CASE NO. V 11-5150

VARIANCE

JOSE CHRIS TERCERO, APPLICANT

ORDER

THIS MATTER came before the Board of County Commissioners (hereinafter referred to as "the BCC") for hearing on August 9, 2011, on the Application of Jose Chris Tercero (hereinafter referred to as "the Applicant") for a variance of Ordinance No. 2007-2 (Village of Agua Fria Zoning District), Section 10.6 to allow three dwelling units on 0.962 acres. The BCC, having reviewed the Application and supplemental materials, staff reports and conducted a public hearing on the request, finds that the Application is well-taken and should be granted, and makes the following findings of fact and conclusions of law:

1. The Applicant requests a variance of Ordinance No. 2007-2 (Village of Agua Fria Zoning District), Section 10.6 to allow three dwelling units on 0.962 acres.

2. The property is located at 2227 Paseo De Tercero, within Section 5, Township 16 North, Range 9 East ("Property").

3. A residence, with storage shed, constructed in 1972, is located on the Property. The property is served by the Agua Fria Community Water Association and sanitary sewer service is provided by the City of Santa Fe.

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4. Even though the density is 0.75 acres per dwelling, the minimum lot size can be reduced to 0.33 acres per dwelling with community water and sewer for all the dwellings on the Property.

5. In support of the Application, the Applicant stated that he is in agreement with staff's conditions.

6. No members of the public spoke in favor or in opposition to the Application.

7. Staff recommends the following conditions of approval:

A. The Applicant must obtain development permits from the Building and Development Services Department for the proposed homes.

B. The Applicant must comply with minimum standards for Terrain Management as per the Land Development Code and with Ordinance No. 2003-6 Water Harvesting.

C. The placement of additional dwelling units on the property is prohibited.

8. The requested variance is a minimal easing of the Ordinance.

After conducting a public hearing on the request and having heard from the Applicant, the Board of County Commissioners hereby

Approves the requested variance of Ordinance No. 2007-2 (Village of Agua Fria Zoning District) to allow three dwelling units on 0.962 acres subject to the Applicant complying with staff's conditions as stated above.

IT IS SO ORDERED

This Order was approved by the Board of County Commissioners of Santa Fe County on this ___ day of October, 2011.

By: _____

Virginia Vigil, Chair

Attest: _____

Valerie Espinoza, County Clerk

Approved as to form:

Stephen C. Ross, County Attorney

could do them at the same time so that people weren't trying to guess when it was. The request somewhat was could it be towards the end of the day. Now, I don't know if those people are watching on TV or listening or what but a few people in the public were just interested in the process and wanted to know if we could have a more specific time then some time between 1:00 and 6:00.

CHAIR VIGIL: Okay. So it would be fair to say that when we discuss redistricting it should be at the end of the workday.

MS. MILLER: Yes. I think we could just say some time after 4:00 and before 6:00.

CHAIR VIGIL: Until we have to notice the public hearings specifically. Thank you very much. Yes.

COMMISSIONER ANAYA: On that point, Madam Chair, I actually like your idea about having, for the land use meetings, having the redistricting noticed when we come back into session at 5:00, and then for the administrative meetings having that as the last item on the administrative agenda. That way we're towards the end of the administrative agenda but we give people a chance that are working, for the land use meeting to come at 5:00, if the Commission's okay with that. Actually, I think that helps the public a little bit. Does that work, Madam Chair?

CHAIR VIGIL: That's actually – thanks for clarifying that, because we have spoken to that. We're going to take a little bit of a break just to grab a bite to eat. We won't be very long. I would say 15 minutes at the most. We'll try to make it 10. And so we'll start the land use hearing I would say about 5:40. So those of you who are here for your hearings just give us a break to grab a bit to eat. Okay? And we'll be right back. Thanks.

[The Commission recessed from 5:25 to 6:02.]

