open Door Baptist Church v. Clark County*, 140 Wash.2d 143, 152, 995 P.2d 33 (2000). The government must then show it has a narrow means for achieving a compelling goal. *Id.*

PDS does not contend that Clearview is not sincere in its belief, nor do they contest that Clearview's claims that the County's regulations burden its exercise of religion. Several citizens do contest this fact, however, although they did not provide legal briefing on the issue. The Hearing Examiner concludes that Clearview is sincere in its beliefs. As such, the issue presented here is whether the County's regulations *substantially burden* the free exercise of the Church's religious "sentiment, belief [or] worship." *Id.* If they do, then strict scrutiny applies and the County must show it has a compelling state interest in its regulations and that the regulation is the least restrictive means to achieve those interests. *Id.*

In *City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 643, 211 P.3d 406, 411 (2009), the Supreme Court set forth the test for determining whether a regulation substantially burdens the free exercise of religion. They stated:

Government burdens religious exercise "[i]f the 'coercive effect of [an] enactment' operates against a party 'in the practice of his religion....' " *First Covenant*, 120 Wash.2d at 226, 840 P.2d 174 (alteration in original). This does not mean any slight burden is invalid, however. If the constitution forbade all government actions that worked *some* burden by minimally affecting "sentiment, belief [or] worship," then any church actions argued to be part of religious exercise would be totally free from government regulation.

Id. at 643. In reflecting on its prior decisions, the Court stated "if any government burden, **such as applying for permits**, were unconstitutional, "we would have decided *Open Door* differently." *Woodinville*, *supra* at 644. The Court went on to state:

The context for the constitutional evaluation of any burden necessarily encompasses impact on others in the county. . . . By way of analogy, while healing the sick is similarly connected to worship, a church must still comply with reasonable permitting processes if it wants to operate a hospital or clinic. This notion is expressly reflected in article I, section 11 providing, "the liberty of conscience hereby secured shall not be so construed as to ... justify practices inconsistent with the peace and safety of the state." *Id.*

What we learn from the Supreme Court is that article I, section 11 of the Washington State Constitution (the free exercise clause), has not been interpreted to provide an outright exemption for a church from

otherwise lawful permitting requirements. Here, the Zoning Code requires Clearview to either submit an application for the development of land for a church on a lot *conforming* to the zoning regulations, or seek administrative relief through a variance. Clearview has done neither of these things.

Clearview has not demonstrated that the permitting requirements are unduly burdensome. In addition, they have not alleged that there are insufficient parcels of land on which a church could be sited (either as a permitted or conditional use). They simply seek to develop the substandard lot that they purchased. Clearview does not allege that they were unaware of the substandard nature of the property or that they are innocent purchasers. The Examiner concludes that there is land within the immediate vicinity in the Clearview Rural Commercial zone, and elsewhere in the County, where a church can be permitted outright.

The Examiner further concludes that the County's policies and regulations are neutral as to their effect on religious freedom. Zoning regulations are a lawful expression of the County's police power authority. The minimum lot size standards apply equally to all permitted and conditional uses within the R-5 zone. They are not designed to discourage churches. Contrary to Clearview's assertion, strict scrutiny is not triggered in this case unless the regulations are found to be unduly burdensome. Here, Clearview has not met its burden to show that the County's regulations are *unduly burdensome*.

Additionally, Clearview has not alleged that they cannot achieve a variance or that the process cannot offer them relief. The fact is that Clearview has not attempted to apply for a variance and believes that its status as a church assembly should prevent the lawful application of the County Code to their proposal. Applying the principles announced by the Supreme Court to the facts here, the Examiner concludes that Clearview is not exempt from compliance with the County's zoning standards (or from seeking administrative relief from those standards if they are unable to comply with them), by virtue of article I, section 11.

In addition, given that the Supreme Court stated that article I, section 11 affords *greater protection* than that offered by the First Amendment of the U.S. Constitution, the Hearing Examiner concludes that Clearview's assertion that they are similarly exempt from permitting requirements under the federal constitution is incorrect. If no such relief is offered under the state constitution, then their federal constitutional claim of relief must also fail.

