

**Tenth Circuit No. 09-1188**  
**IN THE UNITED STATES COURT OF APPEALS**  
**FOR THE TENTH CIRCUIT**

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ROCKY MOUNTAIN CHRISTIAN CHURCH,  
Plaintiff-Appellee

and

UNITED STATES OF AMERICA,  
Intervenor Plaintiff-Appellee

v.

BOARD OF COUNTY COMMISSIONERS OF  
BOULDER COUNTY, COLORADO  
Defendant-Appellant

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On Appeal From the United States District Court for the District of Colorado

The Honorable Robert E. Blackburn, District Judge

Civil Action No. 06-cv-00554-REB-BNB

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**BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANT FOR  
REVERSAL**

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## **I. INTRODUCTION**

The American Planning Association ("APA") and the Colorado Chapter of APA submit this *amicus curiae* brief in support of the Board of County Commissioners of Boulder County ("County") appeal of the District Court's order denying the County's renewed summary judgment motion (Appendix A) and the District Court's order granting plaintiff's motion for preliminary injunction and directing entry of judgment (Appendix B) in *Rocky Mountain Christian Church v. Board of County Commissioners of Boulder County, Colorado* (No. 06-cv-00554-REB-BNB) (hereinafter *RMCC v. Boulder*).

## **II. STATEMENT OF INTEREST**

APA is a nonprofit public interest and research organization founded in 1978 to advance the art and science of planning – including physical, economic and social planning – at local, regional, state, and national levels. APA's mission is to encourage planning that will contribute to the public well-being by developing communities and environments that more effectively meet the present and future needs of people and society.

APA resulted from a merger between the American Institute of Planners, founded in 1917, and the American Society of Planning Officials, established in 1934. The organization has 47 regional chapters and 20 divisions devoted to specialized interests, such as the County Planning Division and the Planning and

Law Division. APA represents more than 44,000 members and the Colorado Chapter represents approximately 1,500 members. These members are professional planners, planning officials and citizen planners involved in urban and rural planning activities in their communities. They are involved on a day-to-day basis in formulating policies and preparing development regulations.

APA has submitted *amicus curiae* briefs in many landmark cases of importance to the planning profession, including numerous briefs to the United States Supreme Court and federal appellate courts.<sup>1</sup> Through a formal review process, APA has adopted policy guides on Agricultural Land Preservation, Neighborhood Collaborative Planning, and Planning for Sustainability that are relevant to the issues in this case.<sup>2</sup>

Planning and development review is always a balancing act, for which the local government is uniquely situated. Not only does the District Court's decision promote special treatment for religious institutions at the expense of the planning process, it substitutes its own judgment for that of the local government. If left to stand, this case will have significant repercussions on the future of land use and

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<sup>1</sup> These amicus briefs are available at <http://www.planning.org/amicus/briefs.htm>.

<sup>2</sup> These policies were adopted following a strenuous examination and review process. See <http://www.planning.org/policy/guides/adopted/agricultural.htm>; <http://www.planning.org/policy/guides/adopted/neighborhoodcollaborative.htm>; and <http://www.planning.org/policy/guides/adopted/sustainability.htm>.

community planning within the Tenth Circuit and, possibly, other circuits that look to their sister circuits for guidance.

Pursuant to Federal Rules of Appellate Procedure Rule 29(a), all parties have consented to the filing of this *amicus curiae* brief.

### **III. STATEMENT OF FACTS**

APA adopts the facts as presented in Defendant-Appellant Boulder County's Opening Brief. A few key facts relevant to this brief are highlighted here.

Currently, RMCC's building at the intersection of 95th and Niwot Road ("Niwot campus") serves about 2,300 members. (App. 3428:1-3.) In 2004, RMCC filed a special use application to double the size of the building to almost 250,000 square feet and provide more than 1,300 parking spaces. (App. 6460, 4694:7-11.) The expansion would serve RMCC's needs for the next 20 years or more, in anticipation of membership growth from almost 2,500 to 5,500. (App. 3788-89).

RMCC's property is designated as "Agricultural Lands of National Significance" in the County Comprehensive Plan ("Plan") and located in the County's Agricultural (A) Zoning District. The site is outside the Niwot Community Service Area ("CSA"), in an area designated for low-density rural development in the Plan.

The County first adopted its Comprehensive Plan more than thirty years ago, for the dual purposes of protecting open space and agricultural land while

managing growth. (App. 4579-81, 4893-95, 5790-91.) The Boulder County Land Use Code ("Code") was adopted to implement the Plan. (App. 4601-4602.) All uses, including churches, in the Agricultural District require review if the intensity of the proposed use rises above a certain threshold. (App. 4016-17.) The sole purpose of this special review is to determine the compatibility of the use with the site, surrounding land uses and adequacy of services. (App. 4576-77, 4687:18-25.)

The County's efforts to preserve agricultural lands and open space are considered models for other communities throughout the United States. The County has won awards for its preservation and planning activities from the National Association of Counties Center for Sustainable Communities, the National Association of Environmental Professionals and the Colorado Chapter of the APA, among others. These activities and awards attest to the County's longstanding successful commitment to preserve agricultural and open space lands.

#### **IV. SUMMARY OF ARGUMENT**

Boulder County did not violate the Religious Land Use and Institutionalized Persons Act ("RLUIPA") when it denied an application from RMCC to double the size of its facility in a zone reserved for agriculture and compatible uses in the Comprehensive Plan. RLUIPA was intended to protect religious exercise from burdensome, discriminatory or unreasonable land use regulations. Instead of protecting RMCC from hostile government action as intended by Congress, the



District Court granted RMCC an extraordinary special privilege not extended to other property owners and not required under RLUIPA – the right to overrule a community's Comprehensive Plan.

## **V. ARGUMENT**

### **A. "SUBSTANTIAL BURDEN" UNDER RLUIPA IS NOT SHOWN BY FAILURE TO APPROVE A LARGER CHURCH FACILITY IN AN AGRICULTURAL ZONE**

To prevail under the first prong of RLUIPA, religious organizations must show that their religious exercise was "substantially burdened" by the challenged regulation. 42 U.S.C. § 2000cc(a)(1).<sup>3</sup> Once the church demonstrates "substantial burden," the regulation can nonetheless be upheld if the government demonstrates a compelling interest in its enforcement. 42 U.S.C. §§ 2000cc(a)(1)(A), 2000cc-2(b).

#### **1. ZONING-BASED LIMITS ON SQUARE FOOTAGE DO NOT CONSTITUTE A "SUBSTANTIAL BURDEN" UNDER RLUIPA**

Not all restrictions on use of church property constitute a "substantial burden" for the purposes of RLUIPA. Under the First Amendment, as relevant to

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<sup>3</sup> The substantial burden test in RLUIPA applies only to individualized assessments of proposed uses for property, because of the increased risk of discriminatory application. 42 U.S.C. § 2000(a)(2); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1225 (11th Cir. 2004); *Konikov v. Orange County, Florida*, 410 F.3d 1317, 1323 (11th Cir. 2005).

interpreting RLUIPA<sup>4</sup>, the Supreme Court limits free exercise challenges to governmental "compulsion" that coerces or penalizes religious conduct. *Lyng v. Northwest Indian Cemetery Protection Association*, 485 U.S. 439, 448-49 (1988). For a substantial burden under RLUIPA, this Court requires evidence that religious exercise has been rendered "effectively impracticable." *Grace United*, 451 F.3d at 655. No substantial burden is found when "the incidental effects of otherwise lawful government programs 'make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs.'" 451 F.3d at 662 (quoting *Lyng*, 485 U.S. at 450).

RMCC's evidence of "substantial burden" consisted of a litany of complaints that its existing 116,000 square foot building was too small to comfortably accommodate a growing congregation. (App. 3453:18-22, 3456-57, 3560:4-22, 3568, 3698-99, 3722:11-17, 3788-89, 4329:4-7, 4413:17-20, 4693-94.) There was no evidence that Boulder County's denial of RMCC's 132,000 square foot expansion made the church's religious exercise "effectively impracticable" or

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<sup>4</sup> This Court has relied on jurisprudence under the Religious Free Restoration Act of 1993 and the First Amendment for guidance in interpreting the meaning of "substantial burden" under RLUIPA. *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 653-55 (10th Cir. 2006).

coerced action contrary to their beliefs.<sup>5</sup> In fact, RMCC continued to use its Niwot campus for the full range of church activities after the denial.

Nationally, RLUIPA plaintiffs have alleged "substantial burden" when similarly ambitious plans to expand churches are denied for planning reasons. In *Living Water Church of God v. Charter Township of Meridian*, 258 Fed. Appx. 729 (6th Cir. 2007), the plaintiff church argued that denial of a special use permit for a larger school and church building "prevents it from fulfilling its ministries and missions." Calling it no more than a "size issue," the Sixth Circuit held that denial of the permit might make the applicant's religious exercise "more expensive or difficult," but it did not "place substantial pressure" on the church "to violate its religious beliefs or effectively bar the church from using its property in the exercise of its religion" in violation of RLUIPA. 258 Fed. Appx. at 733.

Other cases denying "substantial burden" claims include: *Timberline Baptist Church v. Washington County*, 154 P.3d 759 (Or. App. 2007) (denial of special use permit for parochial school on agricultural lands outside the urban growth boundary); *Petra Presbyterian v. Village of Northbrook*, 489 F.3d 846 (7th Cir. 2007) (church prevented from locating in an industrial area contrary to adopted

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<sup>5</sup> Jury Instruction No. 11 appears to have used a definition of "substantial burden" much broader than that adopted by this Court, allowing the jury to find substantial burden if the failure to allow a larger building "significantly inhibits or constrains conduct or expression" manifesting religious belief. See attached, Appendix C.

zoning); *North Pacific Union Conf. v. Clark County*, 74 P.3d 140 (Wash. App. 2003) (denial of a conditional use permit for 40,000 square foot church administrative office in an agricultural district); *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F.Supp.2d 961, 986 (N.D. Ill. 2003) (serious monetary and logistical difficulties from permit denial); *The Williams Island Synagogue, Inc. v. City of Aventura*, 358 F.Supp.2d 1207 (S.D. Fla. 2005) (existing synagogue site did not meet congregational needs).

RMCC's complaint falls squarely within the long line of cases that finds no substantial burden under RLUIPA from denial of church expansion plans.

Although RMCC's operations at its Niwot campus were limited by the size of existing facility, denial of the church's 2004 application did not coerce its members to violate their religious beliefs or penalize them for religious conduct. RMCC and its members remained free to practice their religion without governmental interference in their existing facility, their new facility located approximately 15 miles away and in 12 of the County's 13 zoning districts.

## **2. PROTECTING AGRICULTURAL AND OPEN SPACE LANDS THROUGH A COMPREHENSIVE PLAN IS A COMPELLING GOVERNMENTAL INTEREST**

Boulder County is renowned for its natural beauty and agricultural bounty. It has carefully protected these assets for more than 30 years through increasingly stringent regulation of development under its Comprehensive Plan. Since 1978, the

Plan has directed development into municipalities where urban services are available, and implemented policies to protect natural resources from loss. The Plan was based on community consensus about the importance of agricultural and open space preservation. (App. 5760.)

Boulder County has rigorously enforced its Comprehensive Plan policies through the Land Use Code and special use review process. The special use process requires the County to determine that the requested development will not adversely affect surrounding uses, require additional services or infrastructure, or deplete natural resources such as agriculture and open space conversion. Special use review is a quintessentially local process, requiring knowledge of local conditions and policies.

APA has acknowledged the importance of comprehensive planning in protecting community character and natural resources, including agricultural land and open space.<sup>6</sup> Loss of important agricultural land threatens the nation's food source, national security, and environmental quality. Loss of open space threatens

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<sup>6</sup> "Scattered development in farming areas removes agricultural land from production both directly and indirectly. Development directly removes the agricultural productivity on which it is built. Indirectly, it may force nearby farmers out of production by traffic, trespassing, and pilferage by non-farm residents, by their complaints about dust, smells, sprays, and noise, and especially by causing a general rise in land values, and higher property taxes." APA Policy Guide on Agricultural Land Preservation.

ecosystems and wildlife habitat, increases greenhouse gases, reduces water quality and storage capacity and blurs the distinction between urban and rural areas. Loss of community character affects property values and, ultimately, leads to diminished confidence in local government.

Boulder County, therefore, had a compelling interest in enforcing the urban management, agricultural protection and open space goals of its Comprehensive Plan. The District Court erred when it decided otherwise.

**B. VIOLATION OF "EQUAL TERMS" UNDER RLUIPA IS NOT SHOWN BY COMPARING USES WITH DIFFERENT PLANNING IMPACTS**

To prevail under the second prong of RLUIPA, religious organizations must show that they were treated on less than "equal terms" than a similarly situated secular use. 42 U.S.C. § 2000cc-2(b). Contrary to the District Court decision, a finding that two uses are "similarly situated" under RLUIPA requires that the special land use applications of both entities have the same effect on the purpose or objectives of the special land use criteria in the Boulder Land Use Code. *See e.g., The Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 270 (3rd Cir. 2007). In this case, the two uses had distinctly different impacts on the County's ability to further its Comprehensive Plan goals of preserving agricultural land and protecting the open space and rural character of the Niwot area.

Courts use the equal terms test to determine whether a local government's land use decision "departs from requirements of neutrality and general applicability." *Midrash*, 366 F.3d at 1232. The Eleventh Circuit developed the following four-part test to identify violations of the equal terms provision of RLUIPA:

(1) the plaintiff must be a religious assembly or institution, (2) subject to a land use regulation, that (3) treats the religious assembly on less than equal terms with (4) a nonreligious assembly or institution. *Primera*, 450 F.3d at 1307-08; *Midrash*, 366 F.3d at 1232.

Government action that is both neutral and generally applicable does not violate RLUIPA if it is rationally related to a legitimate governmental interest. *Grace United*, 451 F.3d at 649.

In this case, RMCC alleged that the County selectively enforced facially neutral policies and procedures against RMCC but not against the Dawson School, the only non-religious comparator. The District Court agreed that the Dawson School was a reasonable comparator to RMCC based on its location in the Agricultural Zoning District, size of its parcel and facilities and similarity of surrounding neighborhoods. However, the salient fact is that RMCC was differently situated than the Dawson School with respect to the County's agricultural and open space preservation goals under its Comprehensive Plan.

The RMCC development was 30 percent larger, generated 5 times as much traffic, required substantially more parking and proposed a single structure, with a

full educational wing, as opposed to the multiple smaller structures on the Dawson campus. RMCC offered a development buffer less than 1/40 the size provided by the School, thereby exposing adjacent agricultural land to the effects of urban development. Finally, although both comparators were located in an Agricultural Zone, only RMCC was located in a designated open space buffer outside the Niwot CSA where no other urban-level development had been authorized by the County. These planning differences alone were enough to demonstrate that the two projects were not "similarly situated" for the purposes of agriculture and open space under the County's Comprehensive Plan and, thus, RLUIPA. *The Lighthouse Institute*, 510 F.3d at 270 (3rd Cir. 2007).<sup>7</sup>

Even if RMCC and Dawson School were similarly situated, the jury agreed that Boulder County did not apply its regulations in a discriminatory manner. Almost all local jurisdictions have special use permit procedures that require application of standard criteria to individual situations. The criteria are completely neutral with respect to religion and applicable to all uses with the potential to raise compatibility issues. The RMCC expansion plan was evaluated under the same review process as any other development of similar size and location, using the

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<sup>7</sup> It is also significant that ten years separated the RMCC and Dawson decisions, during which time RMCC's expert testified that County regulations had tightened for all uses, not just churches. Like all laws, planning practices must evolve and change over time, to be keep up with current trends and developments.



same standards. Under these circumstances, the County's denial of a special use permit did not violate the "equal terms" provision of RLUIPA.

**C. IMPOSITION OF "UNREASONABLE LIMITATIONS" UNDER RLUIPA IS NOT SHOWN BY ZONING CONTROLS ON THE SIZE OF BUILDINGS**

Section 2(b)(3)(B) of RLUIPA prohibits the imposition or implementation of land use regulation that "unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." 42 U.S.C. § 2000cc(b)(3)(B). Reasonableness must be "determined in light of all the facts, including the actual availability of land and the economics of religious organizations." *Vision Church, United Methodist v. Village of Long Grove*, 468 F.3d 975, 990 (7th Cir. 2006) (citing legislative history). Contrary to the District Court's decision, the focus is not on how a regulation impacts a church's plans, but on whether the regulation unreasonably limits the entire category of church uses within the jurisdiction.

To prevail under this third prong of RLUIPA, religious organizations must show that the defendant jurisdiction totally excludes them or imposes "unreasonable limits" on their activities. Congress intended to prevent local governments from adopting land use requirements so stringent that churches could not locate within their boundaries. This prong of RLUIPA was not based on extensive First Amendment jurisprudence, but on objections from churches that they were zoned out of desirable areas due to their tax-exempt, religious status.

RMCC's evidence of "unreasonable limits" was that it was subject to a generally-applicable special use permit requirement that resulted in limits on the total size of its Niwot campus. The remainder of RMCC's evidence was that no special use application for a church had ever been completely rejected by the County, but that churches were subject to the same level of increasingly stringent regulation as other uses. RMCC offered no evidence that these conditions had the effect of unreasonably limiting church uses in Boulder County. Under RMCC's theory, as accepted by the District Court, any condition of approval can be challenged under RLUIPA on the ground that it "unreasonably limits" a church's development scheme, without considering the importance of the regulation to the entire community or its effect on the Comprehensive Plan.