XIII. PUBLIC HEARINGS

B. Growth Management

1. CDRC CASE # V 11-5150 Jose Chris Tercero Variance. Jose Chris Tercero, Applicant, Requests a Variance of Ordinance # 2007-2, (Village of Agua Fria Zoning District), Section 10.6 to Allow Three Dwelling Units on 0.962 Acres. The Property is Located at 2227 Paseo de Tercero, within Section 5, Township 16 North, Range 9 East, (Commission District 2). Wayne Dalton, Case Manager

WAYNE DALTON (Building & Development Services Supervisor): On June 16, 2011 the CDRC met and acted on this case. The decision of the CDRC was to recommend approval of the applicant's request for a variance by a unanimous 5-0 voice vote.

There is currently a residence which was constructed in 1972, and a storage shed on the property. The property is served by the Agua Fria Community Water Association and sanitary sewer service is provided by the City of Santa Fe. The property is located within the Agua Fria Traditional Community Zoning District. Ordinance # 2007-2 states the minimum lot size in this area is 0.75 acres per dwelling unit. Lot size can be reduced to 0.33 acres with community water and sewer.

The Applicant has provided a letter from the Agua Fria Community Water Association stating they will provide water for two additional homes. The Applicant has also provided a letter from the City of Santa Fe stating that sanitary sewer service is available to serve the property and the two additional homes, therefore, the minimum lot size can be reduced to 0.33 acres per dwelling unit. The Applicant's property contains 0.962 acres and it is approximately .028 acres, which would be 12,000 square feet short of meeting the code criterion for placement of three dwelling units.

The Applicant states that he has four children and would like to provide places for them to reside so they can live close to him and his wife who are getting up in age and are dealing with numerous medical issues.

Recommendation: Staff has reviewed this submittal and has found the following facts to support this Application: Ordinance 2007-2 states the density in this area is 0.75 acres per dwelling unit; lot size can be further reduced to 0.33 acres with community water and sewer. This property is served with both community water and sewer. Staff feels this could be considered a minimal easing of Ordinance 2007-2 due to the property being within 12,000 square feet of the required size which would achieve the purpose of Ordinance 2007-2; therefore, staff recommends approval of the Applicant's request subject to the following conditions. Madam Chair, may I enter those into the record?

[The conditions are as follows:]

1. The Applicant must obtain development permits from the Building and Development Services Department for the proposed homes.
2. Compliance with minimum standards for Terrain Management as per the Land Development Code and compliance with Ordinance 2003-6 Water Harvesting.
3. The placement of additional dwelling units on the property is prohibited.

CHAIR VIGIL: Are there any questions of Mr. Dalton from members of the Board? Seeing none, is the applicant here? Mr. Tercero, if you would step forward and state your name and address for the record.

JOSE CHRIS TERCERO: My name is Jose Chris Tercero. I live on 2227 Paseo de Tercero.

CHAIR VIGIL: Mr. Tercero, are you in agreement with the staff's recommendations and conditions of approval?

[Duly sworn, Mr. Tercero testified as follows:]

MR. TERCERO: Yes, I am.

CHAIR VIGIL: Okay. Is there anything you'd like to add? None? Okay. This is a public hearing. Is there anyone here from the public that would like to address the Commission with regard to this? Seeing none, this public hearing is closed, and I'll turn it over to the Commission. Are there any questions or direction on this?

COMMISSIONER MAYFIELD: Madam Chair, I'll move for approval of Case #V 11-5150.

CHAIR VIGIL: I have a motion.

COMMISSIONER STEFANICS: I'll second.

CHAIR VIGIL: I have a motion and a second. Any further discussion?

DRAFT

The motion passed by unanimous [5-0] voice vote.

