IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

O CENTRO ESPIRITA BENEFICIENTE UNIAO DO VEGETAL (UDV-USA), a New Mexico corporation, on its own behalf and as representative of its members; O CENTRO ESPIRITA BENEFICENTE UNIAO DO VEGETAL, NUCLEO SANTA FE (UDV), a New Mexico corporation, on its own behalf and as representative of its members; THE AURORA FOUNDATION a Texas corporation,	)	No. 12-cv-00105-MV-LFG
Plaintiffs,	)	
v.	)	
BOARD OF COUNTY COMMISSIONERS OF SANTA FE COUNTY,	)	
Defendant.	)	

UNITED STATES OF AMERICA'S STATEMENT OF INTEREST IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

I. STATEMENT OF INTEREST OF THE UNITED STATES

The United States respectfully submits this Statement of Interest, pursuant to 28 U.S.C § 517, because this litigation implicates the proper interpretation and application of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc *et seq*. The Department of Justice has authority to file suit to enforce RLUIPA and to intervene in any proceeding that involves RLUIPA. 42 U.S.C. § 2000cc-2(f). The United States has a strong interest in the RLUIPA arguments raised in Defendant's Motion to Dismiss (Dkt. No. 22), which include issues on which the Tenth Circuit has yet to rule, and believes that its participation will aid the Court in their resolution.

II. BACKGROUND[1]

O Centro Beneficente Uniao do Vegetal ("UDV") is a Christian Spiritist religion that was founded in Brazil over 60 years ago. (Compl. [Dkt. No. 1] ¶ 14.) As part of their religious practice, members of the UDV receive *hoasca* tea as communion, and believe it connects them to God. (*Id.* ¶ 15.) The tea, made from two plants native to Brazil, contains a small amount of dimethyltryptamine (DMT), a Schedule I controlled substance. (*Id.* ¶¶ 15-16.) In prior litigation, the United States Supreme Court unanimously upheld the church's right to sacramental use of *hoasca* tea as part of its religious practice. *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006); (Compl. ¶ 16).

Plaintiffs filed the present lawsuit following Defendant's denial of their application to build a permanent house of worship at 5 Brass Horse Road in Santa Fe County, New Mexico, a location where UDV had previously held services for 14 years. Although Defendant has approved 54 applications from churches since 1981, it has denied only one during that same period—Plaintiffs' application to build a UDV temple. (Compl. ¶¶ 104-05.) As a result, Plaintiffs allege that "Defendant denied the application for improper reasons, including hostility to Plaintiffs because of their religious beliefs and practices and political considerations." (*Id.* ¶ 103.)

From 1992 to 2006, Plaintiffs allege that the UDV conducted religious services at 5 Brass Horse Road in Santa Fe County on property located near the entrance to the Arroyo Hondo neighborhood, and less than one mile from major access roads. (*Id.* ¶¶ 19, 22, 24.) During that time, the church held several hundred religious services on the property and celebrated

[1] The factual allegations contained herein are drawn solely from Plaintiffs' Complaint (Dkt. No. 1), and are assumed to be true for the purposes of this motion. The United States does not take a position regarding the accuracy of any facts alleged.

weddings, baptisms, and holidays on site. (*Id.* ¶¶ 22, 24.) Plaintiffs also allege that the property bears special religious significance to UDV members in the United States because of ceremonies held there by Brazilian leaders of the UDV that had never before been conducted outside of Brazil, including a ceremony in 1993 authorizing regular services at 5 Brass Horse Road and a ceremony in 1996 confirming spiritual authority on the religious leader of the Santa Fe congregation. (*Id.* ¶¶ 20-21, 23.)

Plaintiffs allege that until 2006, the church held its religious ceremonies in a yurt (a temporary structure) that Plaintiffs erected on the land at 5 Brass Horse Road. (*Id.* ¶ 24.) However, once the church outgrew the yurt, it sought temporary locations for worship in Santa Fe County. (*Id.* at ¶ 25.) For a number of years, and presently, the congregation has rented a studio attached to a house to use for religious purposes. (*Id.* ¶ 26.) Plaintiffs contend that this location is inadequate for a variety of reasons, including that it is not large enough for the growing congregation. (*Id.* ¶¶ 28-34.) Further, Plaintiffs allege that the studio does not meet the needs of the church because UDV's tenets require each church to work toward owning the land and building where it holds its services. (*Id.* ¶ 27.)