B. Reliance on Past County Decisions. PDS argues that the CUP should be granted because the parties were working together in good faith and that Clearview had reasonable expectations that their project was approvable. (Exhibit J) Clearview agrees and also argued at the hearing and in its legal brief that their lot was legally created in the 1960s, and the County has previously approved churches "that do not otherwise meet certain requirements of the development code where the public health, safety and welfare are not jeopardized..." implying that their application should be approved as well. (Exhibit K1 at p. 4)

PDS's position relates to its improper interpretation of the substandard lot regulations, stemming from an erroneous Code Interpretation issued in 2008 by former PDS Director Craig Ladiser. (PDS took the position that *only* single-family residences were subject to the Bulk Matrix requirements, not duplexes and presumably, other uses). The Snohomish County Superior Court struck down this interpretation in an Order dated April 2, 2009. (Exhibit A5) The decision was affirmed on appeal by Division I of the Court of Appeals in an unpublished decision issued April 12, 2010. In that decision, the Court of Appeals held that "[i]t is not inconsistent for the code to prohibit development on a lot of substandard size and at the same time recognize the substandard lot as a legal "lot" because it was legally created." *Watson, Hill, Landles and 7-Lakes, Inc. v. Snohomish County* (No. 63531-0-1 Slip Op. at 6).

Apparently, PDS relied on this erroneous interpretation of the zoning regulations in communicating with Clearview that its proposal could be approved, despite its substandard status. (Exhibit J) After the court decision was issued, PDS changed its position and communicated to Clearview that it could no longer recommend approval. Howard Knight testified at the hearing that they have reversed that position and now recommend approval based on legal concerns including the constitutional claims discussed herein. The precise legal question here is whether Clearview has a right to rely on the continued erroneous interpretation of the substandard lot regulations. This is a matter of well-settled law. In *Dykstra v. Skagit County*, 97 Wn. App. 670 (1999), the Dykstras contended that Skagit County's denial of their permits violated their substantive due process rights because the County had previously granted exemptions to other owners of substandard lots. The County argued that their prior actions were flawed and part of an improper process. The Court dismissed the Dykstras claims, stating:

Governmental entities are not precluded from enforcing ordinances even though they may have been improperly enforced in the past. As the court stated in *City of Mercer Island v. Steinmann*, 9 Wn. App. 479, 483, 513 P.2d 80 (1973): "The governmental zoning power may not be forfeited by the action of local officers in disregard of the statute and the ordinance. The public has an interest in zoning that cannot thus be set at naught. The plaintiff landowner is presumed to have known of the invalidity of the exception and to have acted at his peril." (quoting *Zahodiakin Eng'g Corp. v. Zoning Bd. of Adjustment*, 8 N.J. 386, 396, 86 A.2d 127 (1952)). In *Buechel v. Department of Ecology*, the Supreme Court cited *Mercer Island* with approval, stating: "The proper action on a land use decision cannot be foreclosed because of a possible past error in another case involving different property." *Buechel*, 125 Wn.2d 196, 211, 884 P.2d 910 (1994) (holding that Board's denial of permit and variance, despite its previous grant of permit in similar situation, was not arbitrary and capricious). More recently, the Supreme Court applied this rationale in the context of water rights. See, *Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998) (where Department originally acted *ultra vires* in measuring a water right, Department did not act arbitrarily and capriciously in abandoning unlawful practice and switching to new practice).

Here, PDS's past erroneous interpretation of the substandard lot regulations does not create a legal right of reliance on the part of Clearview. They were on notice of its substandard nature at the time of their purchase. They are not excused from compliance with the Bulk Matrix of the Zoning Code.

5. Federal Statutory Claim -- RLUIPA. Clearview also argues that they are exempt from the requirements of the bulk standards where their application meets all other County regulations pursuant to RLUIPA. (Exhibit K1) The Ninth Circuit Court of Appeals has defined how RLUIPA is to be interpreted in a land use context. In *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, 456 F.3d 978, 985-986 (9th Cir., 2006), the Court stated:

RLUIPA is Congress's latest effort to protect the free exercise of religion guaranteed by the First Amendment from governmental regulation. In *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878-82, 110 S. Ct. 1595, 108 L.Ed.2d 876 (1990), the Supreme Court decided that the Free Exercise Clause of the First Amendment "does not inhibit enforcement of otherwise valid laws of general application that incidentally burden religious conduct." *Cutter v. Wilkinson*, 544 U.S. 709, 125 S. Ct. 2113, 2118, 161 L.Ed.2d 1020 (2005). Congress enacted RLUIPA in response to the constitutional flaws with the 1993 Religious Freedom and Restoration Act of (RFRA). "RLUIPA 'replaces the void provisions of RFRA[,] and prohibits the

government from imposing 'substantial burdens' on 'religious exercise' unless there exists a compelling governmental interest and the burden is the least restrictive means of satisfying the governmental interest." *San Jose Christian*, 360 F.3d at 1033-34 (quoting *Wyatt v. Terhune*, 315 F.3d 1108, 1112 (9th Cir.2003) (citation omitted). To avoid RFRA's fate, Congress wrote that RLUIPA would apply only to regulations regarding land use and prison conditions. (See *Cutter*, 125 S. Ct. at 2118)

Although some courts around the Country have questioned its legal validity, the Ninth Circuit has found that RLUIPA is constitutional and, therefore, we consider its application to this case. *Id.* at 978.

RLUIPA applies only if one of three conditions obtain: (1) If the state "program or activity receives Federal financial assistance," 42 U.S.C. § 2000cc(2)(A), implicating congressional authority pursuant to the Spending Clause; (2) if the substantial burden imposed by local law "affects . . . [or] would affect, commerce with foreign nations, among the several States, or with Indian tribes," *id.* § 2000cc(2)(B), implicating congressional power pursuant to the Commerce Clause; (3) or, if "the substantial burden is imposed in the *implementation of a land use regulation* or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, *individualized assessments* of the proposed uses for the property involved," (42 U.S.C. § 2000cc(2)(C) (emphasis added). *Id.*)

The Ninth Circuit noted that the trigger for RLUIPA analysis under 42 U.S.C. § 2000cc(2)(C)(3) is the application of the zoning regulations to a particular parcel of land.

By its own terms, it appears that RLUIPA does not apply directly to land use regulations, such as the Zoning Code here, which typically are written in general and neutral terms. However, when the Zoning Code is applied to grant or deny a certain use to a particular parcel of land, that application is an "implementation" under 42 U.S.C. § 2000cc(2)(C). See *Kaahumanu v. County of Maui*, 315 F.3d 1215, 1220-23 (9th Cir.2003) (concluding in a RLUIPA case that a similar permit process resulted in an administrative, rather than legislative, action because it "was based on the circumstances of the particular case and did not effectuate policy"); *Freedom Baptist Church of Delaware County v. Twp. of Middletown*, 204 F.Supp.2d 857, 868-69 (E.D.Pa.2002) ("No one contests that zoning ordinances must by their nature impose individual assessment regimes. That is to say, land use regulations through zoning codes necessarily involve case-by-case evaluations of the propriety of proposed activity against extant land use regulations."). RLUIPA therefore governs the actions of the County in this case.

Id., (Footnotes omitted). Here, there is no disagreement that the third prong of the statute is relevant, since this case involves the "*individualized assessment* of the proposed use for the property involved." (42 U.S.C. § 2000cc(2)(C)(3)) Accordingly, RLUIPA applies to this case.

RLUIPA states, in relevant part:

(1) 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 -- (A) is in furtherance of a compelling

governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest.”

(42 U.S.C. § 2000cc(a)(1) (emphasis added)).

In the present case, we must examine whether the application of the zoning regulations to Clearview is a *substantial burden* on its religious exercise within the meaning of RLUIPA, for which relief from the regulations may be granted by the Hearing Examiner. As provided in the statute, this involves a 2-step analysis. First, we examine whether the regulations substantially burden the religious exercise of Clearview. Second, if we conclude that there is a substantial burden, then we examine whether the regulations are (A) in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest.” (42 U.S.C. § 2000cc(a)(1)) If the regulation fails either part of the strict scrutiny test, then the Examiner may consider the requested relief.

As the party alleging the violation of RLUIPA, Clearview bears the burden of proving that the County's zoning regulations impose a substantial burden on its religious exercise. (*Id.* § 2000cc-2(b)) In determining how to define a “substantial burden” under RLUIPA, the Ninth Circuit looked to the U.S. Supreme Court.