XIII. B. 2. **CDRC Case # V 11-5070 Joya de Hondo Variance. Gray-Hall LLC. (Damion Terrell), Applicant, Jenkins/Gavin, Agent Request a Variance of Article XV, Section 6.E (Community College District Road Standards) of the County Land Development Code to Allow an Off-Site Living Priority Lane with a Right-of-Way Ranging in Size From 20 Feet to 30 Feet for a Section of Roadway Approximately 1,110 Feet in Length and to Allow a Driving Surface of 16 Feet in Width for a Portion of Roadway Approximately 640 Feet in Length, for the Purpose of Creating a Four-Lot Summary Review Subdivision on 43.8 acres. The Property is Located Off of Old Galisteo Way, within Section 15, Township 16 North, Range 9 East (Commission District 4). Vicki Lucero, Case Manager**

VICKI LUCERO (Development Review Team Leader): On April 21, 2011 the CDRC met and acted on this case. The decision of the CDRC was to recommend approval of this request.

The subject property is an existing 43.8-acre tract located off of Old Galisteo Way which lies within the Community College District. The lot is currently vacant.

On April, 14, 2009, the Applicant submitted an application to Santa Fe County to create a four-lot Summary Review Subdivision on the 43.8 acres. As part of this submittal the Applicant was proposing to construct a 20-foot wide driving surface on Old Galisteo Way from Los Tapias Lane to the entrance of his property. County staff reviewed the application and determined that it met the requirements of the County Land Development Code. The Land Use Administrator was prepared to approve the plat when several of the neighbors filed an appeal of his decision claiming that as a result of a court order filed in 1970, and the court order is in Exhibit E of your packet, the road surface could not be increased beyond the existing 16-foot wide driving surface on Old Galisteo Way from Los Tapia Lane south for approximately 640 feet.

Upon review of the court documents, County staff determined that the easement precludes widening of the road as required by Code.

Article XV, Section 6.E.7.a.iv of the County Land Development Code provides that a Living Priority Lane shall consist of a 34-foot right-of-way with two 10-foot driving lanes. The Applicant states that because of the court order they are unable to make improvements that meet County standards to that 640-foot portion of road where only a 20-foot easement exists. Therefore, a variance is requested for the width of right-of-way and width of road surface of 16 feet. In addition, the right-of-way outside of the 640-foot portion is a maximum of 30 feet however on this portion of the roadway the Applicant will be able to construct the required improvements for a 20-foot driving surface so a variance is only needed to allow a right-of-way width of 30 feet for a length of approximately 470 feet.

Article II, Section 3.1 of the County Code states, "Where in the case of proposed

BOARD OF COUNTY COMMISSIONERS

CASE NO. MP/PDP 09-5300

UDV TEMPLE, APPLICANT

JAMES SIEBERT, AGENT

ORDER

THIS MATTER came before the Board of County Commissioners ("BCC") for hearing on June 14, 2011 and July 12, 2011, on the application of the Centro Espirita Beneficente Uniao do Vegetal in the United States ("Applicant" or "UDV") and James Siebert ("Agent") for Master Plan and Preliminary Development Plan approval for a community service facility ("Application") pursuant to Ordinance No. 1996-10, the Santa Fe County Land Development Code, as amended ("Code"). The BCC, having reviewed the Application and staff reports and having conducted a public hearing, finds that the Application is not well-taken and should not be granted and makes the following findings of fact and conclusions of law:

1. The Applicant requests Master Plan and Preliminary Development Plan approval for a community service facility ("Facility") consisting of the following: a 4,660 square foot structure to be used as a temple with a 540 square foot portal; a 1,900 square foot roof and slab structure, which will be enclosed and included in the temple at a later date; a 706 square foot yurt; a 225 square foot utility room; and a 225 square foot storage building.

2. The Applicant also requests that the Final Development Plan for the Facility be reviewed and approved by the County's Land Use Department ("Staff") administratively pursuant to Article II, Section 2 of the Code.

3. The Facility is to be located on 2.52 acres at 5 Brass Horse Road at the southwest corner of the intersection of Arroyo Hondo Road (CR 58) and Brass Horse Road (CR 58C) within Section 13, Township 16 North, Range 9 East.