To enable the church to build a permanent temple consistent with its religious needs, the owner of the land at 5 Brass Horse Road (who is also a UDV member) executed a purchase agreement that would transfer the land to the church for a nominal sum so long as the land was used for a permanent UDV temple. (*Id.* ¶ 35.) On July 7, 2009, Plaintiffs submitted an application to Defendant seeking a permit to build a temple on the property. (*Id.* ¶ 41.) The temple as originally proposed included space for religious services, space for child care, a common room, a dining room, two kitchens, two bathrooms, storage space, a greenhouse, a

caretaker's residence,[2] and a space for Plaintiffs' to re-erect the yurt that had formerly been on site. (*Id.* ¶ 45). Plaintiffs planned to hold approximately 66 services at the temple each year: regular religious services at 8:00 pm on the first and third Saturdays of each month, services on ten religious holidays, and services on occasional days for the purpose of instruction or commemorating special events (such as weddings). (*Id.* ¶ 46.) Throughout the application process, the church had no more than 80 parishioners, most of whom resided in Santa Fe County. (*Id.* ¶ 42.) The proposed temple would accommodate the needs of up to 100 members. (*Id.* ¶ 43.)

Plaintiffs submitted their application to Defendant under Article III, Section 7 of the Santa Fe County Land Use Code ("Code"), which classifies churches as a type of "community service facility" along with police and fire stations, day care centers, schools, and community centers. (*Id.* ¶ 47.) At the time of Plaintiffs' application, Section 7.1 read:

> Community service facilities are allowed anywhere in the County, provided all requirements of the Code are met, if it is determined that:
> 7.1.1. The proposed facilities are necessary in order that community services may be provided for the County; and
> 7.1.2. The use is compatible with existing development in the area and is compatible with development permitted under the Code.

(*Id.* ¶ 48.) Section 7.2 stated, "The submittals and reviews for community service facilities shall be those provided for in Article III, Section 4.5."[3] (*Id.*)

Plaintiffs allege that although their application met all Code requirements for community service facilities, Defendant imposed additional requirements after Plaintiffs submitted their application that it did not apply to other community service facilities, including other churches.

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[2] Plaintiffs later revised their plan to remove the greenhouse and caretaker's residence in response to Defendant's concern about Plaintiffs' water budget and the availability of water on site. (Compl. ¶ 60.)

[3] Plaintiffs allege that Section 4.5 had been deleted years earlier and did not exist in the Code at the time of the church's application. (*Id.* ¶ 48.)

(*Id.* ¶¶ 49-50.) For example, the Code did not require community service facility applicants to obtain master plan approval or to submit archeology reports, liquid waste disposal plans, groundwater hydrology reports, or public safety plans. However, Defendant required all of these before it would consider Plaintiffs' application. (*Id.* ¶¶ 51-52, 57, 60-62, 68.)

Plaintiffs allege that in October 2012, over a year after Plaintiffs submitted their application to Defendant, Defendant amended the section of the Code pertaining to community service facilities to codify some of the additional requirements it had imposed on Plaintiffs. (*Id.* ¶ 73.) By codifying the requirement for master plan approval, the amendment formally shifted final authority over approving applications under Article III, Section 7 of the Code from the appointed members of the County Development Review Committee ("CRDC") to Defendant, a body of elected members. (*Id.* ¶ 74.)

Once residents of the Arroyo Hondo neighborhood became aware of the church's plans to build a permanent temple at 5 Brass Horse Road, Plaintiffs allege that opponents began to voice an array of concerns to Defendant. (*Id.* ¶ 36.) Some of those complaints included concerns regarding traffic, noise, harm to the residential character of the neighborhood, light pollution, and disturbance to residents caused by the church's nighttime services. (*Id.* ¶ 37.) Plaintiffs also allege that additional concerns raised were specific to the church's religious practice—particularly its use of *hoasca* tea—including concerns that members would be driving "under the influence," that the church engaged in "drug use," that crime would increase, and that *hoasca* threatened members' physical health and would contaminate the ground water. (*Id.* ¶ 38.)