In *International Church of the Foursquare Gospel v. City of San Leandro*, 2008 U.S. Dist. Lexis 105525 (N.D. Cal. Dec. 22, 2008), the District Court cited the availability of approximately 50 percent of the land within the city for assembly uses in finding no "unreasonable limits" under Section 2(b)(3). At \*57. In *Vision Church*, the Seventh Circuit ruled that requiring a church to obtain a special use permit was neutral on its face and justified by "legitimate, non-discriminatory municipal planning goals." 468 F.3d at 991. So long as churches had the same opportunity as other uses to locate in the community, the Village could safely require special use permits under the third prong of RLUIPA:

"[T]he Village also has required many secular institutions, including "[s]chools, elementary and high, including playgrounds and athletic fields," "[u]tility and public service uses," and "[n]ursing homes," to be approved as a special use in a residential district. [Citation omitted.] Like these institutions, religious assemblies have a reasonable opportunity to build within the Village, provided that the requirements for a special use permit have been filled. *Vision Church*, 468 F.3d at 991.

Like *Vision Church*, RMCC underwent the same process as anyone who applies for a special permit, and it was under this generally-applicable process that conditions were placed on the size of its Niwot campus. The fact that the resulting conditions of approval prevented RMCC's expansion plans in the highly-sensitive Niwot Agricultural District did not convert them into "unreasonable limits."

## **VI. CONCLUSION**


RLUIPA was intended to be a shield against unfair or burdensome governmental land use decisions, not a sword to defeat comprehensive planning and the community's public interest in planning for growth and development. Where a local government fairly and equally applies neutral planning principles, its decision should not be second-guessed simply because the applicant is a religious organization. Allowing RMCC to be excused from complying with Boulder County's planning regulations without substantial evidence of interference with RMCC's religious exercise is a misinterpretation and misapplication of RLUIPA.

For all of the above reasons, *amicus curiae* APA respectfully requests the Court to vacate the District Court's judgment and the injunction entered in favor of

the Church and either enter judgment in favor of the County or remand with instructions to enter judgment on all claims in favor of the County.

Respectfully submitted this 10<sup>th</sup> day of September, 2009.

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**  
**TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS, AND**  
**TYPE STYLE REQUIREMENTS**

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 3,384 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2002 SP3 in 14pt Times New Roman.

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Dated: September 10, 2009

**CORPORATE DISCLOSURE STATEMENTS PURSUANT TO  
FED. R. APP. P. 26.1 AND FED. R. APP. P. 29(c)**

The American Planning Association, Inc. is a nonprofit corporation organized pursuant to District of Columbia law, D.C. Code § 29-301.01 *et seq.* APA does not have any parent corporations and does not issue any stock which is publicly held by anyone.

The Colorado Chapter of the American Planning Association, Inc. is a nonprofit corporation organized pursuant to Colorado law. The Colorado Chapter is affiliated with American Planning Association but has no parent corporations. The Colorado Chapter does not issue any stock which is publicly held by anyone.

## **APPENDIX A**

**The Honorable Judge Blackburn's Order Denying Defendant's Renewed  
Motion for Judgment As a Matter of Law (filed Mar. 30, 2009)**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
Judge Robert E. Blackburn**

Civil Case No. 06-cv-00554-REB-BNB

ROCKY MOUNTAIN CHRISTIAN CHURCH,

Plaintiff,  
and

UNITED STATES OF AMERICA,

Intervenor Plaintiff,  
v.

BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY, COLORADO,  
Defendant.

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**ORDER DENYING DEFENDANT'S RENEWED  
MOTION FOR JUDGMENT AS A MATTER OF LAW**

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**Blackburn, J.**

This matter is before me on the **Defendant's Renewed Motion for Judgment as a Matter of Law** [#279]<sup>1</sup> filed January 5, 2009. Both the plaintiff and the intervenor plaintiff filed responses [#286 & #293] and the defendant filed replies [#290 & #298]. I deny the motion.

**I. STANDARD OF REVIEW**

Under Rule 50, a court should render judgment as a matter of law when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." FED. R. CIV. P. 50(a)(1). When

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<sup>1</sup> "[279]" is an example of the convention I use to identify the docket number assigned to a specific paper by the court's electronic case filing and management system (CM/ECF). I use this convention throughout this order.



reviewing a motion under Rule 50(a), I must review the record “taken as a whole” and I “must draw all reasonable inferences in favor of the nonmoving party . . . .” **Reeves v. Sanderson Plumbing Products, Inc.**, 530 U.S. 133, 150 (2000). I may not make credibility determinations or weigh the evidence. **Id.** Further, I must “give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.” **Id.** (internal quotation omitted). In short, the “standard for granting summary judgment mirrors the standard for judgment as a matter of law, such that the inquiry under each is the same.” **Id.** (internal quotations omitted).

## II. BACKGROUND

This case was tried to a jury from November 3 to November 19, 2008. At the conclusion of the trial, the jury returned verdicts in favor of the plaintiff, Rocky Mountain Christian Church (RMCC), on three claims under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc - 2000cc-5. Specifically, the jury found for the RMCC on the RMCC’s claims under (1) RLUIPA’s equal terms provision, § 2000cc(b)(1); (2) RLUIPA’s substantial burden provision, § 2000cc(a); and (3) RLUIPA’s unreasonable limitations provision, § 2000cc(b)(3)(B). The jury found in favor of the defendant on all other claims, including the RMCC’s constitutional and RLUIPA claims alleging that the defendant, the Board of County Commissioners of Boulder County, Colorado (BOCC), had discriminated against the RMCC on the basis of religion.

At the close of the evidence, I deferred ruling on the BOCC’s motion for judgment as a matter of law, as permitted under FED. R. CIV. P. 50(b), and ultimately directed the BOCC to file its motion in writing, which it has done. In its present motion,

the BOCC re-asserts its motion for judgment as a matter of law as to the three RLUIPA claims on which the jury found in favor of the RMCC. The BOCC argues that the RMCC failed to present sufficient evidence at trial to support any of the three RLUIPA claims on which the jury found in favor of the RMCC. In addition, the BOCC argues that the three RLUIPA sections on which the RMCC's successful claims are based are unconstitutional as applied in this case. I address first the BOCC's arguments that the evidence was not sufficient to sustain the jury's finding in favor of the RMCC on the three RLUIPA sections cited above. **See, e.g., *Jean v. Nelson***, 472 U.S. 846, 854 (1985) (prior to reaching constitutional questions, federal courts first must consider nonconstitutional grounds for decision).

I note that the BOCC has addressed its asserted affirmative defenses in its response to the RMCC's motion for permanent injunction [#270]. To ensure a comprehensive analysis of the claims on which the BOCC claims it is entitled to judgment as a matter of law, I address the BOCC's affirmative defenses in this order. I address the RMCC's motion for permanent injunction in a separate order.

### **III. SUFFICIENCY OF THE EVIDENCE**

#### **A. Equal Terms - § 2000cc(b)(1)**

The equal terms provision of RLUIPA provides:

No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

42 U.S.C. § 2000cc(b)(1). The BOCC argues that the evidence presented at trial was not sufficient to sustain the jury's verdict in favor of the RMCC on the RMCC's claim under this subsection. I disagree.

The RMCC's claims in this case are based on the BOCC's partial denial of the RMCC's 2004 Special Use Application. In its 2004 special use application, the RMCC sought to expand its facilities from 116,000 square feet to 240,800 square feet. The Church later modified its application to eliminate a proposed 12,000 square feet balcony addition to its sanctuary, reducing its request for additional seating from 1,000 to 150, and by eliminating a proposed 8,000 square feet basement addition. The Church deleted also its request to increase the population of its school from 380 students to 540 students and modified other requests concerning parking, lighting, and a buffer zone on the western side of its property. The BOCC denied most, but not all, of the RMCC's Special Use Application. Hereafter, I will refer to the BOCC's decision on the RMCC's 2004 special use application as the denial of the application.

A plaintiff bringing an as-applied Equal Terms challenge must present evidence that a similarly situated nonreligious comparator received differential treatment under the challenged regulation. If a plaintiff offers no similarly situated comparator, then there can be no cognizable evidence of less than equal treatment, and the plaintiff has failed to meet its initial burden of proof.

***Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County***, 450 F.3d 1295, 1311 (11<sup>th</sup> Cir. 2006). The BOCC argues that the RMCC did not establish a sufficient evidentiary basis for a reasonable jury to conclude that the RMCC was treated on less than equal terms as compared to the Dawson School, the one similarly situated secular comparator advanced by the RMCC. The BOCC argues that the Dawson School is similarly situated to the RMCC, for the purpose of the equal terms claim, only if the evidence demonstrates that the special use applications of both entities have the same effect on the purposes or objectives of the special use criteria in the Boulder Land Use Code. The Land Use Code is the primary source of the land use regulations

applied in this case, although there are other relevant sources that were discussed at trial.

The BOCC notes that the BOCC's denial of the RMCC's 2004 special use application hinged on the application of three criteria. The BOCC concluded that the RMCC's proposal 1) was not in harmony with the character of the neighborhood and was not compatible with the surrounding area; 2) was not in accordance with the Comprehensive plan because it constituted intensive development on rural land, and on agricultural lands of national importance; and 3) would result in an over-intensive use of land and excessive depletion of natural resources, namely agricultural lands.

*Defendant's Motion for Summary Judgment* [#113], filed June 20, 2007, Exhibit N (BOCC Resolution 2006-23) (this exhibit also was admitted at trial). The BOCC contends that the evidence at trial showed that the special use application of the Dawson School differed from the RMCC application in several respects:

- 1) The RMCC proposed to expand its facilities by about 124,000 square feet and to add over 500 parking spaces, while the Dawson school proposed to add about 72,600 square feet and relatively few parking spaces.
- 2) The RMCC proposed a massive complex of large connected buildings, totaling about 240,000 square feet, while the Dawson School proposed multiple small buildings.
- 3) The visual impact of RMCC's proposed development would be greater than the existing visual impact of the expansion of the Dawson School, which was approved in 1996.
- 4) The traffic that would be generated by RMCC, if it were permitted to build everything proposed in its 2004 application, would be ten times greater than the traffic generated by the Dawson School.
- 5) The BOCC notes that the RMCC is in an area known as the Niwot buffer zone, and the Dawson School is not in the Niwot buffer zone.

In response, the RMCC argues that the evidence at trial showed that both the RMCC and the Dawson School are both in the agricultural zone district in the plains planning area of the Boulder County Comprehensive Plan. They both are outside of any designated community service area, and they both sought approval to expand an existing facility under Section 4-601 of the code. The size of the RMCC parcel and the Dawson School parcel were comparable, and the size of the facilities proposed by RMCC and the Dawson School were comparable. Rosie Koopmann, the plaintiff's expert witness, testified that both parcels were on lands designated as agricultural lands of national importance, both RMCC and the Dawson School sought approval for a double gymnasium of about the same size, and approval of significant classroom space. Further, Koopmann testified that the areas and neighborhoods surrounding the two facilities were comparable.

When the Dawson School's special use application was granted, it was permitted to expand its facilities to about 196,000 square feet, including a 30,000 square feet double gymnasium, a 20,000 square foot elementary school, and 11,000 square feet of classrooms. In contrast, the RMCC was denied its proposed double gymnasium and its proposed educational wing. Currently, RMCC's approved buildings include 116,000 square feet. After the RMCC modified its special use application, the RMCC sought to expand its facilities to about 220,000 square feet.

Generally, I conclude that the evidence presented at trial is amply sufficient to permit a reasonable finder of fact to conclude that the RMCC and the Dawson School were comparable for the purpose of applying RLUIPA's less than equal terms provision, 42 U.S.C. § 2000cc(b)(1). Some of the differences noted by the BOCC are minimized in importance because those differences do not appear to have played a direct role in

the BOCC's challenged decision. With regard to traffic, I note that the BOCC's decision does not note the special use criteria concerning traffic as a basis for the decision, although it does note the number of proposed parking spaces and the fact that the RMCC draws people within a 7 mile radius. BOCC Resolution 2006-23, p. 5. Similarly, there is no regulatory provision noted by the BOCC that prefers multiple buildings to one large building. Finally, there was sufficient evidence at trial to support a reasonable conclusion that the visual impact of the RMCC facility, after the proposed expansion, would be similar to or less than the visual impact of the current RMCC facility. The evidence presented at trial provides a sufficient evidentiary basis for a reasonable jury to conclude that the Dawson School was similarly situated to the RMCC for the purpose of the RMCC's equal terms claim and for a reasonable jury to find in favor of the RMCC on this claim.

In its response to the **Plaintiff's Motion for Permanent Injunction** [#270], filed November 25, 2008, the BOCC argues that the verdict for the RMCC on the RLUIPA equal terms claim cannot stand because the BOCC's denial of the RMCC's 2004 special use application was rationally related to a legitimate governmental interest. This is the standard applicable when a law that is both neutral and generally applicable is claimed to impose a burden on a person's exercise of religion. In that context, the law need only be rationally related to a legitimate governmental interest to survive a free exercise challenge. ***Grace United Methodist Church v. City of Cheyenne***, 451 F.3d 643, 649 (10<sup>th</sup> Cir. 2006) (quotations and citations omitted). For reasons outlined in greater detail below, I conclude that the jury's verdict in this case demonstrates that the BOCC's decision was not an application of a law that is both neutral and generally applicable. Therefore, the rationally related to a legitimate governmental interest

defense is not applicable to the RLUIPA equal terms claim.

**B. Substantial Burden - § 2000cc(a)**

The substantial burden provision of RLUIPA provides, in relevant part:

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. Evidence of Substantial Burden on Religious Exercise

As the BOCC notes, the evidence at trial demonstrated that the RMCC has continued to engage in all aspects of its religious exercise after the BOCC's decision to deny partially the RMCC's 2004 special use application. The BOCC argues that limiting the scale of the RMCC's activities at its Boulder County location does not constitute a substantial burden. The RMCC argues that, for the purpose of § 2000cc(a), the denial of a church's expansion proposal can constitute a substantial burden even if religious activity continues at the site. I agree.

**Substantial Burden** - The term "substantial burden," as used in the RLUIPA, is to be interpreted by reference to the Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. §§ 2000bb through 2000bb-4. ***Grace United Methodist Church v. City Of Cheyenne***, 451 F.3d 643, 661 (10<sup>th</sup> Cir. 2006). The RFRA purported to codify the test articulated by the Supreme Court in ***Sherbert v. Verner***, 374 U.S. 398 (1963). In ***Sherbert***, the Court invalidated a state unemployment compensation rule that

conditioned the availability of benefits on an applicant's willingness to work under conditions forbidden by the applicant's religion. Sherbert was a member of the Seventh-day Adventist Church and was discharged by her employer because she would not work on Saturday, which was the Sabbath day of her faith. *Id.* at 399. State unemployment officials found that Sherbert was not qualified for unemployment benefits because her refusal to accept a job that required her to work on Saturday amounted to a refusal to accept suitable work when offered. *Id.* The Supreme Court ruled that this finding violated Sherbert's free exercise rights:

The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

*Id.* at 404. The Court held that governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest. *Id.* at 403.

In 1990, the Supreme Court decided ***Employment Division v. Smith***, 494 U.S. 872, 879 (1990), in which the Court held that the Free Exercise Clause does not "relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" In ***Smith***, the plaintiffs' religious use of peyote resulted in their dismissal from their employment. The state of Oregon concluded that the use of peyote was misconduct, and that this basis for dismissal from employment disqualified the plaintiffs from receipt of Oregon unemployment compensation benefits. The ***Smith*** Court refused to apply the ***Sherbert*** balancing test. ***Smith***, 494 U.S. at 883-84. The Court noted that ***Sherbert*** and related cases involved systems of



“individualized exemptions” that lent themselves to individualized governmental assessment of the reasons for a person’s conduct. **Smith**, 494 U.S. at 884. The **Smith** Court concluded that **Sherbert** has been confined largely to the context in which it was decided, denial of unemployment compensation, and that the **Sherbert** rule does not apply to neutral laws of general applicability. **Smith**, 494 U.S. at 883 - 884.

In response to **Smith**, Congress enacted the RFRA. The RFRA purported to codify the **Sherbert** test and to apply that test to all government acts that “substantially burden” religious exercise, even if the burden results from a rule of general applicability. **City of Boerne v. Flores**, 521 U.S. 507, 515 (1997). In **City of Boerne**, the Supreme Court held that the RFRA was unconstitutional as applied to state and local governments. 521 U.S. at 532 - 536. RLUIPA was enacted in response to **City of Boerne** and, again, for the purposes of the RLUIPA, the term “substantial burden” is to be given the broad meaning used in RFRA and in **Sherbert**.

**Religious Exercise** - The RLUIPA defines “religious exercise” to encompass “any exercise of religion, whether or not compelled by, or central to, a system of religious belief,” including “(t)he use, building, or conversion of real property for the purpose of religious exercise.” 42 U.S.C. § 2000cc-5(7). This definition is broader than the definition of “religious exercise” used under the RFRA and in constitutional jurisprudence under the First Amendment. Generally, the Supreme Court has limited free exercise claims to religious beliefs or practices that are central or fundamental to a person’s religion. **Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah** 508 U.S. 520, 565 (1993); **Grace United Methodist Church v. City Of Cheyenne**, 451 F.3d 643, 662 (10<sup>th</sup> Cir. 2006).

Applying the definition of “substantial burden” and the broad definition of “religious exercise” applicable under RLUIPA, I conclude that the evidence presented at the trial of this case was sufficient to permit a reasonable fact finder to conclude that the land use regulation at issue here imposed a substantial burden on the religious exercise of the RMCC. As the RMCC notes, the evidence was sufficient to support reasonable conclusions that

- a. Overcrowding has caused the church to move from two longer services on Sunday to three shorter services thereby curtailing time for singing and praise, for weekly communion and personal reflection, and for the blessing of various speakers and missionaries during services.
- b. Those attending the first two services can no longer witness public baptisms.
- c. The Church has been prevented from holding most wedding ceremonies due to space constraints.
- d. The space for funerals is limited and caskets are placed in hallways due to space constraints.
- e. The church has no space to hold fellowship events large enough to accommodate the size of its congregation.
- f. Time for fellowship between services has been curtailed.
- g. Some adult Sunday school classes have been curtailed or eliminated completely and others are limited in size due to lack of space.
- h. Some church groups have been forced to stop meeting altogether.
- i. The sermon delivered by Pastor Ahlgrim has been shortened from 35 minutes per week to only 25 minutes per week.
- j. The Church is prevented from highlighting its missionaries to its congregation.
- k. Visiting teachers, ministers, artists, musicians and other speakers and performers cannot minister to the church body.
- l. Growth of the Sunday School has curtailed lesson times for the children.

m. Sunday school classes and Christian educational space have reached capacity / lack of additional space limits the ministries that can be pursued and developed.

n. Certain Church programs, such as Women in the Word, adult Sunday School, and Mothers of Preschoolers, cannot accept new participants due to lack of space.

o. Some children's Sunday School classes must be held in hallways due to lack of space.

p. Space constraints inhibit growth and outreach to new members.