4. The Application was submitted pursuant to Article III, "Zoning Regulations, Submittals and Reviews," Section 7, "Community Service Facilities," of the Code, which sets forth the required submittals and reviews for community service facilities, including churches, to be permitted by the County. Article III, Section 7 of the Code states:

> SECTION 7 – COMMUNITY SERVICE FACILITIES
>
> Community service facilities are facilities which provide service to a local community organization. These may include governmental services such as police and fire stations, elementary and secondary day care centers, schools and community centers, and churches.
>
> 7.1 Standards
>
> 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 in the County;
>
> 7.1.2 The use is compatible with existing development in the area and is compatible with development permitted under the Code; and
>
> 7.1.3 A master plan and preliminary and final development plan for the proposed development are approved.
>
> 7.2 Submittals and Review

> The submittals and reviews for community service facilities shall be those provided for in Article III, Section 4.4 and Article V, Section 5.2 (Master Plan Procedure) and Section 7 (Development Plan Requirements).

5. UDV claims that the statute, strictly construed, does not require submission and approval of a master plan, and only submitted one under reservation. See Proposed Findings of Fact and Conclusions of Law at ¶¶ 6-7 & n.2, 16 (Tab 12 of Second Supplemental Submission of UDV) [hereinafter "Proposed Findings"]. This interpretation is incorrect. Article III, Section 7 of the Code, reproduced above, sets forth conjunctive requirements including a "master plan and preliminary and final development plan for the proposed development." Code, at art. III, § 7.1.3.

6. On November 18, 2010, the County Development Review Committee ("CDRC") considered the Applicant's request and recommended approval of the Application.[1]

7. Applicant, a New Mexico domestic nonprofit corporation, stated that it conducts religious services and currently has approximately 64 parishioners in Santa Fe County and anticipates a maximum of 100 parishioners.

8. Applicant testified that beginning in 1992, UDV conducted its services at 5 Brass Horse Road in a yurt for 15 years without a permit from the County as a community service facility; Applicant testified that in 2009, it ceased conducting services at 5 Brass Horse Road at the County's request.

9. Applicant stated that UDV services are held two Saturdays each month from 8 p.m. to midnight with two additional services each month on weekend afternoons or evenings;

[1] The original application considered by the CDRC was subsequently revised to address discrepancies in the square footage as well as the number and timing of the phases of construction.

Applicant states that parishioners stay at the temple after midnight to socialize and eat and leave the premises between midnight and 4 a.m.

10. As part of the religious service, Applicant explained that parishioners drink hoasca tea, described by the Applicant as a mildly hallucinogenic tea. Applicant stated that to insure parishioners do not leave the premises impaired, the gates on the property would be locked until the effects of the tea disappear.

11. In support of its Application, the Applicant submitted information, documentation and expert testimony regarding the requirements of Article III, Sections 4.4 and 7 and Article V, Sections 5.2 and 7 including issues of compatibility with existing development, building design, water needs and availability, wastewater system, traffic and other requirements of the Code for a community service facility.

12. Opponents to the Application, certain residents in the Arroyo Hondo neighborhood in which the proposed temple is to be located, presented experts who disputed the Applicant's submittals as to water needs and availability, adequacy of the proposed wastewater system in regard to the toxicity of hoasca tea, public safety issues related to traffic and compatibility of use with the surrounding community.

13. Opponents to the Application testified that no other use of property in the Arroyo Hondo neighborhood involves regular use between midnight and 4 a.m. at least twice a month with the attendant noise, lights and traffic from 64 to 100 parishioners in 25 to 50 vehicles.

14. Opponents to the Application described the Arroyo Hondo neighborhood as a rural residential community with an average lot size of nine acres and the average house size of

3,600 square feet compared to the Applicant's request for a community service facility in excess of 8,000 square feet on 2.5 acres.

15. Opponents explained that the nearby Love of Learning school is located on property approximately 34 times as large as the Applicant's 2.5 acre lot.

16. There is no similar use in the Arroyo Hondo neighborhood. Santa Fe has not treated the Applicant differently than any other similarly-situated applicant.