Plaintiffs contend that Defendant, too, expressed concern about the congregation's consumption of *hoasca* tea, and noted in one letter to Plaintiffs' counsel that the tea made

approving the temple "particularly challenging." (*Id.* ¶ 66.) Plaintiffs allege that Defendant asked Plaintiffs to obtain an insurance policy naming the County as an additional insured to cover motor vehicle accidents caused by *hoasca*, and inquired as to whether the church would allow an independent physician to observe services to ensure that it took adequate steps to prevent driving while "under the influence" of the tea. (*Id.* ¶ 63.) Defendant later required that Plaintiffs submit a public safety plan before it would consider their application, which Plaintiffs assert had never been required of any other community service facility or even any bar or other liquor-serving establishment. (*Id.* ¶¶ 68-71.)

On November 18, 2010, the CDRC held a public meeting and considered the church's application. (*Id.* ¶ 75.) Defendant's staff representative, Shelly Cobau, recommended master plan and preliminary development plan approval of Plaintiffs' application. (*Id.* ¶ 76.) After hearing objections from resident opponents, CRDC approved the preliminary development plan, and recommended that Defendant approve the Plaintiffs' application for master plan rezoning. (*Id.* ¶¶ 77-78.)

After Plaintiffs obtained CRDC approval, Defendant placed Plaintiffs' application on its February 2011 agenda. At the last minute, the hearing was rescheduled, and Defendant did not consider Plaintiffs' application until June 14, 2011. (*Id.* ¶¶ 83-85, 87.) At the meeting, Ms. Cobau described the application and the opposition to it, and explained that the CDRC recommended approval. (*Id.* ¶¶ 89-90.) After hearing presentations by Plaintiffs and their opponents, Defendant tabled the application on July 12, 2011. (*Id.* ¶ 93.) At the July meeting, Defendant considered additional testimony, and then voted 3-2 to deny Plaintiffs' application. (*Id.* ¶¶ 94-95.)

On October 25, 2011, Defendant entered a written order formally denying Plaintiffs' application. (*Id.* ¶ 96.) Defendant based its denial on the inadequacy of water for the site, the finding that *hoasca* is a "neurotoxic hazard" that poses a threat to groundwater quality, waste water concerns, and the inappropriateness of a church using an "intoxicating drug" in a residential area. (*Id.* ¶¶ 97-102.) Plaintiffs assert that "Defendant's denial order rests on factual findings that lack support in the record evidence; findings that are directly contrary to the conclusions of Defendant's own consultants, the conclusions of Defendant's own staff, and the recommendations of the CRDC; and findings on factual issues that the land use code did not require Plaintiffs or Defendant to address." (*Id.* ¶ 96.)

III. LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

A motion filed under Rule 12(b)(6) "tests the sufficiency of the allegations within the four corners of the complaint after taking those allegations as true." *Mobley v. McCormick*, 40 F.3d 337, 340 (10th Cir. 1994). "'The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted.'" *Tal v. Hogan*, 453 F.3d 1244, 1252 (10th Cir. 2006) (quoting *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999)).

IV. PLAINTIFFS' COMPLAINT CONTAINS SUFFICIENT FACTUAL ALLEGATIONS TO STATE CLAIMS UNDER RLUIPA'S SUBSTANTIAL BURDEN, EQUAL TERMS, AND NONDISCRIMINATION PROVISIONS

A. The Complaint Alleges Sufficient Facts to State a Substantial Burden Claim Under 42 U.S.C. § 2000cc(a)

Section (2)(a)(1) of RLUIPA 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 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).

Although RLUIPA does not offer a statutory definition of "substantial burden," its legislative history instructs that the term is to be defined by reference to the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq.*, and First Amendment jurisprudence. *See* 146 Cong. Rec. 16,698, 16,700 (2000) ("The term 'substantial burden' as used in this Act is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden on religious exercise."). Congress directed that RLUIPA is to be "construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g).