The BOCC cites some contrary evidence, but that evidence does not demonstrate that there was no legally sufficient basis for the jury in this case to conclude that the BOCC's decision imposed a substantial burden on the RMCC's exercise of religion.

## 2. Jurisdictional Hooks

The BOCC argues that the jury's verdict in this case now mandates the conclusion that the RMCC's substantial burden claim does not satisfy the so-called "jurisdictional hooks" provided in § 2000cc (a)(2), which provides alternative jurisdictional bases for a substantial burden claim under RLUIPA. Section 2000cc (a)(2) provides:

This subsection applies in any case in which—

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) 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.

Previously, I concluded that the RMCC's substantial burden claim satisfied the interstate commerce jurisdictional hook provided in § 2000cc (a)(2)(B). *Order Concerning Defendant's Motion for Summary Judgment* [#168], filed March 31, 2008, p. 15. This jurisdictional hook is satisfied if the alleged substantial burden in question affects, or removal of that substantial burden would affect, interstate commerce. As I noted previously, the RMCC's 2004 Special Use Application concerns a construction project that would cost tens of millions of dollars. The RMCC challenges the county's denial of parts of the Special Use Application that form a significant portion of the construction project proposed in the application. In my summary judgment order, I concluded that the undisputed facts in the record demonstrated that the RMCC's claim falls within the interstate commerce jurisdictional hook of § 2000cc (a)(2)(B).

In its present motion, the BOCC notes that the jury did not award RMCC any damages based on the BOCC's partial denial of the RMCC's special use application. The BOCC argues that this determination by the jury supports a reasonable inference that the jury concluded that the RMCC will not actually build the expansion it proposed in its special use application. If the RMCC will not actually build the expansion, then the denial of the special use application will not affect interstate commerce. I disagree that the suggested inference is proper or required. As RMCC notes, the lack of a damages award may be based on a conclusion by the jury that damages are too speculative. In this circumstance, almost no inference is safe. However, it is reasonable to conclude, based on the evidence presented at trial and after the jury's verdict, that it is more likely than not that the RMCC will build at least some significant portion of the construction project proposed in its special use application. That alone is sufficient to support the conclusion that removal of the substantial burden would affect commerce among the

several states. Even if the RMCC builds only ten percent of the proposed project, the construction project would affect interstate commerce.

As I discuss in Section IV.B.3, below, I conclude also that, considering the RMCC's allegations and the jury's verdicts in this case, the jurisdictional hook stated in § 2000cc (a)(2)(C) also is satisfied in this case.

### 3. BOCC's Affirmative Defense - Strict Scrutiny

The substantial burden provision of the RLUIPA includes an affirmative defense that has been asserted by the BOCC. 42 U.S.C. § 2000cc(a) provides that no government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of 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." This affirmative defense requires a determination of whether the interest asserted by the BOCC is a compelling governmental interest. That determination is a question of law that must be resolved by the court. ***U.S. v. Harman***, 297 F.3d 1116, 1127 (10<sup>th</sup> Cir. 2002). Thus, following the trial, resolution of this affirmative defense is now ripe for my determination.

The affirmative defense codified at § 2000cc(a) replicates the strict scrutiny standard of constitutional law. ***See, e.g., U.S. v. Playboy Entertainment Group, Inc.***, 529 U.S. 803, 813 (2000). As the United States Supreme Court has noted aptly, "strict scrutiny leaves few survivors." ***City of Los Angeles v. Alameda Books, Inc.***, 535 U.S. 425, 455 (2002). The BOCC argues that the evidence presented at trial demonstrates that the BOCC's denial of the RMCC's special use application was in furtherance of a

compelling governmental interest and was the least restrictive means of furthering that interest.<sup>2</sup> I disagree.

A compelling governmental interest is an interest of the highest order. **Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah** 508 U.S. 520, 546 (1993).

There is, however, little guidance from the Supreme Court in determining what qualifies as a compelling interest. In **Wisconsin v. Yoder**, the Court defined a compelling interest as “only those interests of the highest order.” 406 U.S. 205, 215, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (“[O]nly those interests of the highest order and not otherwise served can overbalance legitimate claims to the free exercise of religion.”). In **Sherbert v. Verner**, the Court stated that “[o]nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation.” 374 U.S. 398, 406, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) (*quoting Thomas v. Collins*, 323 U.S. 516, 530, 65 S.Ct. 315, 89 L.Ed. 430 (1945)).

**U.S. v. Hardman**, 297 F.3d 1116, 1127 (10<sup>th</sup> Cir. 2002). To establish a compelling governmental interest in the context of § 2000cc(a), the BOCC must demonstrate that a compelling governmental interest is at stake in this particular case, rather than relying on a compelling interest in general. *See, e.g., Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430 (2006) (applying RFRA); **Westchester Day School v. Village of Mamaroneck**, 504 F.3d 338, 353 (2<sup>nd</sup> Cir. 2007) (applying RLUIPA, citing **Gonzales**, 546 U.S. 418 (2006)).

The BOCC argues that the interests served by the Boulder County Land Use Code and the Boulder County Comprehensive Plan are compelling governmental interests. The BOCC cites cases in which courts have concluded that land use and the enforcement of zoning regulations are compelling governmental interests. However, the BOCC does not cite any evidence from the trial in this case, and I do not recall any

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<sup>2</sup> The BOCC addresses this issue in its response [#284] to the RMCC’s motion for permanent injunction [#270].

such evidence being presented at trial, that shows that the particular issues presented by the RMCC's special use application implicated compelling governmental interests. Again, the primary reasons cited by the BOCC in its resolution denying the RMCC's special use application were lack of harmony with the character of the neighborhood, incompatibility with the surrounding area, incompatibility with the county's comprehensive plan, which limits intensive development on rural land, incompatibility with the designation of the RMCC's land as agricultural lands of national importance, and over-intensive use of land or excessive depletion of natural resources.

In the context of a strict scrutiny analysis, such interests generally have been found not to be compelling. ***Dimmitt v. City of Clearwater***, 985 F.2d 1565, 1570 (11<sup>th</sup> Cir.1993) (deleterious effect of graphic communication on visual aesthetics and traffic safety not a compelling state interest of the sort required to justify content based regulation of noncommercial speech); ***Midwest Media Property, L.L.C. v. Symmes Tp., Ohio***, 503 F.3d 456, 477 (2007) (aesthetic and safety concerns insufficient to satisfy strict scrutiny; citing ***Dimmitt***); ***United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, Florida***, 493 F.2d 799, 808 (5<sup>th</sup> Cir. 1974) (consistency with master plan not compelling governmental interest). In the present case, I conclude that the interests asserted by the BOCC to justify its denial of the RMCC's special use application, although legitimate in many senses, do not constitute compelling governmental interests.

I note further that the jury's finding that the RMCC was treated on less than equal terms with the Dawson School also plays a role in the compelling interest analysis.

Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest

given in justification of the restriction is not compelling. It is established in our strict scrutiny jurisprudence that “a law cannot be regarded as protecting an interest ‘of the highest order’ ... when it leaves appreciable damage to that supposedly vital interest unprohibited.”

***Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah***, 508 U.S. 520, 546-547

(1993). It is important to note that the jury found in favor of the BOCC on both of the plaintiff’s claims alleging that the BOCC discriminated against the RMCC because the RMCC is a church or is a religious institution. However, addressing the RMCC’s RLUIPA equal terms claim, the jury found that the BOCC treated the RMCC on less than equal terms than the Dawson School. In general, similar interests were at stake in the Dawson School’s special use application and the RMCC’s special use application. The fact that the Dawson School received more favorable treatment in this context tends to show that the interests asserted by the BOCC are not interests of the highest order.

Addressing the least restrictive means aspect of the BOCC’s strict scrutiny affirmative defense, the RMCC argues that the BOCC did not present at trial evidence that demonstrates that the BOCC used the least restrictive means to serve the BOCC’s claimed compelling interest when the BOCC denied most of the RMCC’s special use application. To satisfy its burden on this issue, the BOCC must show that it considered and rejected less restrictive measures because the less restrictive measures were not effective to serve the compelling interest at issue. ***Wygant v. Jackson Bd. of Educ.***, 476 U.S. 267, 280 n. 6. (1986). The BOCC argues that the evidence at trial showed that the BOCC has approved all of the RMCC’s special use applications, other than the 2004 application, and has permitted the RMCC’s use of its property to the extent that the RMCC now operates the largest church in Boulder County. Further, the BOCC



notes that it made a concerted effort to accommodate the RMCC's religious practice while still complying with the Land Use Code. The RMCC argues that the record in this case does not show that the BOCC considered whether approval of some additional elements of the RMCC's special use application might serve to accommodate the RMCC's religious exercise while further minimizing the burden imposed by the Land Use Code without impairing significantly the interests served by the code.

I find and conclude that the record in this case does not include evidence that the BOCC considered alternatives in a way that shows that the BOCC focused on finding the least restrictive means of serving its asserted interests while minimizing to the greatest extent possible the burden imposed on the RMCC's religious exercise. Further, the evidence in the record does not demonstrate that the BOCC's partial denial of the RMCC's special use application was the least restrictive means of serving the BOCC's asserted interests.

#### 4. Conclusion

In sum, I conclude that the evidence presented at trial is sufficient to support the jury's verdict finding that the BOCC imposed a substantial burden on the RMCC's exercise of religion, as those terms are used in the RLUIPA. Further, I conclude that the evidence and the jury's verdict demonstrate that the BOCC's challenged decision readily falls within the interstate commerce "jurisdictional hook" of § 2000cc (a)(2). Finally, I conclude that the evidence presented at trial is not sufficient to establish the strict scrutiny affirmative defense of § 2000cc(a).

#### **C. Unreasonable Limitations - § 2000cc(b)(3)(B)**

The unreasonable limitations provision of RLUIPA, codified at § 2000cc(b)(3)(B), provides, in relevant part: "No government shall impose or implement a land use

regulation that . . . unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.” The BOCC argues that the evidence presented at trial is not sufficient to support the jury’s verdict on this claim because, according to the BOCC, the RMCC presented no more than a scintilla of evidence that the Commissioners’ application of the Special Use criteria set forth in the Boulder Land Use Code unreasonably limits religious assemblies, institutions, or structures within the county. Because this portion of the RLUIPA refers to religious assemblies, institutions, or structures using plural rather than singular nouns, the jury in this case was instructed that it could find that a land use regulation

“unreasonably limits” if the regulation, as applied or implemented, has the effect of depriving both the Rocky Mountain Christian Church and other religious institutions or assemblies of reasonable opportunities to practice their religion, including the use and construction of structures, within Boulder County.

Jury Instruction No. 12.

At trial, Rosi Koopman was qualified as an expert witness for the RMCC on the subject of planning and development. Koopman testified that she had worked for the Boulder County land use department for 12 years and that after leaving the county’s employ, she had worked with several Boulder County churches, including RMCC, as a consultant concerning their efforts to negotiate the county’s special use permit process. Asked if she had formed an opinion about the extent of the difficulties faced by a religious organization in obtaining land use approval in Boulder County, Koopman said she had formed an opinion. She opined that the county’s regulations had become more difficult over the years, and that any church of any size must go through either a site plan review or a special use review. During her testimony she described various difficulties and limitations faced by various Boulder County churches with which she had

worked as a consultant on the churches' special use permits. On cross examination Koopman agreed that anyone in Boulder County who applies for permission to do something on their property faces the same regulations and limitations. She agreed also that she was not aware of any special use application by a church, other than RMCC, that had not been approved by the county. She testified also that it is common for a church to have conditions placed on their special use applications that reduce either the number of people permitted or the number of square feet permitted in a facility.

Applying the plain language of this portion of RLUPIA and the jury instruction quoted above, I conclude that the evidence was sufficient to support a reasonable conclusion by the jury that churches other than RMCC faced land use regulations in Boulder County that unreasonably limited the opportunity of those churches to practice their religion.

#### **D. Conclusion**

Applying the standard of review applicable under FED. R. CIV. P. 50, as detailed above, I find and conclude that the evidence presented in the trial of this case is sufficient for a reasonable jury to find in favor of the RMCC on its claims under (1) RLUIPA's equal terms provision, § 2000cc(b)(1); (2) RLUIPA's substantial burden provision, § 2000cc(a); and (3) RLUIPA's unreasonable limitations provision, § 2000cc(b)(3)(B).

#### **IV. CONSTITUTIONALITY - AS APPLIED CHALLENGE**

The BOCC argues that the RLUIPA is unconstitutional both facially and as applied. The BOCC asserted its facial challenge in its motion to dismiss [#34], filed June 30, 2006. I declined to address and resolve the facial challenge pretrial because

it was possible that the jury would find in favor of the BOCC on the RLUIPA claims. In that circumstance, there would be no need to address the constitutional challenge. Of course, the jury now has found against the BOCC on three of the RMCC's RLUIPA claims. In its present motion for judgment as a matter of law, the BOCC argues its as applied challenge, addressing the three RLUIPA claims on which the jury found in favor of the RMCC. Addressing the BOCC's as applied challenge, I conclude that the three RLUIPA sections on which the jury found in favor of the RMCC are constitutional as applied in this case.

Because I conclude that these RLUIPA sections are constitutional as applied in this case, I do not address the BOCC's facial challenge. A facial challenge is based on the assertion "that no set of circumstances exists under which the [RLUIPA] would be valid." ***U.S. v. Salerno***, 481 U.S. 739, 745 (1987). Of course, my conclusion that the RLUIPA is constitutional as applied in this case necessarily refutes the contention that the RLUIPA is unconstitutional in all conceivable circumstances.

In conventional constitutional litigation, it rarely (if ever) will be the case that a court, having upheld the constitutionality of a law in the context of the as-applied challenge before it, will proceed to strike the law in all of its applications based on hypothetical applications of the law to hypothetical individuals not before the court.

***Connection Distributing Co. v. Holder*** 557 F.3d 321, 335 (6<sup>th</sup> Cir. 2009).

### **A. Establishment Clause**

The BOCC argues that the equal terms, substantial burden, and unreasonable limitations provisions of RLUIPA, as applied in this case, violate the Establishment Clause of the First Amendment. The BOCC asserts that these RLUIPA provisions grant extraordinary privileges to RMCC which permit the RMCC to avoid the neutral and generally applicable criteria of the Boulder County Land Use Code solely because the

RMCC is religious. As applied in this case, the BOCC contends, these RLUIPA provisions require the BOCC to violate the constitutionally mandated neutrality between religion and non religion.

Establishment Clause challenges are reviewed under the three part test established in **Lemon v. Kurtzman**, 403 U.S. 602 (1971). Although the **Lemon** test often has been criticized, the Tenth Circuit recently reiterated that the **Lemon** test is the controlling law. **Weinbaum v. City of Las Cruces**, 541 F.3d 1017, 1030 n. 14 (10<sup>th</sup> Cir. 2008). Under **Lemon**, a governmental action does not violate the Establishment Clause if (1) the action has a secular legislative purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not foster an excessive government entanglement with religion. **Lemon**, 403 U.S. at 612 - 613. "State action violates the Establishment Clause if it fails to satisfy any of these prongs." **Edwards v. Aguillard**, 482 U.S. 578, 583 (1987). The Tenth Circuit interprets the purpose and effect prongs of the **Lemon** test in light of Justice O'Connor's endorsement test, stated in **Lynch v. Donnelly**, 465 U.S. 668, 687 - 694 (1984) (O'Connor, J., concurring). **Weinbaum**, 541 F.3d at 1030. The endorsement test asks whether a "reasonable observer, reasonably informed as to the relevant circumstances, would perceive the government to be acting neutrally." **Mission v. Salt Lake City Corp.**, 425 F.3d 1249, 1260 (10<sup>th</sup> Cir. 2005) (quotations omitted). Applying the **Lemon** test, I conclude that the equal terms, substantial burden, and unreasonable limitations provisions of RLUIPA, as applied in this case, do not violate the Establishment Clause.

### 1. Purpose

In deciding whether the government's purpose for a particular legislative enactment is improper under the Establishment Clause, a court must determine the

purpose of the legislation by examining the purpose “through the eyes of an objective observer, one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute . . . .” **Weinbaum**, 541 F.3d at 1031. A legislative enactment whose purpose is to “alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions” does not violate the legislative purpose prong of **Lemon Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos**, 483 U.S. 327, 335 (1987). A court should not lightly attribute unconstitutional motives to the government, particularly when a plausible secular purpose can be discerned. **Weinbaum**, 541 F.3d at 1032.

Courts that have examined RLUIPA’s land use provisions generally have concluded that these provisions have a secular purpose: to lift government-created burdens on private religious exercise. **See, e.g., Westchester Day School v. Village of Mamaroneck**, 504 F.3d 338, 355 (2<sup>nd</sup> Cir. 2007) (examining substantial burden provision); **Midrash Shepardi, Inc. v. Town of Surfside**, 366 F.3d 1214, 1240 - 1241 (11<sup>th</sup> Cir. 2004) (equal terms provision). In **Cutter v. Wilkinson**, the Supreme Court concluded that the institutionalized persons provisions of RLUIPA had the purpose of alleviating “exceptional government-created burdens on private religious exercise,” and concluded that those provisions do not violate the Establishment Clause. 544 U.S. 709, 720 (2005). The land use provisions of RLUIPA carry the same purpose, and that purpose is proper under the legislative purpose prong of **Lemon**.