17. Applicant has not established that the denial of its Application to institute this facility at this location places a substantial burden on its religious exercise.

18. The Applicant has not provided sufficient evidence that the traffic generation by the UDV would be of minimal disruption to the surrounding neighborhood and agricultural use. The Applicant provides expansive potential hours of operation and fails to compare them with the community's "peak hours." See Proposed Findings, at ¶ 23 (stating that approximately 30 services will begin at approximately 8pm and last four hours, and approximately 36 services will begin between 1pm and 10pm and also last four hours); see also id. at ¶ 26 (asserting that UDV's "traffic counts" showed "relatively minor traffic flows at peak hours, which do not coincide with the UDV primary hours of traffic generation."); id. at ¶ 65 (claiming that the traffic report commissioned by the UDV shows "acceptable traffic increase during peak hours"). For example, the Applicant provides 36 times per year when the traffic produced by the UDV could begin anytime after noon and end as late as 2 a.m. See id. at ¶ 23. Without more specificity, the county's "substantial interests in regulating traffic, noise and pollution" of its lower-density residential/agricultural communities are not overcome by the Applicant's proposal. Grace United Methodist Church v. City Of Cheyenne, 451 F.3d 643, 658 (10th Cir. 2006).

19. Applicant has not alleged or proven that its worship could not occur at another, convenient location within Santa Fe County. Applicant asserts the vague objection to the denial of the application on the ground that there is "no other *permanent* UDV location . . . within Santa Fe County or within a reasonable distance of Santa Fe County." Proposed Findings, at ¶ 47 (emphasis added). Applicant claims the "next closest *permanent* UDV location is 7 hours by car from Santa Fe County in a city that is two hours from the nearest commercial airport, making it not a reasonable alternative." Id. (emphasis added). Whatever is meant by "permanent," Applicant has not explained why it may only worship at the location in Arroyo Hondo. In fact, it has conceded that it has worshipped on the land as it stands for almost 15 years. See id. at ¶ 51. The Applicant has not provided sufficient evidence to prove that the County's neutral, generally applicable Code substantially burdens its religious exercise. "A church has no constitutional right to be free from reasonable zoning regulations nor does a church have a constitutional right to build its house of worship where it pleases." Messiah Baptist Church v. County of Jefferson, 859 F.2d 820, 826 (10th Cir.1988); see also Lighthouse Institute for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 274 (3d Cir. 2007); Westchester Day School v. Village of Mamaroneck, 504 F.3d 338, 350 (2d Cir. 2007). A substantial burden must be more than an inconvenience or an incidental effect. Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227-28 (11th Cir. 2004) *cert. denied,* 543 U.S. 1146 (2005).

20. The Applicant fails to prove a substantial burden by its mere assertion that other available properties are not suitable. See Proposed Findings, at ¶¶ 51-53. Applicant's statements pointing to specific features of the property currently owned by the UDV can not unilaterally create a substantial burden on religious exercise. To wit, the Applicant claims that the "unique history" of the "consecrated" land currently-owned by the UDV is the only viable location

"because it was the site of the first UDV rites in the United States," "the Santa Fe *nucleo* has a 15-year history of meeting on the land," and it is a "quiet site in a natural setting." Proposed Findings, at ¶ 51. These facts, even considered to be true, do not overcome the application of neutral, generally applicable land use regulations – even if they impact a religious entity's land. Nor does the fact that the use has a long, if informal, history on the land or some special significance to this particular religious sect establish a substantial burden. See Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); Navajo Nation v. U.S. Forest Service, 535 F.3d 1058 (9th Cir. 2008), *cert. denied,* 129 S. Ct. 2763 (U.S. June 8, 2009); Westchester Day School v. Village of Mamaroneck, 504 F.3d 338, 350 (2d Cir. 2007); San Jose Christian College v. City of Morgan Hill, 360 F. 3d 1024 (9th Cir. 2004); Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752 (7th Cir. 2003), *cert. denied,* 541 U.S. 1096 (2004); Messiah Baptist Church v. County of Jefferson, 859 F.2d 820, 826 (10th Cir.1988).