1. The Standard for Substantial Burden

The Tenth Circuit has not ruled directly on the standard to apply in RLUIPA land use decisions. Two decisions by the Tenth Circuit, and decisions of other federal courts,

demonstrate how RLUIPA's substantial burden provision should be applied in the land use context.

In a RLUIPA land use case, *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643 (10th Cir. 2006), the Tenth Circuit found that the jury had correctly determined that operation of a day care center was not religious exercise, and thus there was no cause of action under RLUIPA. The Court, in dictum, however, endorsed the jury instruction on what would constitute a substantial burden, though the Tenth Circuit would substitute "important" for the district court's erroneous use of "fundamental":

> A government regulation "substantially burdens" the exercise of religion if the regulation: (1) significantly inhibits or constrains conduct or expression that manifests some tenet of the institution[']s belief; (2) meaningfully curtails an institution's ability to express adherence to its faith; or (3) denies an institution reasonable opportunities to engage in those activities that are *fundamental* to the institution's religion.

Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 660 (10th Cir. 2006) (emphasis in original).

Along similar lines, the Tenth Circuit held that there is a substantial burden under RLUIPA's institutionalized provision[4] when government action "prevents participation in conduct motivated by a sincerely held religious belief or . . . places substantial pressure on an

[4] 42 U.S.C. § 2000cc-1(a) provides:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—
> (1) is in furtherance of a compelling governmental interest; and
> (2) is the least restrictive means of furthering that compelling governmental interest.

adherent . . . not to engage in conduct motivated by a sincerely held religious belief . . . ." *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010).

Such an analysis, looking at government limitation of, interference with, or denial of reasonable opportunities to engage in important religious practices, is consistent with how substantial burden has been applied by other courts in a variety of situations and considering a range of factors.

For example, courts considering substantial burden claims have routinely recognized the importance of a permanent house of worship to religious exercise. *See, e.g.*, *Int'l Church of the Foursquare Gospel v. City of San Leandro*, 634 F.3d 1037, 1047 (9th Cir. 2011) ("'[A] place of worship is . . . at the very core of the free exercise of religion . . . .'") (quoting *Vietnamese Buddhism Study Temple in America v. City of Garden Grove*, 460 F. Supp. 2d 1165, 1171 (C.D. Cal. 2006)); *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1226 (C.D. Cal. 2002) ("Preventing a church from building a worship site fundamentally inhibits its ability to practice its religion.").

In cases where religious organizations do not have adequate space to conduct religious services or related activities, courts have determined that denying land use approvals that would address those concerns may substantially burden religious exercise.[5] *Grace United*, 451 F.3d at 660 (dictum) (stating that actions that "den[y] an institution reasonable opportunities to engage in those activities that are [important] to the institution's religion" are substantial burdens); *Rocky Mountain Christian Church v. Board of County Commissioners*, 612 F. Supp. 2d 1163,

[5] Religious organizations do not, however, forfeit substantial burden claims by continuing to hold religious services in facilities that are inadequate to their needs. *See Albanian Associated Fund v. Twp. of Wayne*, No. 06-cv-3217, 2007 WL 2904194, at *10 (D.N.J. Oct. 1, 2007) ("The fact that the plaintiffs continue to utilize its inadequate facility . . . does not, *per se*, render any burdens placed upon plaintiffs by defendants insubstantial.").

1170, 1172 (D. Colo. 2009) (upholding the jury's verdict that the denial of the church's expansion proposal imposed a substantial burden because of inadequate space for religious services and special events, fellowship gatherings, and educational activities, even though religious activities continued on site), *aff'd on other grounds*, 605 F.3d 1081 (10th Cir. 2010); *see also San Leandro*, 634 F.3d at 1047 (concluding that "the district court . . . erred in determining that the denial of space adequate to house all of the Church's operations was not a substantial burden"); *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 348-53 (2d Cir. 2007) (finding the denial of a plan to expand a religious school's facilities substantially burdened religious practice).