## 2. Principal or Primary Effect

The effect prong of the **Lemon** test “looks through the eyes of an objective observer who is aware of the purpose, context, and history” of the legislation in

question. **Weinbaum**, 541 F.3d at 1031. To satisfy **Lemon**, the law must have a principal or primary effect that neither advances nor inhibits religion. **Amos**, 483 U.S. 336. The fact that religious organizations are better able to advance their purposes because of the law in question does not mean necessarily that the law violates the Establishment Clause. **Id.** at 336 - 337. "A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose." **Id.** at 337. On this rationale, property tax exemptions for churches and exemption from the employment discrimination strictures of Title VII have been upheld when facing Establishment Clause challenges. **Walz v. Tax Comm'n**, 397 U.S. 664 (1970) (property tax exemption); **Amos**, 483 U.S. 327 (Title VII exemption). On the other hand, a law produces effects forbidden by the Establishment Clause if "the government itself has advanced religion through its own activities and influence." **Amos**, 483 U.S. at 337. The Establishment Clause prohibits government sponsorship of religion, financial support for religion, and the active involvement of the sovereign in religious activity. **Id.**

The BOCC argues that the RLUIPA land use provisions, as applied in this case, effectively mandate preferential treatment of a religious entity over secular entities based solely on religion, and, thus, those provisions convey a message of government approval or endorsement of religion, in violation of the Establishment Clause. The BOCC contends that the jury's verdict requires the BOCC to reverse its nondiscriminatory partial denial of the RMCC's special use application; thus, requiring the BOCC to give extraordinary benefits to the RMCC based solely on the fact that the RMCC is religious.

The BOCC's argument is based on its contention that the jury's verdict demonstrates that the jury found that the RMCC's special use application violated the

requirements of the Land Use Code. The BOCC notes that the jury rejected both of RMCC's claims alleging discrimination based on religion. If the jury rejected the theory of religious discrimination, the BOCC contends, then the jury must have concluded that the BOCC rejected the RMCC's 2004 special use application for the reasons stated by the BOCC; that is, because the RMCC's proposed uses did not comply with the Land Use Code and its special use criteria. If the jury's verdict establishes that the RMCC's special use application was denied because it did not comply with the Land Use Code, then the jury's verdict under RLUIPA will require the BOCC to exempt the RMCC from the code because the RMCC is religious.

The limits of the protections afforded to a church under the Free Exercise Clause are implicated in the BOCC's analysis. Not every regulation of religious conduct is subject to a free exercise challenge. In fact, many regulations that affect religious conduct are not subject to a free exercise challenge.

(T)he free exercise clause does not prohibit Congress and local governments from validly regulating religious conduct. Neutral rules of general applicability normally do not raise free exercise concerns even if they incidentally burden a particular religious practice or belief. Thus a law that is both neutral and generally applicable need only be rationally related to a legitimate governmental interest to survive a constitutional [free exercise] challenge.

***Grace United Methodist Church v. City of Cheyenne***, 451 F.3d 643, 649 (10<sup>th</sup> Cir. 2006) (quotations and citations omitted).

(T)he defect of lack of neutrality applies primarily to those laws that *by their terms* impose disabilities on the basis of religion (e.g., a law excluding members of a certain sect from public benefits . . .); whereas, the defect of lack of general applicability applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment . . . .

***Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah***, 508 U.S. 520, 557 (1993)



(Scalia, J., concurring) (citations omitted; emphasis in original). Generally, “land use regulations, i.e., zoning ordinances, are neutral and generally applicable notwithstanding that they may have individualized procedures for obtaining special use permits or variances.” ***Grace United Methodist Church***, 451 F.3d at 651 (internal quotation omitted). Facially, the Boulder County Land Use Code and its special use criteria are neutral and generally applicable. The BOCC argues that the RLUIPA violates the Establishment Clause because the RLUIPA, as applied in this case, gives the RMCC an exemption from these otherwise permissible land use regulations.

The BOCC’s analysis ignores a key aspect of the jury’s verdict in this case. The jury found in favor of the RMCC on the RMCC’s equal terms claim, concluding that the BOCC had imposed or implemented a land use regulation in a manner that treats the RMCC, a religious institution, on less than equal terms with a nonreligious assembly or institution, the Dawson School. Much of the BOCC’s Establishment Clause argument is based on the contention that the RLUIPA, as applied in this case, requires the BOCC to favor religion rather than maintaining neutrality toward religion. However, the jury’s equal terms verdict necessarily is based on the conclusion that the BOCC treated the RMCC on less favorable terms than a similarly situated secular comparator. Although the jury did not attribute a bias against religion to the BOCC, this unequal treatment of the RMCC is prohibited by the RLUIPA no matter what the underlying motive may be. Further, an objective observer who is aware of the purpose, context, and history of the RLUIPA could not conclude that the Act’s equal treatment requirement causes the government itself to advance religion through its own activities and influence.

In the context of this case, the jury’s verdicts in favor of the RMCC on its substantial burden and unreasonable limitations claims also readily satisfy the primary

effect prong of the **Lemon** test. First, the jury's finding of unequal treatment may well have informed its findings that the BOCC also had imposed a substantial burden and unreasonable limitations on the RMCC. If the equal treatment requirement is the lynchpin of the jury's verdicts, then an objective observer could not conclude that the RLUIPA, as applied in this case, causes the government itself to advance religion through its own activities and influence. Second, even if the finding of unequal treatment did not inform the jury's verdicts on the substantial burden and unreasonable limitations claims, an objective observer who is aware of the purpose, context, and history of the RLUIPA could not conclude that the Act's substantial burden and unreasonable limitations provisions cause the government itself to advance religion through its own activities and influence. To the extent the jury's verdicts on these two claims may require the BOCC to relax regulations that otherwise might properly be enforced against the church, such a requirement does not cause government itself to advance religion through its own activities and influence. Like the property tax and Title VII exemptions noted above, an exemption from land use regulation that might be read into the jury's verdicts in this case cannot reasonably be seen, under applicable law, as government advancement of religion.

### 3. Excessive Government Entanglement with Religion

The excessive entanglement prong of the **Lemon** test is related closely to the effect prong. Addressing the entanglement prong of **Lemon**, the Supreme Court has said:

(T)he factors we use to assess whether an entanglement is "excessive" are similar to the factors we use to examine "effect." That is, to assess entanglement, we have looked to the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious

authority. Similarly, we have assessed a law's "effect" by examining the character of the institutions benefited ( e.g., whether the religious institutions were "predominantly religious"), and the nature of the aid that the State provided ( e.g., whether it was neutral and nonideological) . . . ."

**Agostini v. Felton**, 521 U.S. 203, 232-233 (1997) (internal quotations and citations omitted). The **Agostini** Court continued:

Not all entanglements, of course, have the effect of advancing or inhibiting religion. Interaction between church and state is inevitable, see 403 U.S., at 614, 91 S.Ct., at 2112, and we have always tolerated some level of involvement between the two. Entanglement must be "excessive" before it runs afoul of the Establishment Clause. *See, e.g., Bowen v. Kendrick*, 487 U.S., at 615-617, 108 S.Ct., at 2577-2579 (no excessive entanglement where government reviews the adolescent counseling program set up by the religious institutions that are grantees, reviews the materials used by such grantees, and monitors the program by periodic visits); *Roemer v. Board of Public Works of Md.*, 426 U.S. 736, 764-765, 96 S.Ct. 2337, 2353-2354, 49 L.Ed.2d 179 (1976) (no excessive entanglement where State conducts annual audits to ensure that categorical state grants to religious colleges are not used to teach religion).

*Id.* at 233.

In **Lemon**, the Court observed that

(o)ur prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable. Fire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws are examples of necessary and permissible contacts. Indeed, under the statutory exemption before us in **Walz**, the State had a continuing burden to ascertain that the exempt property was in fact being used for religious worship. Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.

**Lemon v. Kurtzman**, 403 U.S. 602, 614 (1971).

The BOCC argues that the RLUIPA, as applied in this case, required the BOCC to inquire whether the uses proposed by the RMCC constituted the exercise of religion. In addition, the BOCC says it was required to inquire whether denial of the special use

application would burden substantially RMCC's religious exercise or deprive RMCC of reasonable opportunities to practice its religion. These required inquiries, the BOCC asserts, constitute an excessive entanglement of government with religion. I disagree.

No doubt, RLUIPA often will require a government body, like the BOCC, to evaluate whether the enforcement of land use regulations will burden religious exercise, will affect opportunities to practice religion, or has been administered equally between similarly situated religious and non-religious institutions. To a great extent, the U.S. Constitution also requires such evaluations. However, the assessments a government must make under RLUIPA do not require a pervasive monitoring of religious institutions or a detailed examination of those institutions that might support a claim of excessive entanglement. Rather, with inquiries analogous to those found not to cause excessive entanglement in *Walz* and *Amos*, the BOCC can determine the nature of a religious institution and the extent to which land use regulations may impose an improper burden or unequally administered regulation on a religious institution. The inquiries required by RLUIPA are not analogous to the detailed and pervasive inquiries at issue in *Colorado Christian University v. Weaver*, inquiries that the Tenth Circuit found to violate the excessive entanglement aspect of *Lemon*. 534 F.3d 1245, 1261 - 1266 (10<sup>th</sup> Cir. 2008). In short, the relationship between the BOCC and religious institutions that is required under RLUIPA falls well within the acceptable relationship between government and religious organizations described in *Lemon* and does not constitute excessive entanglement of government with religion.

#### 4. Conclusion

Thus, I conclude ultimately that, as applied in this case, the equal terms, substantial burden, and unreasonable limitations provisions of RLUIPA do not violate

the Establishment Clause of the First Amendment.

## **B. Fourteenth Amendment**

The BOCC challenges the constitutionality of the equal terms, substantial burden, and unreasonable limitations provisions of RLUIPA based on the contention that these provisions exceed Congress's enforcement powers under Section 5 of the Fourteenth Amendment. This is so, the BOCC contends, because these provisions of RLUIPA, as applied in this case, effect substantive changes in constitutional protections and do not constitute proper remedial, preventative legislation designed to enforce constitutional protections.

To the extent the substantial burden provision of RLUIPA properly has been triggered under Congress's authority under the Commerce Clause, this argument is not applicable to the substantial burden provision. However, the substantial burden provision of RLUIPA has also a jurisdictional hook that implicates § 5. This "jurisdictional hook" provides that RLUIPA's substantial burden provision is applicable when

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 (a)(2)(C). This jurisdictional hook is implicated in this case.

Therefore, I address the BOCC's § 5 challenge as to the equal terms, substantial burden, and unreasonable limitations provisions of RLUIPA as applied in this case.

Section 5 of the Fourteenth Amendment grants to Congress the power to "enforce, by appropriate legislation," the provisions of the Fourteenth Amendment. **U.S. Const. Amend. XIV, § 5.** Of course, the Due Process Clause of the Fourteenth

Amendment incorporates the Free Exercise and Establishment Clauses of the First Amendment. **Cantwell v. Connecticut**, 310 U.S. 296, 303 (1940) (the “fundamental concept of liberty embodied in the [Fourteenth Amendment’s Due Process Clause] embraces the liberties guaranteed by the First Amendment”). Thus, Congress may act to enforce the First Amendment’s religion clauses under § 5.

The § 5 enforcement power is limited, however.

Congress’ power under § 5, however, extends only to “enforc [ing]” the provisions of the Fourteenth Amendment. The Court has described this power as “remedial,” **South Carolina v. Katzenbach**, supra, [383 U.S.] at 326, 86 S.Ct., at 817-818. The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment’s restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power “to enforce,” not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the “provisions of [the Fourteenth Amendment].”

**City of Boerne**, 521 U.S. 507, 519 (1997).

A challenge to an enactment under § 5 requires an examination of three issues. First, a court must “identify with some precision the scope of the constitutional right at issue.” **Bd. of Trustees of Univ. of Ala. v. Garrett**, 531 U.S. 356, 365 (2001).

Second, a court must determine if Congress identified a history and pattern of unconstitutional conduct that it sought to remedy with the challenged enactment. *Id.* at 964 - 965. Third, a court must determine if the legislation is “congruent” and “proportional” to the injury to be prevented or remedied. **City of Boerne**, 521 U.S. at 532 - 536; **Kimel v. Florida Bd. of Regents**, 528 U.S. 62, 81 (2000).

Examining the limits of Congress’s § 5 powers, the Supreme Court found RLUIPA’s predecessor, the Religious Freedom Restoration Act (RFRA) of 1993, to be

unconstitutional as applied to the states because RFRA far exceeded Congress's power under § 5 of the Fourteenth Amendment. **City of Boerne**, 521 U.S. 507 (1997). The Court concluded that the RFRA was not congruent and proportional to the unconstitutional conduct that Congress sought to address. Rather, the Court concluded that RFRA

is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections.

\* \* \* \*

[RFRA's] (s)weeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description regardless of subject matter.

**City of Boerne**, 521 U.S. at 532.

#### 1. Scope of the Constitutional Right at Issue

The text of the RLUIPA shows clearly that, in passing RLUIPA, Congress sought to protect the constitutional right of free exercise of religion and the right to equal protection of the law in the context of land use decisions. The Act's protections clearly are directed at religious assemblies and institutions. I agree with the conclusion of the Eleventh Circuit that the RLUIPA is designed to protect the non-discrimination principles of the Free Exercise and Establishment Clauses of the First Amendment, as well as the Equal Protection Clause of the Fourteenth Amendment. **Midrash Sephardi, Inc. v. Town of Surfside**, 366 F.3d 1214, 1238 (11<sup>th</sup> Cir. 2004). In short, the scope of the rights at issue is the rights protected by the Free Exercise Clause of the First Amendment, made applicable to the states under the Due Process Clause of the Fourteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment, as those rights implicate land use decisions affecting religious assemblies

or institutions.

As discussed above with regard to the BOCC's Establishment Clause challenge, many regulations that affect religious conduct are not subject to a free exercise challenge. The Free Exercise Clause does not "relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"

***Employment Division v. Smith***, 494 U.S. 872, 879 (1990). The ***Smith*** Court distinguished ***Sherbert v. Verner***, 374 U.S. 398 (1963), and related cases because those cases involved systems of "individualized exemptions" that lent themselves to individualized governmental assessment of the reasons for a person's conduct. ***Smith***, 494 U.S. at 884.

In sum,

the free exercise clause does not prohibit Congress and local governments from validly regulating religious conduct. Neutral rules of general applicability normally do not raise free exercise concerns even if they incidentally burden a particular religious practice or belief. Thus a law that is both neutral and generally applicable need only be rationally related to a legitimate governmental interest to survive a constitutional [free exercise] challenge.

***Grace United Methodist Church v. City of Cheyenne***, 451 F.3d 643, 649 (10<sup>th</sup> Cir. 2006) (quotations and citations omitted).

(T)he defect of lack of neutrality applies primarily to those laws that *by their terms* impose disabilities on the basis of religion (e.g., a law excluding members of a certain sect from public benefits . . .); whereas, the defect of lack of general applicability applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment . . . .

***Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah***, 508 U.S. 520, 557 (1993) (Scalia, J., concurring) (citations omitted; emphasis in original). Generally, "land use



regulations, i.e., zoning ordinances, are neutral and generally applicable notwithstanding that they may have individualized procedures for obtaining special use permits or variances.” ***Grace United Methodist Church***, 451 F.3d at 651 (internal quotation omitted).

A law that is not generally applicable because its design, construction, or enforcement targets the practices of a particular religion for discriminatory treatment is subject to a free exercise challenge. If such a law imposes a substantial burden on the plaintiff’s free exercise of religion, then the burden will not withstand a free exercise challenge unless the burden can be justified by a compelling governmental interest. ***Sherbert***, 374 U.S. at 403. Generally, when the government must articulate a compelling governmental interest to justify its action, it also must accommodate that interest via the least restrictive means that can accommodate the interest. ***See, e.g., Soskin v. Reinertson***, 353 F.3d 1242, 1247 (10<sup>th</sup> Cir. 2004).

Under the Equal Protection Clause, a law that discriminates among religions or discriminates between religion and non-religion may be subject to the strict scrutiny analysis. ***See Colorado Christian University v. Weaver***, 534 F.3d 1245, 1256 (10<sup>th</sup> Cir. 2008) (government decisions that discriminate among religions subject to strict scrutiny; ***citing Larson v. Valente***, 456 U.S. 228, 246 (1982)). However, when discrimination affecting free exercise rights is the primary issue, equal protection analysis takes a back seat. The Supreme Court has rejected attempts to invoke strict scrutiny under the equal protection clause, based on religious discrimination, when the challenged state action is not a violation of the Free Exercise Clause. ***Locke v. Davey***, 540 U.S. 712, 721 n. 3 (2004). “(I)f a challenged program comports with the Free Exercise Clause, that conclusion wraps up the religious discrimination analysis. Thus,

rational basis scrutiny applies to any further equal protection inquiry.” *Eulitt ex rel.*

*Eulitt v. Maine, Dept. of Educ.*, 386 F.3d 344, 353-354 (1<sup>st</sup> Cir..2004).

## 2. History and Pattern of Unconstitutional Conduct

With regard to RLUIPA's land use provisions, the provisions at issue in this case, Congress compiled what it considered to be “massive evidence” of widespread discrimination against religious institutions by state and local officials regarding land-use decisions, and concluded that often these decisions frustrated a core aspect of religious exercise – the ability to worship. See Joint Statement, 146 Cong. Rec. S7774-75; H.R. Rep. No. 106-219, at 21-24. Congress found also that while systems of individualized land use assessments readily lend themselves to discrimination against religious assemblies, it is difficult to prove discrimination in any particular case. See 146 Cong. Rec. at S7775; H.R. Rep. No. 106-219, at 18-24.

The hearing record demonstrates a widespread practice of individualized decisions to grant or refuse permission to use property for religious purposes. These individualized assessments readily lend themselves to discrimination, and they also make it difficult to prove discrimination in any individual case. But the committees in each house have examined large numbers of cases, and the hearing record reveals a widespread pattern of discrimination against churches as compared to secular places of assembly, and of discrimination against small and unfamiliar denominations as compared to larger and more familiar ones.