21. Applicant is incorrect when it asserts "[t]here is no Code provision granting [the Board] the authority to regulate the aesthetics of the physical structures." Proposed Findings, at ¶ 66. In fact, the Code contains a number of provisions addressing the aesthetics of any proposed property development. See, e.g., Code, at art. III, sec. 4.4.3(b) ("Site Planning Standards: Building Placement"); id. at art. III, sec. 4.4.3(d) ("Site Planning Standards: Terrain Management"); id. at art. III, sec. 4.4.4(b) ("Development and Design Standards: Buffer Zones and Setbacks"); id. at art. III, sec. 4.4.4(c) ("Development and Design Standards: Maximum Height"); id. at art. III, sec. 4.4.4(e) ("Development and Design Standards: Maximum Lot Coverage"); id. at art. III, sec. 4.4.4(f) ("Development and Design Standards: Landscaping"); id. at art. III, sec. 4.4.4(h) ("Development and Design Standards: Outdoor Lighting"); id. at art. III,

sec. 7 ("Community Service Facilities" standards); id. at art. V, sec. VII ("Development Plan Requirements"); id. at art. V, sec. 5.2 ("Master Plan Procedure"). There are various requirements governing the design of the property and the planned structures thereon, which, for example, may mean a structure may be too large for the parcel upon which it would be built or aligned in a non-conforming manner. See Code, at art. III, sec. 4.4.4(b) (buffers and setbacks); id. at art. III, sec. 4.4.4(c) (height); id. at art. III, sec. 4.4.4(e) (lot coverage).

22. Size alone does not necessitate the approval or denial of a proposal. The mere fact that Applicant's proposed use requires less square footage than some other properties in Arroyo Hondo is not grounds for granting the application. See Proposed Findings, at ¶ 66 (noting the existence of large homes in Arroyo Hondo and several buildings larger than the proposed UDV use).

23. Nor does the fact that the UDV hired an architect "to design a building to look like a house rather than an institutional or commercial building" necessitate the approval of the proposal, which involves a significantly more intense use than a residential use. Proposed Findings, at ¶ 66. These neutral, generally-applicable requirements for the design of a planned development or property do not place a substantial burden on religious exercise, even if the UDV must bear some inconvenience or expense to remedy any defective points of the application. See Grace United Methodist Church v. City Of Cheyenne, 451 F.3d 643, 658 (10th Cir. 2006); Messiah Baptist Church v. County of Jefferson, 859 F.2d 820, 825 (10th Cir.1988); Living Water Church of God v. Charter Twp. of Meridian, 258 F. App'x 729 (6th Cir. 2007); Korean Buddhist Dae Won Sa Temple v. Sullivan, 953 P.2d 1315, 1346 (Haw. 1998).

24. Mere inability to use property which UDV owns or in which it holds an equitable interest does not constitute a substantial burden. Applicant claims that "[d]enial of the use for religious exercise of a particular property that a church owns constitutes a substantial burden on that religious exercise." Proposed Findings, at ¶ 80 (citing DiLaura v. Twp. of Ann Arbor, 112 F. App'x 445, 446 (6th Cir. 2004)). The clear weight of precedent in the Tenth Circuit and authority in the other federal circuits holds that a religious entity is not substantially burdened simply because it cannot use its property as it wishes, or as expansively as it wishes, in the face of neutral, generally-applicable zoning laws and regulations. See Grace United Methodist Church v. City Of Cheyenne, 451 F.3d 643, 660-64 (10th Cir. 2006); see also Petra Presbyterian Church v. Village of Northbrook, 489 F.3d 846, 851 (7th Cir. 2007), *cert. denied*, 552 U.S. 1131 (2008); Vision Church v. Village of Long Grove, 468 F.3d 975 (7th Cir. 2006), *cert. denied*, 552 U.S. 940 (2007).