The Court has held that various unemployment compensation regulations imposed a substantial burden on adherents' religious exercise, and thereby were subject to strict scrutiny, because the regulations withheld benefits based on adherents' following their religious tenets. See *Sherbert v. Verner*, 374 U.S. 398, 406, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). This choice between unemployment benefits or religious duties imposed a burden because it exerted "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 717-18, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981); see also *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450-51, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988) (explaining that to trigger strict scrutiny under the First Amendment a governmental burden must have a "tendency to coerce individuals into acting contrary to their religious beliefs"). These cases demonstrate "that a 'substantial burden' must place more than an inconvenience on religious exercise." See *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir.2004).

"[F]or a land use regulation to impose a 'substantial burden,' it must be 'oppressive' to a 'significantly great' extent. That is, a 'substantial burden' on 'religious exercise' must impose a significantly great restriction or onus upon such exercise." *San Jose Christian*, 360 F.3d at 1034 (quoting Merriam-Webster's Collegiate Dictionary 1170 (10th ed. 2002)).

(Emphasis added). *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, 456 F.3d 978, 989 (9th Cir., 2006).

In *Guru Nanak Sikh Society*, the Court of Appeals invalidated the County's zoning regulations where the permitting scheme was clearly designed to prohibit the church from achieving a permit anywhere in the County. They paid particular attention to the fact that the County had repeatedly denied the churches' permit applications and found the underlying rationale for the denials had disregarded the impact mitigation offered by the church. The Court contrasted that decision from its earlier decision in *San Jose*

Christian, supra, where it found the plaintiff had not suffered a substantial burden because the city's actions "had not lessened the possibility that the college could find a suitable property." (*Id* at 992) The Court stated:

In *San Jose Christian*, we considered it centrally important that there was no evidence to suggest that the religious institution desired by San Jose Christian College could not be obtained by "submit[ing] a *complete* application." *San Jose Christian*, 360 F.3d 1035. . . . Moreover, we noted that even if its complete application were denied, the college had no reason to believe another application would be rejected. *Id.* ("There is no evidence in the record demonstrating that College was precluded from using other sites within the city.") See also *Henderson v. Kennedy*, 253 F.3d 12, 17 (D.C.Cir.2001) ("Because the Park Service's ban on sales on the Mall is at most a restriction on one of a *multitude of means*, it is not a substantial burden on their vocation.") (emphasis added).

Id. Applying these legal precedents to the case here, the Hearing Examiner concludes that Clearview has not met its burden of proof to show that the application of the minimum lot size requirements to its development proposal amounts to a substantial burden on its religious exercise. They simply state that it is, without any further offer of proof.

Clearview failed to show that meeting the minimum lot size requirements has a "tendency to coerce individuals into acting contrary to their religious beliefs." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir.2004); *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, 456 F.3d 978, 989 (9th Cir., 2006). Apart from alleging further delay and expense, Clearview has not demonstrated that it cannot obtain a variance from the permitting requirements and has not alleged that the variance process is unduly burdensome. In addition, they have not alleged that there are insufficient parcels of land on which a church could be sited (either as a permitted or conditional use) or that the County's policies or regulations are aimed at discouraging churches in the rural area. In fact, the County's Comprehensive Plan and regulations are neutral as to the siting of churches. The Bulk Matrix found in Table 30.23.030 SCC are general regulations that apply equally to all uses in the rural area.

In challenging the County's regulations, Clearview asserts that the County has no valid government interest in its rural minimum lot size standards because they were adopted only to comply with decisions of the Growth Management Hearings Board, which decisions have since been overturned as exceeding their authority by creating bright line minimum lot sizes on rural areas. (Exhibit K1 at 3-4). Clearview offered no proof in support of its contention as to the County Council's intent in adopting Table 30.23.030 SCC. Assuming *arguendo* that Clearview's assertion is accurate as to why the regulations were adopted in the first place, the County Council has had several opportunities to repeal or amend the rural minimum lot size requirements found in Table 30.23.030 SCC, including the most recent amendments made to the Bulk Matrix which were adopted earlier this year. (See, Amended Ord. 09-079, Section 10, adopted May 12, 2010, eff. May 29, 2010). The County Council chose not to do so. As such, the rural minimum lot size regulations remain valid and enforceable.