146 Cong. Rec. at S7775. “It is for Congress in the first instance to determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, and its conclusions are entitled to much deference.” *Kimel*, 528 U.S. at 80 - 81 (internal quotations and citations omitted).

In its **Motion To Dismiss Amended Complaint** [#34], filed June 30, 2006, the BOCC summarized well the arguments against the conclusion that Congress properly identified and circumstantiated a history and pattern of unconstitutional conduct that

provides a sufficient basis for RLUIPA's land use provisions. Particularly in light of the deference that I must grant to the determinations of Congress in this arena, I conclude that Congress adequately identified and circumstantiated a pattern of unconstitutional conduct that provides an adequate foundation for the RLUIPA land use provisions at issue in this case.

### 3. Congruence and Proportionality

The key issue in the § 5 analysis in this case is whether RLUIPA's equal terms, substantial burden, and unreasonable limitation provisions are congruent and proportional to the problem Congress sought to address in passing the Act. Of course, if no pattern of unconstitutional conduct has been identified, as the BOCC has argued, then it is difficult to conclude that the legislative solution passed to solve a non-existent problem is congruent and proportional to the non-problem. To some extent, the BOCC's argument about congruence and proportionality is based on a contention that Congress did not identify and circumstantiate a problem that RLUIPA properly is designed to solve. Again, I conclude that Congress sufficiently identified a problem of land use decisions improperly limiting the free exercise of religion, and, thus, I reject the BOCC's congruence argument to the extent it is based on the contention that Congress did not properly identify a history and pattern of unconstitutional conduct. RLUIPA's land use provisions are not a solution in search of a problem.

Again, even when a problem has been identified and circumstantiated properly, the law designed to address the problem cannot significantly alter the meaning of the constitutional right in question, and the law must be congruent and proportional to the problem addressed. ***City of Boerne***, 521 U.S. at 519. The BOCC argues that the RLUIPA's equal terms and unreasonable limitation provisions are improper under § 5

because they expand substantially the RMCC's rights under the Free Exercise and Equal Protection clauses.

The BOCC notes that the jury found in favor of the BOCC on all of the RMCC's claims under the Constitution. These claims included claims under the Free Exercise Clause, the Free Speech Clause, and for violation of the RMCC's constitutional right to freedom of association. Because the jury found in favor of the BOCC on all of RMCC's constitutional claims, the BOCC argues, the RLUIPA, as applied in this case, necessarily creates additional rights beyond those guaranteed by the Constitution, and the creation of those additional rights goes beyond Congress's § 5 powers.

I do not agree with the BOCC's argument that the jury's verdicts in this case necessarily demonstrate that RLUIPA creates rights greater than those provided in the Constitution. The jury's deliberations are inscrutable, and one readily can posit a scenario in which the jury's verdicts were based on a compromise or some other rationale that is not dependent on a conclusion that there were no violations of the Constitution in this case. In divining the rationale behind the jury's verdicts, few assumptions are safe. The jury's verdicts do not mandate the conclusion that RLUIPA, as applied in this case, creates rights for the RMCC greater than those provided in the Constitution.

The BOCC argues also that the RLUIPA grants rights that exceed substantially the protections provided to religious institutions and assemblies by the Free Exercise and Equal Protection clauses in the land use context. *Motion To Dismiss Amended Complaint* [#34], filed June 30, 2006, p. 22 - 24. The application of the Free Exercise and Equal Protection clauses in the context of land use decisions must be considered in evaluating this issue. If the RLUIPA substantially expands the RMCC's free exercise

or equal protection rights in this context, then Congress may have exceeded its § 5 powers in passing RLUIPA.

As in its Establishment Clause argument, the BOCC argues that the RLUIPA, as applied in this case, expands substantially the RMCC's rights in the land use context because the RLUIPA effectively requires the BOCC to grant the RMCC an exemption from land use regulations that otherwise would apply to the RMCC. Again, this argument is based on the contention that, absent the RLUIPA, the RMCC would have no valid constitutional basis to challenge the BOCC's denial of the RMCC's 2004 special use application.

Again, the BOCC's analysis ignores a key aspect of the jury's verdict in this case. The jury found in favor of the RMCC on the RMCC's equal terms claim, concluding that the BOCC had imposed or implemented a land use regulation in a manner that treats the RMCC, a religious institution, on less than equal terms with a similarly situated nonreligious assembly or institution, the Dawson School. This conclusion by the jury takes the BOCC's denial of the special use application outside of the protection accorded to land use laws that are viewed as neutral and generally applicable because this conclusion indicates that the Land Use Code, as applied to the RMCC, was not generally applicable. Again, "the defect of lack of general applicability applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment . . . ." ***Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah***, 508 U.S. 520, 557 (1993) (Scalia, J., concurring) (citations omitted; emphasis in original).

The fact that the jury found in favor of the BOCC on the RMCC's claims alleging discrimination on the basis of religion does not change this analysis. Unequal treatment

between similarly situated religious and non-religious comparators subjects the BOCC's decision to the non-discrimination principles of the Free Exercise and Establishment Clauses of the First Amendment, as well as the Equal Protection Clause of the Fourteenth Amendment. The fact that the jury concluded that this unequal treatment did not arise from a motive to discriminate against religion does not somehow cleanse the finding of unequal treatment and thus shield the BOCC from the more rigorous analysis applicable when there is such unequal treatment.

In this case, the RLUIPA's requirement that similarly situated religious and non-religious assemblies or institutions be treated equally does not expand on the requirements of the religion clauses of the First Amendment or the Equal Protection Clause. Rather, the RLUIPA's requirement of equal treatment essentially parrots the requirements of the religion clauses and the Equal Protection Clause, as they are applied to religion. The unreasonable limitation provision of RLUIPA, viewed on its own limited terms, might be seen as a significant expansion of the rights of religious institutions and assemblies because the Free Exercise and Equal Protection clauses do not prohibit all limitations that might be labeled as "unreasonable", at least when those limitations are imposed by laws that are neutral and generally applicable. As applied in this case, however, the unreasonable limitations provision does not provide an improper expansion of the RMCC's rights. Most notably, the jury in this case easily could have concluded that the limitations at issue were unreasonable because they were imposed under a system that caused the BOCC to treat the RMCC on less than equal terms than the secular Dawson School. Applying this narrow but reasonable interpretation of the jury's verdicts, I conclude that the unreasonable limitations provision, as applied in this case, is congruent and proportional to the problem identified by Congress, does not

attempt to expand significantly the constitutional rights of the RMCC, and thus properly falls within Congress's power under § 5.

Turning to the RLUIPA's substantial burden provision, I note first that, in view of the RMCC's allegations and the jury's verdicts, the substantial burden "jurisdictional hook" concerning land use regulations imposed via individualized assessments is applicable in this case. Again, that jurisdictional provision provides that RLUIPA's substantial burden provision is applicable when

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 (a)(2)(C). With the jury's finding of unequal treatment, the BOCC's denial of the RMCC's special use application fairly can be viewed as a burden imposed under a land use regulation that resulted in an individualized assessment of the RMCC's proposed uses of its property.

In the context of such an individualized assessment, the standard of ***Sherbert v. Verner***, 374 U.S. 398 (1963), applies. If such a law imposes a substantial burden on the plaintiff's free exercise of religion, then the burden will not withstand a free exercise challenge unless the burden can be justified by a compelling governmental interest and that interest is accommodated by the least restrictive means available. ***Sherbert***, 374 U.S. at 403 (compelling interest); ***See, e.g., Soskin v. Reinertson***, 353 F.3d 1242, 1247 (10<sup>th</sup> Cir. 2004) (compelling interest justification requires least restrictive means). RLUIPA's substantial burden provision simply parrots this strict scrutiny standard. Thus, in the context of this case, RLUIPA's substantial burden provision is congruent and proportional to the problem identified by Congress, does not attempt to expand

significantly the constitutional rights of the RMCC, and thus properly falls within Congress's power under § 5.

In other contexts, RLUIPA's substantial burden provision could be read to apply the strict scrutiny standard to land use regulations that are, under applicable law, neutral rules of general applicability. In that circumstance, RLUIPA might be seen as attempting to expand significantly the constitutional rights of religious assemblies and institutions. However, this case does not present such circumstances.

I note also that RLUIPA does expand free exercise rights in one respect. As discussed above, RLUIPA defines "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," including the "use, building, or conversion of real property for the purpose of religious exercise. . . ." § 2000cc-5 (7). This definition of "religious exercise" is broader than the definition of "religious exercise" used in constitutional jurisprudence under the First Amendment. Generally, the Supreme Court has limited free exercise claims to religious beliefs or practices that are central or fundamental to a person's religion. ***Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*** 508 U.S. 520, 565 (1993); ***Grace United Methodist Church v. City Of Cheyenne***, 451 F.3d 643, 662 (10<sup>th</sup> Cir. 2006).

Congress's expansion of the term "religious exercise" in RLUIPA does not necessarily exceed Congress's power under § 5. Under § 5, Congress is authorized to enact "prophylactic" legislation that prohibits a "somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text," as long as there is proof of widespread unconstitutional conduct by the states, and the legislation is "congruent" and "proportional" to the injury to be prevented or remedied. ***Kimel v. Florida Bd. of Regents***, 528 U.S. 62, 81 (2000); ***Tennessee v. Lane***, 541 U.S. 509,



526 - 531 (2004). Here, Congress identified what it saw as a widespread problem of discrimination or unequal treatment of religious institutions in the context of land use decisions. The expansion of the definition of religious exercise in RLUIPA relates directly to land use by religious institutions and eliminates the need to parse which aspects of a church's land use fall within the traditional definition of religious exercise and which do not. This limited expansion of free exercise rights is proper under Congress's § 5 powers because it is limited, congruent, and proportional to the injury addressed by Congress in the land use provisions of RLUIPA.

#### 4. Conclusion

Having considered the scope of the constitutional rights at issue, the history and pattern of unconstitutional conduct identified by Congress, and the congruence and proportionality of RLUIPA's equal terms, substantial burden, and unreasonable limitation provisions, as applied in this case, I conclude that those provisions of RLUIPA are within Congress's power under § 5 of the Fourteenth Amendment.

I note that the BOCC also has challenged the RLUIPA as exceeding Congress's power under the Commerce Clause, which provides one of the jurisdictional hooks for the substantial burden provision. *Motion To Dismiss Amended Complaint*, [#34], filed June 20, 2006, pp. 24 - 25. Because I have found the relevant RLUIPA sections to be constitutional, as applied in this case, under Congress's § 5 powers, I decline to address this constitutional question.

If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable. And so, as questions of federal constitutional power have become more and more intertwined with preliminary doubts about local law, we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law.

***Spector Motor Service v. McLaughlin***, 323 U.S. 101, 105 (1944) (Frankfurter, J.).

“This is a ‘fundamental rule of judicial restraint,’ which has received the sanction of time and experience.” ***Zobrest v. Catalina Foothills School Dist.***, 509 U.S. 1, 14-15 (1993) (citing ***Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.***, 467 U.S. 138 (1984)).

## **V. CONCLUSION & ORDER**

For the reasons detailed in this order, I conclude under FED. R. CIV. P. 50 that the evidence presented at trial is sufficient to support the jury’s verdicts in favor of the RMCC and against the BOCC under RLUIPA’s equal terms, substantial burden, and unreasonable limitations provisions, as those provisions have been applied in this case. I conclude also that those provisions, as applied in this case, do not violate the Establishment Clause of the First Amendment and do not exceed Congress’s enforcement powers under Section 5 of the Fourteenth Amendment.

**THEREFORE, IT IS ORDERED** that the **Defendant’s Renewed Motion for Judgment as a Matter of Law** [#279], filed January 5, 2009, is **DENIED**.

Dated March 30, 2009, at Denver, Colorado.

**BY THE COURT:**

  
Robert E. Blackburn  
United States District Judge

## **APPENDIX B**

**The Honorable Judge Blackburn's Order Granting Plaintiff's Motion for  
Permanent Injunction & Directing Entry of Judgment (filed Mar. 30, 2009)**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
Judge Robert E. Blackburn**

Civil Case No. 06-cv-00554-REB-BNB

ROCKY MOUNTAIN CHRISTIAN CHURCH,

Plaintiff,  
and

UNITED STATES OF AMERICA,

Intervenor Plaintiff,  
v.

BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY, COLORADO,  
Defendant.

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**ORDER GRANTING PLAINTIFF'S MOTION FOR PERMANENT INJUNCTION  
& DIRECTING ENTRY OF JUDGMENT**

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**Blackburn, J.**

This matter is before me on the **Plaintiff's Motion for Permanent Injunction** [#270]<sup>1</sup>, filed November 25, 2008. The defendant filed a response [#274] and the plaintiff filed a reply [#284]. The defendant filed also a notice of supplemental authority [#287]. I grant the motion in part and deny it in part. Further, I direct the entry judgment in favor of the plaintiff on the jury's verdicts in favor of the plaintiff, and the entry of judgment in favor of the defendant on the jury's verdicts in favor of the defendant.

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<sup>1</sup> "[#270]" is an example of the convention I use to identify the docket number assigned to a specific paper by the court's electronic case filing and management system (CM/ECF). I use this convention throughout this order.

## I. JURISDICTION

I have subject matter jurisdiction under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1343(a) (deprivation of federally protected rights and privileges), and 28 U.S.C. § 1367(a) (supplemental jurisdiction).

## II. BACKGROUND

This case was tried to a jury from November 3 to November 19, 2008. At the conclusion of the trial, the jury returned verdicts in favor of the plaintiff, Rocky Mountain Christian Church (RMCC), on three claims under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc - 2000cc-5. Specifically, the jury found for the RMCC on the RMCC's claims under (1) RLUIPA's equal terms provision, § 2000cc(b)(1); (2) RLUIPA's substantial burden provision, § 2000cc(a); and (3) RLUIPA's unreasonable limitations provision, § 2000cc(b)(3)(B). The jury found in favor of the defendant on all other claims, including the RMCC's other claim under RLUIPA and the RMCC's claims alleging violation of the United States Constitution and the Constitution of the State of Colorado. The jury awarded no monetary damages to the RMCC.

In my **Order Denying Defendant's Renewed Motion for Judgment as a Matter of Law**, which is entered concurrently with this order, I have denied the BOCC's motion for judgment as a matter of law [#279]. In that motion, and in response to the RMCC's motion for permanent injunction, the BOCC has argued that it is entitled to judgment as a matter of law on the RMCC's successful claims under RLUIPA's equal terms, substantial burden, and unreasonable limitations provisions. The BOCC argues that certain affirmative defenses are applicable to these claims, and that the evidence presented at trial establishes those affirmative defenses. Those affirmative defenses

present questions of law for the court and, in my order denying the BOCC's motion for judgment as a matter of law, I conclude that the BOCC is not entitled to judgment based on those affirmative defenses. In addition, I conclude in that order that the evidence presented at trial was sufficient to sustain the jury's verdicts and that the RLUIPA's equal terms, substantial burden, and unreasonable limitations provisions are constitutional as applied in this case.

The RMCC's claims in this case are based on the BOCC's partial denial of the RMCC's 2004 special use application. In its 2004 special use application, the RMCC sought to expand its facilities from about 116,000 square feet to 240,800 square feet. The Church later modified its application to eliminate a proposed 12,000 square feet balcony addition to its sanctuary, reducing its request for additional seating from 1,000 to 150, and by eliminating a proposed 8,000 square feet basement addition. The Church deleted also its request to increase the population of its school from 380 students to 540 students and modified other requests concerning parking, lighting, and a buffer zone on the western side of its property. The BOCC denied most, but not all, of the RMCC's Special Use Application.

Based on the jury's verdicts in favor of the RMCC on three of the RMCC's claims under the RLUIPA, the RMCC now seeks a permanent injunction requiring the BOCC to approve the RMCC's 2004 special use application within 30 days, enjoining the BOCC from prohibiting the construction of the religious facilities described in the RMCC's 2004 special use application, and enjoining the BOCC from imposing any further substantial burden on the RMCC's religious exercise.

### III. STANDARD OF REVIEW & ANALYSIS

A party may obtain a permanent injunction if it proves: A) actual success on the merits; B) irreparable harm unless the injunction is issued; C) the threatened injury outweighs the harm that the injunction may cause the opposing party; and D) the injunction, if issued, will not adversely affect the public interest. ***Fisher v. Okla. Health Care Auth.***, 335 F.3d 1175, 1180 (10th Cir.2003); ***See also Prairie Band Potawatomi Nation v. Wagon***, 476 F.3d 818, 822 (10<sup>th</sup> Cir. 2007). The RMCC has established each of these elements.

#### A. Success on the Merits

Again, the jury found in favor of the RMCC on its claims based on RLUIPA's equal terms, substantial burden, and unreasonable limitations provisions. I have resolved the BOCC's claimed affirmative defenses, which presented issues of law, in favor of RMCC. I have concluded that the evidence presented at trial was sufficient to sustain the jury's verdicts, and I have resolved the BOCC's contention that RLUIPA's equal terms, substantial burden, and unreasonable limitations provisions are unconstitutional as applied in this case. I have concluded that these provisions are constitutional as applied in this case. The RMCC has established success on the merits of these three RLUIPA claims.

#### B. Irreparable Harm

The violation of one's right to the free exercise of religion necessarily constitutes irreparable harm. ***O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft***, 389 F.3d 973, 1008 (10<sup>th</sup> Cir. 2004). As detailed in my order denying the BOCC's motion for judgment as a matter of law, this case concerns primarily the RMCC's free exercise of religion as its free exercise is affected by the BOCC's land use decisions. The fact that

the RMCC's free exercise rights in this case are based on statutory claims under the RLUIPA rather than on constitutional provisions does not alter the irreparable harm analysis. *See, e.g., Kikumura v. Hurley*, 242 F.3d 950, 963 (10<sup>th</sup> Cir. 2001) ("courts have held that a plaintiff satisfies the irreparable harm analysis by alleging a violation of RFRA"); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2<sup>nd</sup> Cir. 1996) ("although plaintiff's free exercise claim is statutory rather than constitutional, the denial of the plaintiff's right to the free exercise of his religious beliefs is a harm that cannot be adequately compensated monetarily"). The RMCC has demonstrated irreparable harm.