Courts have also identified a substantial burden when a land use denial, and factors indicating a likelihood of future denials at other properties, leave a religious organization with no ready means to continue its religious practice. For example, in *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, 456 F.3d 978 (9th Cir. 2006), the Ninth Circuit found religious exercise substantially burdened where the county's repeated denials suggested that a temple would not be approved anywhere in the county, as the broad reasons for denial could "easily apply" to any future application and the organization had already agreed to mitigation measures suggested by the Planning Division. *Id.* at 989. However, repeated land use applications by a religious organization are not necessary to establish that further applications would achieve no better result. *See, e.g.*, *Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 898-901 (7th Cir. 2005) (concluding that a municipality's refusal to approve a church's rezoning application despite the church's willingness to address the city's concerns suggested a "whiff of bad faith" and constituted a substantial burden on religious exercise, and

observing that the church would experience "delay, uncertainty, and expense" if it had to search for alternative sites); *see also Westchester Day Sch.*, 504 F.3d at 352 (holding that the zoning board's arbitrary denial of a Jewish day school's application to expand its facilities to provide additional space for religious education and practice constituted a substantial burden on the organization's religious exercise because the school did not have "quick, reliable, and financially feasible alternatives" to meet its religious needs).

Taking the Tenth Circuit dictum in *Grace United*, along with the standard it has applied in the institutionalized persons context, and examining these in light of the how RLUIPA has been applied in various factual contexts by other courts, a clear standard emerges: Looking at the totality of the circumstances—including the needs of a congregation, the degree to which those needs are currently being met, the availability of reasonable alternatives, the past and likely future actions of zoning officials, and all other relevant facts—does a zoning denial significantly inhibit, meaningfully curtail, or deny reasonable opportunities for activities that are important to a congregation's religion.

2. Plaintiffs' Complaint Alleges a Substantial Burden

If Plaintiffs have alleged that Defendant's conduct significantly inhibited, meaningfully curtailed or denied reasonable opportunities for important religious activities, the Court must deny Defendant's motion to dismiss. As described below, the facts presented in the Complaint, which must be taken as true, meet this standard.

First, Plaintiffs allege numerous facts regarding the growth of their congregation over time and the inadequacy of their current, temporary temple to meet their religious needs. (Compl. ¶¶ 24-34, 112(b).) Plaintiffs allege that this location does not meet the permanent needs

of the church in a host of ways: the studio's walls and floors are unfinished; the heating and cooling systems are inadequate; the lack of laundry facilities requires members to launder the temple's linens in their homes; the studio is not large enough for the growing congregation, and in particular the space available for child care during services is inadequate; the well water is not potable; interior steps and stairs make it difficult for people with disabilities or the elderly to access all parts of the temple; and the location of the studio in an area frequently used for recreation at times results in trespassing and the disruption of religious services. (*Id.* ¶¶ 28-34.) Plaintiffs contend that because of these inadequacies, and because UDV's tenets require each church to work toward owning the land and building where it holds its services, Defendant's denial of their application substantially burdened Plaintiffs' exercise of religion. (*See id.* ¶¶ 27, 112(b).)

Plaintiffs also claim that the land at 5 Brass Horse Road is of particular religious significance. (*Id.* ¶¶ 18-23, 112(a).) UDV leaders from Brazil conducted religious sessions and ritual ceremonies on the site that had never been conducted outside of Brazil, and over a period of fourteen years, the church held several hundred religious services and celebrated weddings, baptisms, and holidays on the property.[6] (*Id.* ¶¶ 18-23, 41.)

Plaintiffs also have alleged that Defendant's actions toward them indicate that it is unlikely Plaintiffs will receive future approval at this or any alternative site. (See *id.* ¶¶ 106-

[6] Although plaintiffs need not make such allegations to establish their claim, *see Rocky Mountain Christian Church v. Board of County Commissioners*, 612 F. Supp. 2d 1163, 1172 (D. Colo. 2009) (upholding the jury's verdict of substantial burden where the chosen site carried no special religious significance for the church), the religious significance of a particular location can be a factor in evaluating substantial burden, s*ee Comanche Nation v. United States*, No. Civ-08-849-D, 2008 U.S. Dist. LEXIS 73283, at *50-*51 (D. Okla. Sept. 23, 2008) (RFRA) (finding that construction of an Army training facility on an area known as Medicine Bluffs would "constitute a substantial burden on the traditional religious practices" of the Comanche people because of the location's religious significance).