The fact that Clearview is required to meet minimum zoning standards, which are adopted to protect the public health, safety and welfare, does not impose a significantly great restriction or onus on the exercise of their religion. The intent and function of the R-5 acre zone "is to maintain rural character in areas that lack urban services." (SCC 30.21.025(2)(c)). Here, a church is denoted as a "conditional use" in the R-5 zone. Conditional uses are those which require special review in order to ensure compatibility with permitted uses in the same zone. (SCC 30.22.020) The County has an interest in the orderly development of land and in ensuring the compatibility of new land uses with those that already exist in the rural area. Like all other development applicants, Clearview is required to seek a variance or propose

their development on another parcel that meets the rural minimum lot size standards. “A law is one of neutrality and general applicability if it does not aim to ‘infringe upon or restrict practices because of their religious motivation,’ and if it does not ‘in a selective manner impose burdens only on conduct motivated by religious belief[s].’” *San Jose Christian College*, 360 F.3d at 1035 (9th Cir., 2004); *c.f.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533-543, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). No such showing has been made here. Clearview cannot avoid these regulations by simply refusing to comply with them, using RLUIPA as a shield.

In reaching a similar conclusion in *San Jose Christian College*, *supra*, the Ninth Circuit noted approvingly that its approach is entirely consistent with the Seventh Circuit’s ruling in *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752 (7th Cir. 2003). In that case, churches were required to obtain special use permits for locating and operating a church in business and commercial zones so that they were consistent with the protection of the public health, safety and welfare, and would not substantially injure the value of neighboring property. *Id.* The church’s repeated applications for permits were denied. In rejecting each of their RLUIPA claims, the Seventh Circuit stated:

“[T]he costs, procedural requirements, and inherent political aspects” of the permit approval process were “incidental to any high-density urban land use” and thus “[did] not amount to a substantial burden on religious exercise.” *Id.* At 761. “While they may contribute to the ordinary difficulties associated with location (by any person or entity, religious or nonreligious) in a large city, they do not render impracticable the use of real property in Chicago for religious exercise, much less discourage churches from locating or attempting to locate in Chicago.” *Id.* (*citation omitted*).

San Jose Christian College, 360 F.3d at 1035 (9th Cir., 2004), *quoting Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752 (7th Cir. 2003). The same is true in this case.

The County Council has an interest in protecting rural residents and rural character from incompatible or conflicting uses. They have established a series of neutral and generally applicable standards that address the “bulk” of a development, regardless of its type, in the R-5 zone. The lot size must be 200,000 square feet in order for any of the permitted or conditional uses to be allowed. Clearview’s lot is substandard and is, therefore, not allowed in the R-5 zone absent a variance. No variance has been sought. Clearview has failed to show how compliance with these standards unduly burdens its religious freedom or that achieving a church use on real property in the rural or urban areas of Snohomish County is impracticable. Additionally, the Examiner has examined Table 30.23.030(1) and the variance procedures set forth in Ch. 30.43B SCC, and concludes that neither regulation unduly burdens Clearview’s religious freedom. As such, the strict scrutiny standard required in 42 U.S.C. § 2000cc(a)(1) does not apply. Accordingly, RLUIPA does not provide Clearview with a federal statutory basis from which to claim it is exempt from the County’s Bulk Matrix requirements.¹

6. In conclusion, the Hearing Examiner finds that the application is inconsistent with Title 30 SCC for the reasons stated herein. As such, the Examiner does not need to reach the other two CUP permit criteria; a CUP cannot be issued for the subject property at this time. Clearview’s lot is substandard and fails to meet the required minimum lot size in the R-5 zone in violation of Table 30.23.030(1) SCC.

¹Given that the Examiner has not found a legal basis in federal or state law to “exempt” the Clearview Gospel Hall Assembly from the County’s zoning regulations, the Examiner does not need to address whether Title 2.02 SCC otherwise provides the Examiner with the legal authority to do so.

DECISION AND ORDER

The Conditional Use Permit application is **DENIED WITHOUT PREJUDICE**.

Dated this 2nd day of December, 2010.

Millie M. Judge, Hearing Examiner

EXPLANATION OF RECONSIDERATION AND APPEAL PROCEDURES

The Decision of the Hearing Examiner is final and conclusive with right of appeal to the County Council. However, reconsideration by the Examiner may also be sought by one or more Parties of Record. The following paragraphs summarize the reconsideration and appeal processes. For more information about reconsideration and appeal procedures, please see Chapter 30.72 SCC and the respective Examiner and Council Rules of Procedure.