### C. Balance of Harms

The harm suffered by the RMCC, impairment of its statutorily protected right to the free exercise of religion in the context of land use, is substantial. The BOCC argues that the harm it will suffer if the requested injunction is granted outweighs the harm suffered by the RMCC. The BOCC argues that the jury's verdicts demonstrate that the RMCC's special use application violates the Boulder County Land Use Code. As discussed in my **Order Denying Defendant's Renewed Motion for Judgment as a Matter of Law**, which is entered concurrently with this order, I do not agree with this contention. The record in this case does not demonstrate conclusively that the RMCC's special use application violates the land use code. The BOCC argues also that permitting the expansion proposed in the RMCC's special use application will cause the negative impacts predicted by certain witnesses who testified at trial. In fact, some witnesses at trial did testify that they anticipated certain negative impacts if the RMCC is allowed to expand its facilities as proposed in the special use application. Balanced against the RMCC's statutorily protected right to the free exercise of religion, I conclude that the balance of harms weighs in favor of the RMCC.



#### **D. Public Interest**

As detailed in my **Order Denying Defendant's Renewed Motion for Judgment as a Matter of Law**, which is entered concurrently with this order, the RLUIPA is designed to ensure the enforcement of constitutional rights to the free exercise of religion in the land use context. "Vindicating First Amendment freedoms is clearly in the public interest." *Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1237 (10<sup>th</sup> Cir. 2005) (concerning First Amendment free speech rights). Generally, enforcement of such rights is considered to be in the public interest. The BOCC argues that an injunction that would require it to act contrary to its Land Use Code would not be in the public interest. Again, I disagree with the BOCC's contention that the record in this case demonstrates that the RMCC's special use application violates the applicable Land Use Code. I conclude that granting the injunction requested by the RMCC will not affect the public interest adversely.

#### **E. Scope of Injunction**

The BOCC argues also that the injunction sought by the RMCC is overly broad. The BOCC notes that the RMCC seeks an order enjoining the BOCC from imposing any further substantial burden on the RMCC's religious exercise. I agree with the BOCC's contention that "(i)njunctions that broadly order the enjoined party simply to obey the law and not violate the statute are generally impermissible. *N.L.R.B. v. U.S. Postal Service*, 486 F.3d 683, 691 (10<sup>th</sup> Cir. 2007) (Tymkovich, J. concurring and citing cases). To the extent the RMCC seeks such an injunction, its motion for permanent injunction is denied.

The BOCC argues also that not everything the RMCC requested in its special use application is necessary to alleviate an existing substantial burden on its religious

exercise. In addition, the BOCC notes that testimony at trial indicated that some of the expansion proposed in the RMCC's special use application was for anticipated future growth. To the extent the expansion anticipates future growth, the BOCC argues, permitting that expansion now is not necessary to alleviate a present burden on the RMCC's free exercise of religion.

I conclude that these arguments do not require that the injunction entered by this court be more narrow than the scope of the expansion proposed by the RMCC in its special use application. Even though some of the expansion proposed by the RMCC may not be needed immediately, a project of the size at issue here requires substantial advance planning. If the RMCC were required to substantiate its specific current needs as those needs arise, then the RMCC would be saddled with the burden of planning its expansion in a piecemeal fashion. Of course, such a requirement would impose a different burden on the RMCC, and likely would cause the RMCC to be treated differently than similar secular institutions. In the context of the RLUIPA's requirements concerning land use decisions affecting religious institutions, and the practical realities of planning the expansion of physical facilities of the type proposed by the RMCC, I conclude that an injunction requiring the approval of the RMCC's 2004 special use application is not overly broad.

#### **F. Conclusion**

In sum, the RMCC has demonstrated A) actual success on the merits; B) irreparable harm unless the injunction is issued; C) that the threatened injury outweighs the harm that the injunction may cause the opposing party; and D) that the injunction, if issued, will not adversely affect the public interest. Further, based on the record in this case, I conclude that an injunction requiring the approval of the RMCC's 2004 special

use application is not overly broad. However, an injunction prohibiting the BOCC from imposing any further substantial burden on the RMCC's religious exercise would not be proper.

#### **IV. RELATED ISSUES**

In its first, second, and third claims for relief, as stated in the RMCC's **Amended Complaint and Jury Demand** [#25], filed May 12, 2006, the RMCC seeks relief under Colorado Rules of Civil Procedure 57 and 106(a)(4). In its claims under Rule 106(a)(4), the RMCC seeks an order declaring that the BOCC exceeded its jurisdiction and abused its discretion in denying the RMCC's special use application. In its Rule 57 claim, the RMCC seeks a declaration that the regulations governing the BOCC's review of the RMCC's special use application are "an impermissible delegation of legislative authority and may not be enforced against the Church" to deny its special use application.

In view of my conclusion that the RMCC is entitled to a permanent injunction requiring the BOCC to grant the RMCC's special use application, I deny the RMCC's claims under C.R.C.P. 57 and 106(a)(4) as moot. Ultimately, the relief the RMCC might obtain if it succeeded on these claims is, essentially, the same as the relief it already has obtained in this case.

#### **V. ORDERS**

**THEREFORE, IT IS ORDERED** as follows:

1. That based on the jury's verdicts in this case, **JUDGMENT SHALL ENTER** in favor of the plaintiff, the Rocky Mountain Christian Church, and against the defendant, the Board of County Commissioners of Boulder County, Colorado, on the plaintiff's claims under a) 42 U.S.C. § 2000cc(b)(1), the equal terms provision of the Religious

Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc - 2000cc-5; b) 42 U.S.C. § 2000cc(a), the substantial burden provision of the RLUIPA; and c) 42 U.S.C. § 2000cc(b)(3)(B), the unreasonable limitations provision of the RLUIPA;

2. That based on the jury's verdicts in this case, **JUDGMENT SHALL ENTER** in favor of the defendant, the Board of County Commissioners of Boulder County, Colorado, and against the plaintiff, the Rocky Mountain Christian Church, on the plaintiff's claims under a) 42 U.S.C. § 2000cc(b)(2), the religious discrimination provision of the RLUIPA; b) the First Amendment of the United States Constitution and Article II, Section 4 of the Constitution of the State of Colorado, alleging violation of the plaintiff's right to free exercise of religion; c) the First Amendment of the United States Constitution and Article II, Section 4 of the Constitution of the State of Colorado, alleging violation of the plaintiff's right to free speech; and d) the First Amendment of the United States Constitution and Article II, Section 4 of the Constitution of the State of Colorado, alleging violation of the plaintiff's right to freedom of association;

3. That the plaintiff's claims under Colorado Rules of Civil Procedure 57 and 106(a)(4) are **DISMISSED** as moot,

4. That the **Plaintiff's Motion for Permanent Injunction** [#270], filed November 25, 2008, is **GRANTED** in part;

5. That the defendant, the Board of County Commissioners of Boulder County, Colorado, is **PERMANENTLY ENJOINED** and **ORDERED** to approve the special use application of the plaintiff, the Rocky Mountain Christian Church, identified in the records of the defendant as Docket #SU-04-008, within 45 days of the date of this order;

6. That the **Plaintiff's Motion for Permanent Injunction** [#270], filed November 25, 2008, otherwise is **DENIED**;

7. That the plaintiff is **AWARDED** its costs to be taxed by the Clerk of the Court pursuant to Fed.R.Civ.P. 54(d)(1) and D.C.COLO.LCivR. 54.1; and

8. That any motion seeking an award of attorney fees as part of the costs to be awarded in this case **SHALL BE FILED** on or before **May 11, 2009**, and the filing of any response and reply shall be marshaled as required by D.C.COLO.LCivR 7.1.C.

Dated March 30, 2009, at Denver, Colorado.

**BY THE COURT:**

  
Robert E. Blackburn  
United States District Judge

## **APPENDIX C**

**RMCC v. Boulder County**

**Jury Instructions**

**INSTRUCTION NO. -1-**

Ladies and Gentlemen of the Jury:

Now that you have heard the evidence and will soon hear argument, it becomes my duty to give you the instructions of the court as to the law applicable to this case. It is your duty as jurors to follow the law as I shall state it to you, and to apply the law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me.

In explaining the rules of law that you must follow, I will give you general instructions that apply in every civil case – for example, instructions about burden of proof, evidence, and credibility. Then I will give you specific rules of law that apply to this particular case. Next, I will give you instructions about damages. Finally, I will give you instructions that explain the procedures you should follow in your deliberations and that explain the possible verdicts you may return.

All of the original instructions will be given to you for use in the jury room, so you need not take notes, but, of course, you may do so.

Counsel may quite properly refer to some of the governing rules of law in their arguments. If, however, any difference appears to you between the law as stated by counsel and that stated by the court in these instructions, you are, of course, to be governed by the court's final, original instructions.

Nothing I say in these instructions is to be taken as an indication that I have any opinion about the facts of the case, or what that opinion is. It is not my function to determine the facts, but rather yours.

You must perform your duties as jurors without bias or prejudice as to any party.

The law does not permit you to be governed by sympathy, bias, prejudice, or public opinion. All parties expect that you will carefully and impartially consider all the evidence, follow the law as it is now being given to you, and reach just verdicts and answers to interrogatories, regardless of the consequences. That is the promise you made, and the oath you took.

Anything you may have seen or heard outside the courtroom is not evidence, and must be disregarded entirely.

Statements and arguments of counsel are not evidence in the case. The questions asked by a lawyer for either party to this case are not evidence. If a lawyer asks a question of a witness which contains an assertion of fact, therefore, you may not consider the assertion by the lawyer as any evidence of that fact. Only the answers are evidence. However, when the attorneys on both sides have stipulated or agreed as to the existence of a fact, the jury must, unless otherwise instructed, accept the stipulation and regard that fact as proved.

The evidence in the case consists of the sworn testimony of the witnesses, regardless of who may have called them, all exhibits received in evidence, regardless of who may have produced them, and all facts which have been stipulated and judicially noticed. The jury must accept as conclusive any fact that is stipulated or judicially noticed.

There are two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence – such as the testimony of an eyewitness or earwitness. The other is circumstantial evidence – the proof of a chain of circumstances pointing to the existence or nonexistence of certain facts. The law makes no distinction between direct or circumstantial evidence, but requires that the



jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

If any reference by the court or by counsel to matters of evidence – testimony or exhibits – does not coincide with your own recollection of that evidence, it is your recollection of the evidence that should control during your deliberations and not the statements of the court or of counsel. You are the sole judges of the evidence received in this case.

The mere number of witnesses appearing for or against a particular fact, issue, or proposition does not in and of itself prove or disprove that fact, issue, or proposition. You may find that the testimony of a small number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

Any evidence as to which an objection was sustained by the court, and any evidence ordered stricken by the court, must be disregarded entirely.

You are to consider only the evidence in the case. However, in your consideration of the evidence, you are not limited to just the statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testified. You are permitted to draw, from the facts which you find have been proved, such reasonable inferences as you feel are justified in the light of your experience.

Any finding of fact you make must be based on probabilities, not possibilities. A finding of fact may not be based on surmise, speculation, or conjecture.

At the end of the trial you will have to make your decisions based on what you recall of the evidence. You will not have a written transcript to consult, and it is difficult and time consuming for the reporter to read back lengthy testimony, if she is permitted

to do so at all.

Any interrogatory answered or verdict returned by the jury must represent the considered judgment of each juror. In order to answer an interrogatory or to return a verdict, it is necessary that each juror agree. Any such answer or verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view toward reaching an agreement, if you can do so without violence to individual judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous. However, do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of answering an interrogatory or returning a verdict.

Remember at all times that you are not partisans. You are judges – judges of the facts. Your sole interest is to seek the truth from the evidence in the case and to return just answers to interrogatories and just verdicts based on the evidence in the case and the law as the court has presented it to you.

**INSTRUCTION NO. -2-**

The plaintiff in this case is Rocky Mountain Christian Church. The defendant is the Board County Commissioners of Boulder County, Colorado (Board of County Commissioners). The individual plaintiffs – Alan Ahlgrim, Donald Bondeson, Barb Evans, and David Page – have voluntarily withdrawn their claims, and thus, these individual plaintiffs are no longer parties to this litigation.

Rocky Mountain Christian Church owns and operates a church and school campus in unincorporated Boulder County. In 2004, Rocky Mountain Christian Church filed an application with the County to construct a substantial addition to its existing facility. After a public hearing process, the Board of County Commissioners determined that most of the church's proposed addition did not comply with the requirements of the Boulder County Land Use Code and denied most of the application. Rocky Mountain Christian Church alleges that the actions of the Board of County Commissioners in processing the application and the decision of the Board of County Commissioners on the application violated the Religious Land Use and Institutionalized Persons Act (RLUIPA) and also violated the rights of Rocky Mountain Christian Church to the free exercise of religion, free speech, and free assembly under the United States Constitution and the Colorado Constitution. Rocky Mountain Christian Church claims that it incurred damages as a result of the actions of the Board of County Commissioners .

The Board of County Commissioners alleges that it fairly and lawfully applied the Boulder County Land Use Code and denies that it violated RLUIPA or any of plaintiff's constitutional rights. The Board of County Commissioners also denies that the Rocky Mountain Christian Church incurred damages.

This instruction provides you with a summary of the parties' claims and defenses. These claims and defenses will be more fully explained and developed in the other jury instructions.

In your consideration of the parties' claims and defenses, it is not your job, duty, or responsibility to determine the constitutionality, legality, or morality of Boulder County's comprehensive plan or its land use code and regulations as written. Instead, is your job, duty, and responsibility, using all of the instructions of the court, to determine whether Boulder County's land use code and regulations, as applied by the Board of County Commissioners to Rocky Mountain Christian Church, violated the rights of the Rocky Mountain Christian Church under RLUIPA, the United States Constitution, and/or the Constitution of the State of Colorado.

**INSTRUCTION NO. -3-**

There is nothing particularly different in the way that a juror should consider the evidence in a trial from that in which any reasonable and careful person would deal with any very important question that must be resolved by examining facts, opinions, and evidence. You are expected to use your good sense in considering and evaluating the evidence in the case. Use the evidence only for those purposes for which it has been received and give the evidence a reasonable and fair construction in light of your common knowledge of the natural tendencies and inclinations of human beings.

Keep constantly in mind that it would be a violation of your sworn duty to base an answer to an interrogatory or a verdict on anything other than the evidence received in the case and the instructions of the court.

**INSTRUCTION NO. -4-**

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of a witness, by the manner in which the witness testifies, by the character of the testimony given, and by evidence to the contrary of the testimony given.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness's intelligence, motive, state of mind, and demeanor or manner while on the stand. Consider the witness's ability to observe the matters as to which he or she has testified, and whether he or she impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case, the manner in which each witness might be affected by the outcome and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently, and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such weight, if any, as you may think it deserves.

A witness may be discredited or impeached by contradictory evidence or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness's present testimony. You may, in short, accept or reject the testimony of any witness in whole or in part. If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness's testimony in other particulars and you may reject all of the testimony of that witness or give it such credibility as you may think it deserves. An act or omission is "knowingly" done if voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

**INSTRUCTION NO. -5-**

The rules of evidence ordinarily do not permit witnesses to testify as to their own opinions or their own conclusions about important questions in a trial. An exception to this rule exists as to those witnesses who are described as "expert witnesses." An "expert witness" is someone who, by education, background, training, or experience, may have become knowledgeable in some technical, scientific, or very specialized area. If such knowledge or experience may be of assistance to you in understanding some of the evidence or in determining a fact, an "expert witness" in that area may state an opinion as to a matter in which he or she claims to be an expert.

You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves. You should consider the testimony of expert witnesses just as you consider other evidence in this case. If you should decide that the opinion of an expert witness is not based on sufficient education or experience, or that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, including that of other "expert witnesses," you may disregard the opinion in part or in its entirety.

As I have told you several times, you, the jury, are the sole judges of the evidence and facts of this case.



**INSTRUCTION NO. -6-**

In this civil action the burden is on plaintiffs to prove every essential element for each claim as required in these instructions by a preponderance of the evidence. If the proof should fail to establish any essential element of any of Rocky Mountain Christian Church's claims by a preponderance of the evidence, then the jury should find for the Board of County Commissioners as to that claim.

To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds a belief that what is sought to be proved is more likely true than not true. This rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

In determining whether any fact in issue has been proved by a preponderance of the evidence in the case, the jury may, unless otherwise instructed, consider the testimony of all the witnesses, regardless of who may have called them, all the exhibits received in evidence, regardless of who may have produced them, and any fact that has been stipulated or judicially noticed.

"Burden of proof" means the obligation a party has to prove a claim or an affirmative defense by a preponderance of the evidence. The party with the burden of proof can use evidence produced by any party to persuade you. If a party fails to meet its burden of proof as to any claim or affirmative defense or if the evidence weighs so evenly that you are unable to say that there is a preponderance on either side, then you must reject the claim or affirmative defense that you are then considering.

**INSTRUCTION NO. -7-**

Rocky Mountain Christian Church asserts two groups of claims in this case. First, Rocky Mountain Christian Church asserts claims under the Religious Land Use and Institutionalized Persons Act (RLUIPA). Second, Rocky Mountain Christian Church asserts claims under the United States Constitution and the Constitution of the State of Colorado.

Each claim asserted by Rocky Mountain Christian Church must be considered separately by the jury. The fact that you may find for or against Rocky Mountain Christian Church on a particular claim should not influence or control your verdict as to any other claim. Rather, it is your duty to give separate and individual consideration to each claim. When you do so, you should analyze what the evidence in the case shows with respect to the particular claim you are considering.