107.) Plaintiffs allege that Defendant imposed additional, costly submissions even though Plaintiffs satisfied all parts of the Code applicable at the time of the application. (*Id.* ¶ 50.) Specifically, Plaintiffs contend that Defendants required Plaintiffs to apply for master plan approval even though the Code did not require it for community service facilities. (*Id.* ¶ 51.) Plaintiffs further allege that in October of 2010—more than a year after Plaintiffs submitted their application—Defendant amended the Code's provision regarding community service facilities to codify some of the ad hoc requirements imposed on Plaintiffs, including the requirement of master plan approval. (*Id.* ¶ 73.) Obtaining this approval significantly affected Plaintiffs' application, as it gave final approval authority over the application to Defendant, an elected, political body, instead of the County Development Review Committee ("CDRC"), a board composed of appointed members with an expertise in land use. (*Id.* ¶ 52.)

In addition to master plan approval, Plaintiffs claim that they were required to submit an archeology survey and report (even though such materials are only required under the Code for developments that are larger than the lot at 5 Brass Horse Road); a liquid waste disposal plan (a requirement that only applies to commercial and residential uses); a public safety plan (which is not required for community service facilities or even for businesses that sell or serve alcoholic beverages); and a groundwater hydrology report (which is only required for proposed water budgets higher than Plaintiffs'). (*Id.* ¶¶ 57, 60, 61, 68, 69-71, 86.) Plaintiffs state that they submitted all of these additional materials as requested, and at considerable expense. (*Id.* ¶ 112(c).) Due to these additional requirements and Defendant's delay in processing Plaintiffs' application, Plaintiffs waited over two years from the date of their application to receive a final determination on their proposal. (*Id.* ¶ 96.)

Finally, the Complaint alleges that "Defendant's order denying Plaintiffs' application indicated that Defendant will not allow Plaintiffs to build a temple of any kind anywhere in Santa Fe County." (*Id.* ¶ 107.) In support of this statement, Plaintiffs cite the following finding in Defendant's order of October 25, 2011: "There are a significant number of religious organizations that assert the need to use controlled substances as part of their worship. Santa Fe has a compelling interest in not setting a precedent that transforms it into a mecca for drug use." (*Id.* ¶ 107.) Plaintiffs also allege that other grounds for Defendant's denial—such as Defendant's concerns about *hoasca* contaminating the ground water and "drug-impaired drivers" creating a public safety threat —"could be used to justify the denial of land use applications by other UDV [congregations]." (*Id.* ¶¶ 99-102.) Thus, Plaintiffs allege that Defendant's broad reasons for denial would likely preclude approval of any future application. *See Guru Nanak*, 456 F.3d at 992; *New Berlin*, 396 F.3d at 901.

For all of these reasons, including the physical inadequacy of the current facilities, the importance of this particular location to the church, and Defendant's efforts to block Plaintiffs' locating at this property and the likelihood it would do so at any other property in Santa Fe County, Plaintiffs have sufficiently alleged that the Defendant has substantially limited, interfered with, or denied reasonable opportunities for them to engage in their religious worship.

B. The Complaint Alleges Sufficient Facts to State an Equal Terms Claim Under 42 U.S.C. § 2000cc(b)(1)

Section 2(b)(1) of RLUIPA provides that "[n]o 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). In *Rocky Mountain Christian Church*, the court stated that to establish an equal terms claim, a plaintiff

"'must present evidence that a similarly situated nonreligious comparator received differential treatment under the challenged regulation.'" 612 F. Supp. 2d at 1168 (quoting *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1311 (11th Cir. 2006)); *see also Grace Church of Roaring Fork Valley v. Bd. of County Comm'rs of Pitkin County*, 742 F. Supp. 2d 1156, 1163 (D. Colo. 2010) (quoting same). The court upheld a jury verdict that a school was a proper comparator for the church, and thus the county violated the equal terms provision by denying the church's application to expand its facilities. *Rocky Mountain*, 612 F. Supp. 2d at 1169. On appeal, the Tenth Circuit affirmed, finding the school to be a proper comparator for the church under RLUIPA. 605 F.3d at 1088.