25. The denial of UDV's application does not "coerce the religious institution to change its behavior." Proposed Findings, at ¶ 81 (citing Westchester Day School v. Village of Mamaroneck, 504 F.3d 338, 349 (2d Cir. 2007)). Moreover, the UDV has made no showing that it has "no ready alternatives" or that the alternatives require "substantial 'delay, uncertainty, and expense'" such that its religious exercise has been substantially burdened. Id. The great weight of authority falls on the side of a failure on the part of the Applicant to carry its burden of proving a substantial burden, or coercive effect, even if the denial means that a religious entity cannot build on its own land. See, e.g., Westchester Day School v. Village of Mamaroneck, 504 F.3d 338, 350 (2d Cir. 2007); Messiah Baptist Church v. County of Jefferson, 859 F.2d 820, 824-25 (10th Cir. 1988)); Grace United Methodist Church v. City Of Cheyenne, 451 F.3d 643, 660 & n.4, 661 (10th Cir. 2006); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 &

n.11 (11th Cir. 2004) *cert. denied,* 543 U.S. 1146 (2005); Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761-62 (7th Cir. 2003), *cert. denied,* 541 U.S. 1096 (2004); see also Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450-51 (1988).

26. The denial of a land use application does not constitute a substantial burden simply because the land was fortuitously donated to the religious organization. See Proposed Findings, at ¶ 82. The fact that the UDV may not be able to utilize the land donated to it in the way it wishes does not establish a substantial burden. There is no "free pass" for religious entities to overcome land use regulations. Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761-62 (7th Cir. 2003), *cert. denied,* 541 U.S. 1096 (2004); see also Love Church v. City of Evanston, 896 F.2d 1082, 1086 (7th Cir. 1990) ("Whatever specific difficulties [plaintiff church] claims to have encountered, they are the same ones that face all [land users]. The harsh reality of the marketplace sometimes dictates that certain facilities are not available to those who desire them"). A contrary interpretation would lead to the ability of a church to solicit a donation of land at any desired location, regardless of the zoning regulations at that location, then claim a "substantial burden" under RLUIPA to overcome local zoning and land use laws. The fact that a religious entity does not reap extraordinary benefits from a fortuitous gift or from the operation of a neutral law does not constitute a substantial burden. See, e.g., Hernandez v. Commissioner, 490 U.S. 680, 689 (1989); Braunfeld v. Brown, 366 U.S. 599 (1961); Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761-62 (7th Cir. 2003), *cert. denied,* 541 U.S. 1096 (2004); Rector, Wardens, & Members of Vestry of St. Bartholomew's Church v. The City of New York, 914 F. 2d 348, 355 (2d Cir. 1990), *cert. denied* 499 U.S. 905 (1991); Christian Gospel Church, Inc.

v. City and County of San Francisco, 896 F.2d 1221, 1224 (9th Cir. 1990); Messiah Baptist Church v. County of Jefferson, 859 F.2d 820, 824-26 (10th Cir. 1988); Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303, 306 (6th Cir. 1983); Korean Buddhist Dae Won Sa Temple v. Sullivan, 953 P.2d 1315, 1346 (Haw. 1998); State v. Fass, 175 A.2d 193, 195, 203 (N.J. 1961); Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. City of West Linn, 111 P.3d 1123, 1130 (Or. 2005); Tran v. Gwinn, 554 S.E.2d 63, 67 (Va. 2001).

27. The Applicant's application was not subject to an "individualized assessment." The law and planning principles applied to it are neutral and generally applicable.

28. Applicant has vastly understated the water budget necessary at .21 acre-feet per year. Regular Meeting of June 14, 2011, pg. 80 A conservative estimate taking omitted factors into account leads to a water budget of .34 acre-feet, substantially higher than the .25 acre-feet per year threshold required by the code. Id.

29. Applicant did not avail itself of any of the appropriate techniques for calculating water availability. Regular Meeting of June 14, 2011, pg. 83 Applicant's use of proper techniques would have set water availability at .09 acre-feet per year. Id. at 89 This is insufficient regardless of any water budget that applicants propose.