The elements, definitions, and standards applicable to each claim sometimes are similar or identical, and sometimes they are significantly different. Therefore, you must read and apply the instructions concerning each claim very carefully.

**INSTRUCTION NO. -8-**

Rocky Mountain Christian Church and the Board of County Commissioners have stipulated to the following facts, which you must accept as proven:

(a) Rocky Mountain Christian Church is a nondenominational Christian church located on a 54.4 acre parcel of property (the "Property") at the northwest corner of Niwot Road and N. 95th Street in unincorporated Boulder County (the "County").

(b) Rocky Mountain Christian Church was started in 1984 with Pastor Alan Ahlgrim as its founding pastor to serve the religious needs of residents of the area.

(c) **[There is no paragraph (c).]**

(d) Pastor Ahlgrim remains the Lead Pastor today.

(e) The Articles of Incorporation of Rocky Mountain Christian Church were filed with the Colorado Secretary of State on February 28, 1984.

(f) The Articles of Incorporation of Rocky Mountain Christian Church describe its purposes as follows:

The purpose or purposes for which the corporation is organized:

(1.) is to establish a fellowship with the intent of building a body of believers in Jesus Christ to the end that those persons who are Christian may be encouraged in the Christian faith and life. Further, that persons not yet Christian may be led to an obedient belief in Jesus Christ as the only Son of the living God and in the Bible as the Word of God, resulting in a body of believers without

denominational name, creed, or other barriers to  
Christian unity, and consequently uniting all followers  
of Jesus Christ through the Bible as the only final  
Authority; and

(2.) is exclusively for religious, charitable, educational,  
and evangelistic purposes, including, for such  
purposes, the making of distributions to organizations  
that qualify as exempt organizations under section  
(501)(c)(3) of the Internal Revenue Code, or other  
corresponding provision(s) of any future United States  
Internal Revenue Law.

(g) The Bylaws of Rocky Mountain Christian Church state, among other things,  
that the primary purpose of Rocky Mountain Christian Church "is to exalt Jesus Christ,  
impacting Boulder County and beyond, by bringing people to Christ, building them up in  
the faith, and sending them out to make a difference in their world."

(h) Article III of the Bylaws provides that the qualifications for membership in  
Rocky Mountain Christian Church are those set forth in the Holy Scripture, and those  
meeting the qualifications who wish to unite with the Church shall receive the right hand  
of Christian fellowship.

(i) Rocky Mountain Christian Church and its congregation engage in certain  
religious practices, including, among other things, worship, fellowship, discipleship,  
ministry, and evangelism.

(j) Rocky Mountain Christian Church helped form Rocky Mountain Christian  
Academy, a Colorado nonprofit corporation (the "Christian Academy"), which operates

the 380-student school on the Property serving kindergarten through the eighth grade.

(k) The Bylaws of the Christian Academy provide that it shall be governed by a governing board, a majority of which must be members of Rocky Mountain Christian Church, and one of whom shall be an elder of the Church.

(l) Rocky Mountain Christian Church designed its facilities to allow for dual use and allows the Christian Academy and Rocky Mountain Christian Church to use the facilities without charge.

(m) Rocky Mountain Christian Church is a nonprofit corporation organized pursuant to the laws of the State of Colorado.

(n) Pastor Ahlgrim is the Lead Pastor of Rocky Mountain Christian Church, and holds the title of Senior Minister.

(o) Pastor Ahlgrim's duties as Senior Minister are described in Article VI, Section 8 of the Bylaws. These duties include responsibility for the general supervision of programs and staff of Rocky Mountain Christian Church in cooperation and under the guidance of the Board of Elders.

(p) Pastor Ahlgrim's duties also include preparing and delivering sermons.

(q) Pastor Donald Bondeson is the Discipleship Pastor of Rocky Mountain Christian Church.

(r) Barb Evans is the former Director of Women's Ministries.

(s) David Page is the vice chairman of the Board of Elders of Rocky Mountain Christian Church, which board is the governing body of Rocky Mountain Christian Church.

(t) The responsibilities of the members of the Board of Elders are set forth in Article V of the Bylaws and are based upon the biblical passages cited in Article V.

(u) The Board of County Commissions of Boulder County (the "Board of County Commissioners") is the governing body of Boulder County, Colorado (the "County").

(v) Pursuant to Colorado statutes, the Board of County Commissions has been delegated land use authority with respect to all unincorporated areas within the County.

(w) The County has grown from a population of 131,889 in the 1970 census to a population of more than 291,000 today.

(x) The two largest cities in the County are the City of Boulder and the City of Longmont, both of which are classified by the United States Census Bureau ("Census Bureau") as "urbanized areas" as that term is defined by the Census Bureau.

(y) The distance from downtown Boulder to downtown Longmont is between 12 to 13 miles.

(z) Downtown Boulder and downtown Longmont are connected by Highway 119, commonly known as the Longmont Diagonal.

(aa) The Town of Niwot is an unincorporated community within the County located along the Longmont Diagonal about nine miles outside of Boulder and about three miles outside of Longmont.

(bb) According to the Census Bureau, between 1990 and 2000, the City of Boulder's population grew by 13.6% from 83,312 to 94,673, and the City of Longmont's population grew by 37.9% from 51,555 to 71,093.

(cc) According to the Census Bureau, the population of Niwot in 2000 was 4,160.

(dd) The Census Bureau classifies the Boulder-Longmont area as a primary metropolitan statistical area ("PMSA"), and includes it within the Denver-Boulder-Greeley consolidated metropolitan statistical area ("CMSA").

(ee) Rocky Mountain Christian Church and the Town of Niwot are within the area

classified by the Census Bureau as the Boulder-Longmont PMSA.

(ff) Rocky Mountain Christian Church sometimes serves as a meeting place for certain events for the community in and around the Boulder-Longmont PMSA.

(gg) The religious practices of Rocky Mountain Christian Church require the use of buildings and space.

(hh) Rocky Mountain Christian Church conducts the religious exercise of worship.

(ii) Members of Rocky Mountain Christian Church participate in group worship and engage in activities such as singing, praying, and listening to sermons.

(jj) Rocky Mountain Christian Church maintains programs such as children's and adult Sunday School and support groups.

(kk) Rocky Mountain Christian Church provides services such as counseling, weddings, funerals and support for the poor.

(ll) Rocky Mountain Christian Church provides programs to provide services to members within Rocky Mountain Christian Church and to nonmembers outside of Rocky Mountain Christian Church, including sports ministries, youth programs, missions projects, and other programs.

(mm) Rocky Mountain Christian Church acquired the Property in three separate acquisitions, the first of approximately 15 acres (the "First Parcel") in 1985, a second of approximately 35 acres (the "Second Parcel") in 1994, and a third of approximately five acres (the "Third Parcel") in 2004.

(nn) In connection with the acquisition by Rocky Mountain Christian Church of the First Parcel, the County approved an application to split the First Parcel from a larger parcel of property in a proceeding identified as Docket No. SE-84-034.

(oo) Shortly after the lot split, the County issued a building permit to construct the Church Building on the Property.

(pp) The Property is located on lands designated in the County Comprehensive Plan as Agricultural Lands of National Significance.

(qq) Pursuant to the Boulder County Land Use Code (the "Code"), the Property is currently, and has been at all times since 1984, in an Agricultural (A) zone district.

(rr) The principal permitted uses in the Agricultural (A) zone district are currently set forth at Section 4-102 B of the Boulder County Land Use Code (the "Code").

(ss) By 1996, Rocky Mountain Christian Church had constructed a church building in excess of 50,000 square feet.

(tt) The County authorized operation of a pre-school through special use review in proceeding numbers SU-93-13, which authorized a 20 child pre-school, and SU-94-16, which authorized an expansion for up to 40 children.

(uu) Section 4-102 of the Code provides that all uses, including but not limited to church uses, with an occupancy load of more than 100 cannot be developed in any zone district in unincorporated Boulder County without special use review by the County.

(vv) Special use review requires public hearings before both the County Planning Commission and the Board of County Commissioners.

(ww) The first step in special use review is a preapplication conference with the County Land Use Department.

(xx) A landowner seeking special use approval is required to prepare and bring a conceptual site plan to the preapplication conference.



(yy) After the preapplication conference, the County planner may require additional meetings with the Boulder County Transportation Department, the Boulder County Health Department and the Parks and Open Space Department.

(zz) The next step in the special use review process is for the landowner to submit an application.

(aaa) The application submittal requirements are set forth in Section 3-202 of the Code.

(bbb) The application is sent to various County departments and certain state agencies for comment.

(ccc) Following the referral process, a public hearing is held before the Planning Commission which makes a recommendation to the Board of County Commissioners concerning the application.

(ddd) Finally, a public hearing is held before the Board. The options available to the Board of County Commissioners include, among other things, approving or denying the application.

(eee) The County's criteria for special use review are set forth at Section 4-601 of the Code.

(fff) Special use criteria require a proposed use to be in accordance with the Boulder County Comprehensive Plan (the "Comprehensive Plan").

(ggg) The Comprehensive Plan states, among other things, that it is "advisory in nature" and that it "provides guidance in the decision-making process, but not the 'final word.'"

(hhh) Whether a proposed use is located on lands designated as Agricultural Lands of National Significance is a factor considered by the Board of County

Commissioners in making decisions on particular applications.

(iii) The Board of County Commissioners has approved residential uses on Agricultural Lands of National Significance.

(jjj) Section 4-602(E) provides a special use review process to allow certain nonconforming uses to become conforming uses.

(kkk) As a result of amendments to the Code provision, the Church building became a nonconforming use. The Church building was a nonconforming use between 1994 and 1998.

(III) In 1997, the Rocky Mountain Christian Church filed an application for special use, docketed by the County as Docket No. SU-97-12 (the "1997 Application"), for the purposes of, among other things, making the Church use a conforming use and to expand the Church.

(mmm) The 1997 Application also requested authorization to begin operating a Christian school serving kindergarten through eighth-grade students, with a maximum of 400 students, and to construct a two-story addition of 53,960 square feet to be used for expanded administrative space, to provide classrooms for the proposed school, and to double as religious education classrooms. In addition, the 1997 Application requested authorization to increase the seating capacity of the worship center from 997 to 1,380 through a non-structural, interior renovation.

(nnn) The report prepared by the County land use staff in connection with the hearing before the Board of County Commissioners on the 1997 Application found that the application did not satisfy a number of the criteria set forth in Section 4-601 of the Code. The staff report found that the 1997 Application was not compatible with the surrounding area, was inconsistent with the Comprehensive Plan because the subject

property was designated within the Comprehensive Plan as "Agricultural Lands of National Importance," and as within the "Niwt Buffer Zone," and would result in an over-intensive use of the land.

(ooo) The Board of County Commissioners conditionally approved the 1997 Application as set forth in Resolution No. 98-30.

(ppp) As a condition of approval of the 1997 Application, the Board of County Commissioners required Rocky Mountain Christian Church to combine as one lot the First Parcel and the Second Parcel, and to enter into a development agreement pursuant to which Rocky Mountain Christian Church granted a 14-acre conservation easement on the northern portion of the property of Rocky Mountain Christian Church to the County.

(qqq) Two further special use approvals were granted by the County under Docket No. SU-00-21 (the "2000 Application"), and under Docket No. SU-02-08 (the "2002 Application").

(rrr) The County's land use staff recommended denial of Docket No. SU-02-08.

(sss) Resolution No. 2003-54, which initially had been mistakenly numbered as Resolution No. 2003-59, required that the temporary buildings be removed from the Property at the end of the 2005-2006 school year.

(ttt) The approved uses of the Property currently include a church with a 1,400-seat facility, a preschool for 20 children, a "Mom's Day Out" program for a maximum of 40 children, and the Rocky Mountain Christian Academy for kindergarten through eighth grades with a maximum of 380 students. The uses are in addition to the uses permitted by Resolution 2006-23.

(uuu) At the time of the application and currently, the improvements on the

Property consist of an approximately 106,000 square foot Church building, including a sanctuary, classrooms, meeting space, and gym, and a 2,600 square foot maintenance building, and 7,200 square feet of temporary modular units for the Christian Academy.

(vvv) Special Use Amendment Application, Docket No. SU-04-008 (the "Application") was originally submitted on April 14, 2004, and was amended on October 6, 2004.

(www) Rocky Mountain Christian Church made efforts to comply with the concerns of the community and the County staff by making modifications to the Application.

(xxx) Rocky Mountain Christian Church modified its original Application by eliminating a proposed 12,000 square-foot balcony addition to its sanctuary and by eliminating a proposed 8,000 square foot basement addition.

(yyy) County regulations do not require Rocky Mountain Christian Church to hold neighborhood meetings.

(zzz) A hearing was originally scheduled before the Board of County Commissioners on the Application on December 2, 2004.

(aaaa) On November 26, 2004, Rocky Mountain Christian Church received a Planning Commission Staff Report and Recommendation (the "Revised Staff Report").

(bbbb) The Property is designated as a "Public/Quasi-Public Facility" on the Niwot Community Service Area Map.

(cccc) The Niwot Community Service Area Map constitutes part of the County's Comprehensive Plan.

(dddd) Rocky Mountain Christian Church requested that the hearing before the Board be tabled and that request was granted.

(eeee) The Application was rescheduled for a hearing on November 7, 2005.

(ffff) At the November 7, 2005, hearing, the County land use staff recommended denial of the Application, with the exception of permitting replacement of the modular buildings with permanent space and expansion of the sanctuary seating from 1,440 to 1,500 seats.

(gggg) The County land use staff has recommended denial of some of the Church's prior applications.

(hhhh) At the November 7, 2005, hearing, the Board of County Commissioners continued the hearing and requested that Rocky Mountain Christian Church submit more detail on the use of space within the proposed buildings.

(iiii) On November 18, 2005, representatives of Rocky Mountain Christian Church provided additional information to the County in response to the County's request.

(jjjj) On December 8, 2005, Rocky Mountain Christian Church received six written questions from the Board of County Commissioners via the Director seeking additional information.

(kkkk) Rocky Mountain Christian Church responded to the questions from the Board of County Commissioners in a five-page letter dated January 5, 2006.

(llll) The Board of County Commissioners held continued hearings on the Application on January 17, 2006, and again on February 2, 2006.

(mmmm) The Board of County Commissioners , by voice vote on February 2, 2006, denied most aspects of the Application, but authorized two changes on the Property: an increase of the seating capacity in the sanctuary from 1,400 to 1,550 seats with no associated increase in square footage, and the construction of up to 10,000 square feet of permanent floor area to replace the 7,200 square feet of

temporary modular buildings on the Property.

(nnnn) On February 21, 2006, the Board of County Commissioners adopted Resolution No. 2006-23, which set forth in writing its decision taken at the February 2, 2006, hearing.

(oooo) The authority to adopt zoning regulations is delegated by the General Assembly to counties in sections 30-28-111 through –1118, Colorado Revised Statutes (C.R.S.) (2005).

(pppp) Portions of the Code, including the County's zoning map, constitute the County's zoning resolution, as required by sections 30-28-111 and –113.

(qqqq) The procedures and the duties with respect to an application for approval of a special use of the Board of County Commissioners are set forth in Article 3 of the Code.

(rrrr) The Board of County Commissioners granted a special use application by the Boulder County Parks and Open Space Department for an Agricultural Heritage Center west of Longmont. The Agricultural Heritage Center was in an Agricultural Zone District and partially on Agricultural Lands of National Significance.

(ssss) The Board of County Commissioners approved a conditional special use application for the modification and use of the historic Goodhue farmhouse. The farmhouse was in an Agricultural Zone District and on Agricultural Lands of National Significance.

(tttt) The Board of County Commissioners approved a conditional special use application by the Alexander Dawson School, a secular private school, for a gymnasium for its students. The school was located in an Agricultural Zone District and partially on Agricultural Lands of National Significance.

(uuuu) The County has approved other development within the Niwot Buffer Zone and on Agricultural Land of National Significance.

(vvvv) Members of Rocky Mountain Christian Church are free to attend any church of their choosing.

(wwwv) Rocky Mountain Christian Church has not applied to the County to conduct its religious exercise anywhere other than the Niwot Campus.

(xxxx) The County adopted its Comprehensive Plan ("Plan") in 1978, with periodic updates since the original adoption.

(yyyy) Rocky Mountain Christian Church has operated a church on the subject property since 1987.

(zzzz) Former Boulder County Commissioner Tom Mayer is deceased.

**INSTRUCTION NO. -9-**

In order for Rocky Mountain Christian Church to prevail on its claim that the Board of County Commissioners violated the "equal terms" provision of RLUIPA, Rocky Mountain Christian Church must establish each and all of the following four (4) essential elements by a preponderance of the evidence:

1. The Board of County Commissioners applied or implemented a "land use regulation";
2. in a manner that treated a religious "assembly or institution";
3. on "less than equal terms";
4. with a nonreligious "assembly or institution."

A "land use regulation" is a zoning or landmarking law, or the application or implementation of such a law, that limits or restricts a plaintiff's use or development of its land (including a structure on land).

An "assembly" is a group of persons organized and united for some common purpose.

An "institution" is an established organization or corporation.

"Less than equal terms" means that the Board of County Commissioners treated Rocky Mountain Christian Church less favorably in processing, determining, and deciding the 2004 special use application of the Rocky Mountain Christian Church than the Board of County Commissioners treated a similarly situated nonreligious assembly or institution.

The parties stipulate that Rocky Mountain Christian Church is a religious assembly or institution, as that term is used in essential element number two (2.),



above.

The parties stipulate that Rocky Mountain Christian Church is subject to a land use regulation, as that term is used in essential element number one (1.), above.

If after considering all the evidence you find that Rocky Mountain Christian Church has proven each and all of these four (4) essential elements by a preponderance of the evidence, then your verdict on this claim must be for Rocky Mountain Christian Church, and you should so state on Verdict Form A, Question No. 1.

If after considering all the evidence you find that Rocky Mountain Christian Church has failed to prove any one or more of these four (4) essential elements by a preponderance of the evidence, then your verdict must be for the Board of County Commissioners on this claim, and you should so state on Verdict Form A, Question No. 1.