In this case, Plaintiffs allege in their Complaint that Defendant treated applications from similar non-religious assemblies and institutions differently than it treated Plaintiffs' application. Under the Code, community service facilities include non-religious assemblies and institutions, including schools and community centers. (Compl. ¶ 47.) Plaintiffs claim that no other community service facility application has even been subject to master plan approval or any of the other additional requirements that Defendants imposed on Plaintiffs. *See* supra, Part IV.A.2; (Compl. ¶¶ 51-86). In addition, Plaintiffs specifically allege that "[t]he Academy for the Love of Learning, another recently approved community service facility, is in a predominantly residential neighborhood that is very close to the site of the proposed UDV temple, and the structure is more than twice the size of the proposed UDV temple." (Compl. ¶ 101.) Thus, Plaintiffs allege that the Academy's application shared important factual similarities with Plaintiffs' application and that the Academy's application should be viewed as a non-religious comparator for assessing Defendant's treatment of Plaintiffs' application. *See Rocky Mountain*, 612 F. Supp. 2d at 1169.

Those facts, taken as true, support an equal terms claim. *Cf. Pitkin County*, 742 F. Supp. 2d at 1163-64 (concluding that the proposed non-religious comparators were not similar to plaintiff because, among other things, the decision maker was different, and the parcels differed in zoning and neighborhood location).

C. The Complaint Alleges Sufficient Facts to State a Discrimination Claim Under 42 U.S.C. § 2000cc(b)(2)

Section 2(b)(2) of RLUIPA provides that "[n]o government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination." 42 U.S.C. § 2000cc(b)(2). There is no Tenth Circuit case law directly on point, but district court case law from within the Tenth Circuit, relevant Tenth Circuit case law on RLUIPA Section 2(b)(1), and Tenth Circuit and Supreme Court case law on the Equal Protection Clause and the Fair Housing Act provide useful guidance.

Defendant suggests that this court follow a recent unpublished opinion from the Northern District of Georgia to evaluate UDV's claim of intentional discrimination based on religion or religious denomination. (Mot. to Dismiss [Dkt. No. 22] 27-29 (citing *Church of Scientology of Georgia v. City of Sandy Springs, Georgia*, No. 1-10-cv-00082-AT, 2012 U.S. Dist. LEXIS 19087 (N.D. Ga. Feb. 10, 2012))). This Court should reject Defendant's suggestion, as it conflicts with Supreme Court and Tenth Circuit precedent on different but analogous legal provisions. In *Sandy Springs*, the district court mistakenly relied on an Eleventh Circuit Equal Protection Clause case, *Campbell v. Rainbow City*, 434 F.3d 1306 (11th Cir. 2005), to require that a church in a RLUIPA discrimination claim under 2(b)(2) prove that it was "prima facie identical in all relevant respects" to another use that was permitted. *Sandy Springs*, 2012 U.S. Dist. LEXIS 19087, at *84 (citing *Campbell*, 434 F.3d at 1314). The *Sandy Springs* court's

reliance on *Campbell* was misplaced, however. *Campbell* addressed the question of how to evaluate a "rational basis" case under the Equal Protection Clause. *See* 434 F.3d at 1313-14. Such a standard is completely inappropriate when evaluating whether a defendant engaged in discrimination based on a suspect classification, such as race or religion, which is subject to strict scrutiny. *See Burlington N. R.R. Co.* v. *Ford*, 504 U.S. 648, 651 (1992); *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976). As the Tenth Circuit observed in *Rocky Mountain Christian Church*, commenting on the standard for RLUIPA § 2000cc(b)(1), "it is well-settled that rules which are discriminatorily applied are subject to strict scrutiny, not rational basis review." 605 F.3d at 1088.