Reconsideration

Any Party of Record may request reconsideration by the Examiner. A Petition for Reconsideration must be filed in writing with the Office of the Hearing Examiner, 2nd Floor, County Administration-East Building, 3000 Rockefeller Avenue, Everett, Washington, (Mailing Address: M/S #405, 3000 Rockefeller Avenue, Everett WA 98201) on or before **DECEMBER 13, 2010**. There is no fee for filing a Petition for Reconsideration. **“The petitioner for reconsideration shall mail or otherwise provide a copy of the petition for reconsideration to all parties of record on the date of filing.” [SCC 30.72.065]**

A Petition for Reconsideration does not have to be in a special form but must: contain the name, mailing address and daytime telephone number of the petitioner, together with the signature of the petitioner or of the petitioner’s attorney, if any; identify the specific findings, conclusions, actions and/or conditions for which reconsideration is requested; state the relief requested; and, where applicable, identify the specific nature of any newly discovered evidence and/or changes proposed by the applicant.

The grounds for seeking reconsideration are limited to the following:

- (a) The Hearing Examiner exceeded the Hearing Examiner’s jurisdiction;
- (b) The Hearing Examiner failed to follow the applicable procedure in reaching the Hearing Examiner’s decision;
- (c) The Hearing Examiner committed an error of law;
- (d) The Hearing Examiner’s findings, conclusions and/or conditions are not supported by the record;
- (e) New evidence which could not reasonably have been produced and which is material to the decision is discovered; or

- (f) The applicant proposed changes to the application in response to deficiencies identified in the decision.

Petitions for Reconsideration will be processed and considered by the Hearing Examiner pursuant to the provisions of SCC 30.72.065. Please include the County file number in any correspondence regarding this case.

Appeal

An appeal to the County Council may be filed by any aggrieved Party of Record. Where the reconsideration process of SCC 30.72.065 has been invoked, no appeal may be filed until the reconsideration petition has been disposed of by the Hearing Examiner. An aggrieved party need not file a Petition for Reconsideration but may file an appeal directly to the County Council. If a Petition for Reconsideration is filed, issues subsequently raised by that party on appeal to the County Council shall be limited to those issues raised in the Petition for Reconsideration. Appeals shall be addressed to the Snohomish County Council but shall be filed in writing with the Department of Planning and Development Services, 2nd Floor, County Administration-East Building, 3000 Rockefeller Avenue, Everett, Washington (Mailing address: M/S #604, 3000 Rockefeller Avenue, Everett, WA 98201) on or before **DECEMBER 16, 2010** and shall be accompanied by a filing fee in the amount of five hundred dollars (\$500.00); PROVIDED, that the filing fee shall not be charged to a department of the County or to other than the first appellant; and PROVIDED FURTHER, that the filing fee shall be refunded in any case where an appeal is dismissed without hearing because of untimely filing, lack of standing, lack of jurisdiction or other procedural defect. [SCC 30.72.070]

An appeal must contain the following items in order to be complete: a detailed statement of the grounds for appeal; a detailed statement of the facts upon which the appeal is based, including citations to specific Hearing Examiner Findings, Conclusions, exhibits or oral testimony; written arguments in support of the appeal; the name, mailing address and daytime telephone number of each appellant, together with the signature of at least one of the appellants or of the attorney for the appellant(s), if any; the name, mailing address, daytime telephone number and signature of the appellant's agent or representative, if any; and the required filing fee.

The grounds for filing an appeal shall be limited to the following:

- (a) The decision exceeded the Hearing Examiner's jurisdiction;
- (b) The Hearing Examiner failed to follow the applicable procedure in reaching his decision;
- (c) The Hearing Examiner committed an error of law; or
- (d) The Hearing Examiner's findings, conclusions and/or conditions are not supported by substantial evidence in the record. [SCC 30.72.080]

Appeals will be processed and considered by the County Council pursuant to the provisions of Chapter 30.72 SCC. Please include the County file number in any correspondence regarding this case.

Staff Distribution:

Department of Planning and Development Services: Monica McLaughlin

The following statement is provided pursuant to RCW 36.70B.130: "Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation." A copy of this Decision is being provided to the Snohomish County Assessor as required by RCW 36.70B.130.