**INSTRUCTION NO. -10-**

In order for Rocky Mountain Christian Church to prevail on its claim that the Board of County Commissioners violated the "discrimination on the basis of religion" provision of RLUIPA, Rocky Mountain Christian Church must establish each and all of the following five (5) essential elements by a preponderance of the evidence:

1. the Rocky Mountain Christian Church is an "assembly or institution";
2. the Board of County Commissioners applied or implemented a "land use regulation";
3. that discriminated against;
4. the Rocky Mountain Christian Church;
5. on the basis of religion.

An "assembly" is a group of persons organized and united for some common purpose.

An "institution" is an established organization or corporation.

A "land use regulation" is a zoning or landmarking law, or the application of such a law, that limits or restricts a plaintiff's use or development of its land (including a structure on land).

The parties stipulate that plaintiff Rocky Mountain Christian Church is a religious assembly or institution, as that term is used in essential element number one (1.), above.

The parties stipulate that Rocky Mountain Christian Church is subject to a land use regulation, as that term is used in essential element number two (2.), above.

If after considering all the evidence you find that Rocky Mountain Christian Church has proven each and all of these five (5) essential elements by a preponderance of the evidence, then your verdict on this claim must be for Rocky Mountain Christian Church, and you should so state on Verdict Form A, Question No. 2.

If after considering all the evidence you find that Rocky Mountain Christian Church has failed to prove any one or more of these five (5) essential elements by a preponderance of the evidence, then your verdict must be for Board of County Commissioners on this claim, and you should so state on Verdict Form A, Question No. 2.

**INSTRUCTION NO. -11-**

In order for Rocky Mountain Christian Church to prevail on its claim that the Board of County Commissioners violated the "substantial burden" provision of RLUIPA, Rocky Mountain Christian Church must establish each and all of the following four (4) essential elements by a preponderance of the evidence:

1. the Board of County Commissioners applied or implemented a "land use regulation";
2. that imposes a "substantial burden";
3. on the "sincere" "religious exercise";
4. of Rocky Mountain Christian Church.

A "land use regulation" is a zoning or landmarking law, or the application or implementation of such a law, that limits or restricts a plaintiff's use or development of its land (including a structure on land).

In its application or implementation, a land use regulation imposes a "substantial burden" on the exercise of religion if the regulation: 1) significantly inhibits or constrains conduct or expression that manifests some tenet of the religious belief of Rocky Mountain Christian Church; or 2) meaningfully curtails the ability of Rocky Mountain Christian Church to express adherence to its faith; or 3) denies Rocky Mountain Christian Church reasonable opportunities to engage in activities that express or embody one or more of its sincerely held religious beliefs; or 4) compels action or expression by Rocky Mountain Christian Church that is contrary to a sincerely held religious belief. Mere inconvenience to the exercise of religion is insufficient.

"Religious exercise," for the purpose a RLUIPA claim, means any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

"Religious exercise," for the purpose a RLUIPA claim, includes also the use, building, or conversion of real property for the purpose of religious exercise by a person or entity that uses or intends to use the property for that purpose.

An exercise of religion is "sincere" if it is based on a belief that is religious in nature and is truly held.

The parties have stipulated that the Board of County Commissioners applied or implemented a land use regulation, as that term is used in essential element number one (1.), above.

If after considering all the evidence you find that Rocky Mountain Christian Church has proven each and all of these four (4) essential elements by a preponderance of the evidence, then your verdict on this claim must be for Rocky Mountain Christian Church, and you should so state on Verdict Form A, Question No. 3.

If after considering all the evidence you find that Rocky Mountain Christian Church has failed to prove any one or more of these four (4) essential elements by a preponderance of the evidence, then your verdict must be for the Board of County Commissioners on this claim, and you should so state on Verdict Form A, Question No. 3.

**INSTRUCTION NO. -12-**

In order for Rocky Mountain Christian Church to prevail on its claim that the Board of County Commissioners violated the "unreasonable limitation" provision of RLUIPA, Rocky Mountain Christian Church must establish each and all of the following three (3) essential elements by a preponderance of the evidence:

1. the Board of County Commissioners applied or implemented a "land use regulation";
2. that "unreasonably limits";
3. religious "assemblies," "institutions," or "structures" within Boulder County.

A "land use regulation" is a zoning or landmarking law, or the application of such a law, that limits or restricts a plaintiff's use or development of its land (including a structure on land).

A land use regulation "unreasonably limits" if the regulation, as applied or implemented, has the effect of depriving both the Rocky Mountain Christian Church and other religious institutions or assemblies of reasonable opportunities to practice their religion, including the use and construction of structures, within Boulder County. You may find that the land use regulation, as applied or implemented, imposes unreasonable limits even though religious assemblies are not totally excluded from Boulder County.

An "assembly" is a group of persons organized and united for some common purpose.

An "institution" is an established organization or corporation.

A "structure" is something that is constructed, such as a building.

The parties stipulate that the Board of County Commissioners applied or implemented a land use regulation, as that term is used in essential element number one (1.), above.

If after considering all the evidence you find that Rocky Mountain Christian Church has proven each and all of these three (3) essential elements by a preponderance of the evidence, then your verdict on this claim must be for Rocky Mountain Christian Church, and you should so state on Verdict Form A, Question No. 4.

If after considering all the evidence you find that Rocky Mountain Christian Church has failed to prove any one or more of these three (3) essential elements by a preponderance of the evidence, then your verdict must be for the Board of County Commissioners on this claim, and you should so state on Verdict Form A, Question No. 4.

**INSTRUCTION NO. -13-**

For each of the constitutional claims in this case, the Board of County Commissioners is liable for the actions of county employees that contributed to a violation of the constitutional rights of Rocky Mountain Christian Church only if Rocky Mountain Christian Church has proven by a preponderance of the evidence:

1. that the Board of County Commissioners knew of misconduct by a county employee or employees that contributed to a violation of the constitutional rights of Rocky Mountain Christian Church and failed to correct the misconduct; or

2. that the Board of County Commissioners adopted an "official policy" that permitted or required a county employee or employees to engage in actions that contributed to a violation of the constitutional rights of Rocky Mountain Christian Church; or

3. that the Board of County Commissioners was aware of and permitted the continuance of a "custom or practice" by county employees, which custom or practice permitted or required conduct by one or more county employees that contributed to a violation of the constitutional rights of Rocky Mountain Christian Church.

An "official policy" means a policy statement, ordinance, code, regulation, or decision officially adopted and promulgated by the Board of County Commissioners.

A "custom or practice" is a persistent, widespread course of conduct by county employees that has become a traditional way of applying or implementing policy, even though the county has not formally adopted or announced the custom or practice.

This instruction does not apply to the claims brought by the Rocky Mountain Christian Church under RLUIPA.



**INSTRUCTION NO. -14-**

In order for Rocky Mountain Christian Church to prevail on its claim that the Board of County Commissioners imposed a substantial burden on its free exercise of religion, in violation of the United States Constitution and the Constitution of the State of Colorado, Rocky Mountain Christian Church must establish each and all of the following two (2) essential elements by a preponderance of the evidence:

1. the Board of County Commissioners imposed a "substantial burden" on Rocky Mountain Christian Church's "religious exercise"; and

2. this "substantial burden" on Rocky Mountain Christian Church's "religious exercise" was imposed pursuant to a "system of individualized assessments."

"Substantial burden" means a burden on the exercise of religion

1) that significantly inhibits or constrains conduct or expression that manifests some central or fundamental tenet of the religious belief of Rocky Mountain Christian Church; or 2) meaningfully curtails the ability of Rocky Mountain Christian Church to express adherence to a central or fundamental tenet of its faith; or 3) that denies Rocky Mountain Christian Church reasonable opportunities to engage in activities that express or embody one or more of its central or fundamental religious beliefs, which are sincerely held. Mere inconvenience to the exercise of religion is insufficient.

"Religious exercise" means conduct or expression that is integrally related to a central or fundamental tenet of Rocky Mountain Christian Church's religious beliefs.

A "system of individualized assessments" is a system in which (a) case-by-case inquiries routinely are made as part of an individualized assessment of the reasons for conduct; and (b) includes consideration of the particular circumstances of each

individual case; and (c) includes the application of one or more subjective tests in making the assessment.

If after considering all the evidence you find that Rocky Mountain Christian Church has proven each and all of these two (2) essential elements by a preponderance of the evidence, then your verdict on this claim must be for Rocky Mountain Christian Church, and you should so state on Verdict Form B, Question No. 1.

If after considering all the evidence you find that Rocky Mountain Christian Church has failed to prove any one or more of these two (2) essential elements by a preponderance of the evidence, then your verdict must be for the Board of County Commissioners on this claim, and you should so state on Verdict Form B, Question No. 1.

**INSTRUCTION NO. -15-**

In order for Rocky Mountain Christian Church to prevail on its claim that the Board of County Commissioners discriminated against Rocky Mountain Christian Church on the basis of religion, in violation of the United States Constitution and the Constitution of the State of Colorado, Rocky Mountain Christian Church must establish the following essential element by a preponderance of the evidence:

1. The Board of County Commissioners, in the application or implementation of its land use regulations, discriminated against Rocky Mountain Christian Church on the basis of religion.

If after considering all the evidence you find that Rocky Mountain Christian Church has proven this essential element by a preponderance of the evidence, then your verdict on this claim must be for Rocky Mountain Christian Church, and you should so state on Verdict Form B, Question No. 2.

If after considering all the evidence you find that Rocky Mountain Christian Church has failed to prove this essential element by a preponderance of the evidence, then your verdict must be for the Board of County Commissioners on this claim, and you should so state on Verdict Form B, Question No. 2.

**INSTRUCTION NO. -16-**

In order for Rocky Mountain Christian Church to prevail on its claim that the Board of County Commissioners discriminated against Rocky Mountain Christian Church on the basis of viewpoint, in violation of its right to freedom of speech under the United States Constitution and the Constitution of the State of Colorado, Rocky Mountain Christian Church must establish the following essential element by a preponderance of the evidence:

1. The Board of County Commissioners, in the application or implementation of its land use regulations, discriminated against the viewpoints or ideas of Rocky Mountain Christian Church, and in favor of other viewpoints or ideas.

If after considering all the evidence you find that Rocky Mountain Christian Church has proven this essential element by a preponderance of the evidence, then your verdict on this claim must be for Rocky Mountain Christian Church, and you should so state on Verdict Form B, Question No. 3.

If after considering all the evidence you find that Rocky Mountain Christian Church has failed to prove this essential element by a preponderance of the evidence, then your verdict must be for the Board of County Commissioners on this claim, and you should so state on Verdict Form B, Question No. 3.

**INSTRUCTION NO. -17-**

In order for Rocky Mountain Christian Church to prevail on its claim that the Board of County Commissioners discriminated against Rocky Mountain Christian Church on the basis of its viewpoint in violation of its right to freedom of association under the United States Constitution and the Constitution of the State of Colorado, Rocky Mountain Christian Church must establish the following essential element by a preponderance of the evidence:

1. The Board of County Commissioners, in the application or implementation of its land use regulations, discriminated against the viewpoints or ideas of Rocky Mountain Christian Church, and in favor of other viewpoints or ideas.

If after considering all the evidence you find that Rocky Mountain Christian Church has proven this essential element by a preponderance of the evidence, then your verdict on this claim must be for Rocky Mountain Christian Church, and you should so state on Verdict Form B, Question No. 4.

If after considering all the evidence you find that Rocky Mountain Christian Church has failed to prove this essential element by a preponderance of the evidence, then your verdict must be for the Board of County Commissioners on this claim, and you should so state on Verdict Form B, Question No. 4.

**INSTRUCTION NO. -18-**

The intent of a person or the knowledge that a person possesses at any given time ordinarily may not be proved directly because there is no way of directly scrutinizing the workings of the human mind. In determining the issue of what a person knew or what a person intended at a particular time, you may consider any statements made or acts done or omitted by that person and all other facts and circumstances received in evidence which may aid in your determination of that person's knowledge or intent.

You may infer, but you are certainly not required to infer, that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is entirely up to you, however, to decide what facts to find from the evidence received during this trial.

**INSTRUCTION NO. -19-**

The plaintiff, Rocky Mountain Christian Church (RMCC), has sued for the same damages on multiple claims for relief. If you find in favor of Rocky Mountain Christian Church on more than one claim for relief, then you may award damages to Rocky Mountain Christian Church only once for the same injuries, damages and losses.

Damages must not be based on speculation or conjecture. They must be based on the evidence presented at trial, and only on that evidence.

Difficulty or uncertainty in determining the precise amount of any damages does not prevent you from deciding an amount. You should use your best judgment based on the evidence.

The fact that an instruction on the measure of damages has been given to you does not mean that I am instructing the jury to award or not to award damages. The question of whether or not damages are to be awarded is a question only for the jury's consideration.

**INSTRUCTION NO. -20-**

Rocky Mountain Christian Church has the burden of proving by a preponderance of the evidence the nature and extent of its damages, if any, caused by the wrongful acts of the Board of County Commissioners. If you find in favor of Rocky Mountain Christian Church on one or more of its claims, then you must determine the total dollar amount of Rocky Mountain Christian Church's damages, if any, that were caused by the wrongful acts of the Board of County Commissioners. Damages means the amount of money that will reasonably and fairly compensate Rocky Mountain Christian Church for the injuries, damages, or losses, if any, that you find by a preponderance of the evidence were caused by the wrongful acts of the Board of County Commissioners.

In determining such injuries, damages, or losses, you shall consider:

1. Economic damages, if any, for any increased cost of construction, such as the increased cost of materials, labor, and regulatory compliance, related to Rocky Mountain Christian Church's proposed expansion of its facility; and
2. Noneconomic damages, if any, for the reasonable value of any loss or impairment of the rights of Rocky Mountain Christian Church to free exercise of religion, to freedom of expression, and/ or to freedom of association.

In determining the amount of any damages that you decide to award, you should be guided by dispassionate common sense. You must use sound discretion in making an award of damages, drawing reasonable inferences from the facts you find from the evidence. You may not award damages as punishment or based on sympathy, speculation, or guess work. On the other hand, the law does not require that Rocky Mountain Christian Church prove the amount of its injuries, damages, or losses with



mathematical precision, but only with as much definiteness and accuracy as the evidence permits.

In calculating damages you may not consider any award for attorney fees or costs of this lawsuit, because these awards, if appropriate, will be calculated, determined, and awarded by the court.

**INSTRUCTION NO. -21-**

The word "cause," in any of its various forms or tenses, as used in these instructions means an act or failure to act that in natural and probable sequence produced the claimed injury. It is a cause without which the claimed injury would not have happened.

**INSTRUCTION NO. -22-**

If it becomes necessary during your deliberations to communicate with the court, you may send a note by the bailiff signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with the court regarding the issues of the case by any means other than such a signed writing, and the court will never communicate with any member of the jury on any subject touching the merits of the case other than in writing or orally here in open court.

If you do send a note to me containing a question or request for further direction, please bear in mind that a response takes considerable time and effort. I must first notify counsel to return to court. Then I must confer with counsel, consider their arguments, and, if necessary, research the question before reducing the answer or direction, if any, to writing.

You will note from the oath about to be taken by the bailiffs that they too, as well as all other persons, are forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case.

Bear in mind also that you are never to reveal to any person – not even to the court – how the jury stands, numerically or otherwise, on the questions before you, until after you have reached unanimous answers to interrogatories and unanimous verdicts.

**INSTRUCTION NO. -23-**

The original written instructions are a part of the court record. You are not permitted to write any notes on the original instructions or to deface them in any way. The original instructions and the exhibits are to be returned to the court at the conclusion of your deliberations.

When you go to the jury room, you should first select a foreperson, who will help to guide your deliberations and will speak for you here in the courtroom. The second thing you should do is review the instructions and verdict forms. Not only will your deliberations be more productive if you understand the legal principles on which your answers to interrogatories and verdicts must be based, but for your answers to interrogatories and verdicts to be valid, you must follow the instructions throughout your deliberations. Remember, you are the judges of the facts, but you are bound by your oath to follow the law stated in the original instructions.

You may deliberate only while all jurors are present together in the jury room. You must suspend your deliberations until and unless you are all present together in the jury room.

Your deliberations will be secret. You will never have to explain your answers to interrogatories or verdicts to anyone.

Any interrogatory you answer or any verdict you reach must represent the collective judgment of the jury. In order to answer an interrogatory or to return a verdict, it is necessary that each juror agree to it. In other words, any interrogatory you answer and any verdict you reach must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with one another with a view towards reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for himself and herself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and to change your opinion if convinced it is erroneous. However, do not surrender your honest conviction solely because of the opinion of your fellow jurors or for the mere purpose of returning unanimous answers to interrogatories or unanimous verdicts.

Remember at all times that you are not partisans. You are judges – judges of the facts of this case. Your sole interest is to seek the truth from the evidence received during the trial.

Your answers to interrogatories and verdicts must be based solely on the evidence received in the case. Nothing you have seen or read outside of court may be considered. Nothing that I have said or done during the course of this trial is intended, in any way, to suggest to you somehow what I think your answers or verdicts should be. Nothing said in these instructions and nothing in any form of verdict, which has been prepared for your convenience, is to suggest or convey to you in any way or manner any intimation as to what answers to interrogatories or verdicts I think you should return. What the answers to interrogatories and verdicts shall be is the exclusive duty and responsibility of the jury. As I have told you many times, you are the sole judges of the evidence and facts.

Verdict forms have been prepared for your convenience.

You will take the verdict forms to the jury room, and when you have reached unanimous agreement as to your answers to interrogatories and verdicts, you will have your foreperson write your answers and verdicts, and date and sign, together with all other jurors, the verdict forms.

When you have arrived at your answers to interrogatories and verdicts and have completed, dated, and signed all appropriate verdict forms, your foreperson shall notify the bailiff, who, in turn, will notify me. You shall remain in the jury room until I call for you to return to the courtroom. When you return to the courtroom, your foreperson should bring the original instructions and the verdict forms with him or her.