A more appropriate framework for analyzing intentional discrimination claims under RLUIPA is that established by the Supreme Court for evaluating discriminatory zoning cases under the Fair Housing Act and the Equal Protection Clause in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 541 (applying the *Arlington Heights* factors in a religious discrimination case under the Free Exercise clause). Under *Arlington Heights*, a court looks for "proof that a discriminatory purpose has been a motivating factor in the decision." *Id.* 265-66; *see also Marshall v. Columbia Lea Reg'l Hosp.*, 345 F.3d 1157, 1168 (10th Cir. 2003). Because explicit statements of racially discriminatory motivation are not always present, circumstantial evidence may establish the requisite intent. The *Arlington Heights* Court identified five factors to consider: (1) the impact of official action; (2) the historical background of the decision; (3) the sequence of events preceding the decision; (4) procedural and substantive departures from those normally associated with the type of decision; and (5) the administrative

and legislative record. *Arlington Heights*, 429 U.S. at 266-68; *see also Navajo Nation v. New Mexico*, 975 F.2d 741, 744 (10th Cir. 1992) (citing the *Arlington Heights* factors and upholding a district court's determination of discrimination).

Considering the *Arlington Heights* factors in the context of a RLUIPA discrimination claim is consistent with the two district court cases from the Tenth Circuit that have addressed RLUIPA discrimination claims. First, in *Pitkin County*, the district court granted summary judgment to the county on plaintiffs' discrimination claim by considering the same categories of information referenced by the *Arlington Heights* factors, even though the Court did not refer to them by name. *See* 742 F. Supp. 2d at 1165. For example, in support of their claim, plaintiffs pointed to allegedly discriminatory comments made by members of the planning and zoning commission, statements and questions by county commissioners during public hearings on plaintiffs' application, comments made by commissioners regarding amendments to the land use code, and pretextual reasons for defendants' denial of their application. *Id.* The court determined that that there was no evidence to support these allegations, and thus, no evidence that defendants' denial was motivated by discriminatory animus. *Id.*

Similarly, in *Denver First Church of the Nazarene v. Cherry Hills Village*, No. 05-cv-02463WDM-MEH, 2006 U.S. Dist. LEXIS 49483 (D. Colo. July 19, 2006), the court noted that RLUIPA's nondiscrimination provision is similar to "an employment discrimination claim, whereby a plaintiff may either show intentional discrimination or establish an inference of discrimination"—which is exactly what the *Arlington Heights* factors were designed to do. *See id.* at *9 (citing *New Berlin*, 396 F.3d at 900). Accordingly, the court ruled that "[t]he motives of the council members . . . are potentially relevant to whether the ordinance was imposed on the

basis of religion," *id.*, and thus "crucial to Plaintiff's ability to pursue a claim under Section (b)(2) of RLUIPA," *id.* at *22.

In their complaint, Plaintiffs present a detailed narrative of the impact of Defendant's actions, the historical background of its decision, the sequence of events preceding its decision, and the various procedural and substantive departures that Defendant made in reaching its decision. *See supra*, Part IV.A.2; (Compl. ¶¶ 51-86). For example, Plaintiffs assert that "[s]ince 1981, when Santa Fe County enacted its first zoning ordinance, Defendant has approved 54 churches under the section of the land use code that sets out requirements for community service facilities" (Compl. ¶ 104), including one in close proximity to Plaintiffs' proposed temple (*id.* ¶ 101). Moreover, "[d]uring the past twenty years, Defendant has only denied one church's application for approval of a community service facility: Plaintiffs' application." (*Id.* ¶ 105.) Plaintiffs allege that they were subjected to various procedural and substantive requirements not imposed on other religious organizations. (*See id.* ¶¶ 51-86.) Plaintiffs claim that throughout Defendant's consideration of their application, Defendant expressed concern with Plaintiffs' religious practices—particularly Plaintiffs' sacramental use of *hoasca* tea. (*See id.* ¶¶ 66-68.) Taken together, Plaintiffs sufficiently allege that religious discrimination was a "motivating factor" of Defendant's decision under the *Arlington Heights* standard.

V. CONCLUSION

For the reasons stated above, the United States respectfully submits that Defendant's Motion to Dismiss Plaintiffs' claims under 42 U.S.C. § 2000cc(a), (b)(1), and (b)(2) should be denied.

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Respectfully submitted,

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I hereby certify that on the 25th day of May, 2012, I filed the foregoing electronically through the CM/ECF system, which caused the following counsel to be served by electronic means, as more fully reflected on the Notice of Filing:

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