30. Applicant materially omitted other wells in surrounding area when calculating 100-year schedule of effects. Regular Meeting of June 14, 2011, pg. 89 The purpose of this calculation is to analyze effect on water decline. Id. Steep water decline can lead to hazardous effects to the area over the course of 100 years.

31. There exists a neurotoxic hazard from the Ayahuasca alkaloids present in Applicant's hoscoa tea. Regular Meeting of June 14, 2011, pg. 90 These toxins resist microbial breakdown and would survive passage through a septic tank. Id. at 94 This may have a negative effect on biological systems in the environment. Id. Applicant's waste water system is greatly under designed and, even taking into account the County's recommendations, will contaminate the environment Regular Meeting of June 14, 2011, pg. 94

32. Santa Fe County has a compelling interest in retaining the quiet, residential, agricultural character of the Arroyo Hondo neighborhood. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926); City of Belle Terre v. Boraas, 416 U.S. 9 (1974). The religious use blended with intoxicating drug use is not a residential, agricultural use.

33. Santa Fe County has no lesser restrictive alternative means of pursuing its compelling interest in retention of the quiet, residential, agricultural character of the Arroyo Hondo neighborhood than denial of the Applicant's application.

34. Santa Fe has a compelling interest in preserving the safety of neighborhoods and citizens from drug-impaired drivers, and no less restrictive alternative to protecting residential neighbors than denial of the Application to locate in the Arroyo Hondo neighborhood.

35. There is a compelling interest in protecting public streets and neighborhoods in particular from harm from drug-impaired drivers. Maso v. State Taxation & Revenue Dep't, 85 P.3d 276, 279 (N.M. Ct. App. 2004), *aff'd* 96 P.3d 286 (N.M. 2004); S.D. v. Neville, 459 U.S. 553, 558 (1983); Mackey v. Montrym, 443 U.S. 1, 17, 19 (1979). The Applicant reports that it has not permitted impaired drivers to leave its premises following services. That is precisely what bars and restaurants with liquor licenses must do if their patrons become incapacitated by

alcohol. The risk to the public from intoxicated individuals still exists at either location, however, and there is a compelling interest in zoning the Applicant's use to a non-residential neighborhood.

36. Santa Fe has a compelling interest in separating uses that involve the routine use of controlled substances and intoxicating drugs from neighborhoods, even if the use of the drugs is religiously motivated. Schad v. Borough of Mount Ephraim, 452 U.S. 61, 68, 71 (1981); Christian Gospel Church, Inc. v. City and Cnty of San Fran., 896 F.2d 1221, 1224 (11th Cir. 1990); Rector, Wardens, & Members of Vestry of St. Bartholomew's Church v. The City of New York, 914 F. 2d 348, 357 n.6 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1103 (1991); Grosz v. City of Miami Beach, 721 F.2d 729, 738-739 (11th Cir. 1983); Town v. State ex rel. Reno, 377 So.2d 648, 652 (Fla. 1979); Greater Bible Way Temple of Jackson v. City of Jackson, 733 N.W.2d 734, 751-752 (Mich. 2007) *cert. denied* 128 S. Ct. 1894 (2008) Open Door Baptist Church v. Clark Cnty, 995 P.2d 33, 47 (Wash. 2000). To address that compelling interest, Santa Fe only permits the placement of bars and restaurants in commercial or industrial non-residential districts. Code at Article III, Section 4.3.1(e).

37. There is no less restrictive alternative to protect neighborhoods from the potential hazards of routine use of illegal drugs than to zone such uses away from residential neighborhoods. The fact that this particular religious group asserts that its use of a controlled substance has not resulted in an accident, adverse health effects on an adult, or affected a child to date does not undermine Santa Fe's compelling interest. Many bars and restaurants also have such unblemished records but still must operate in commercial and industrial non-residential zones where they will not affect residential neighborhoods. Code at Article III, Section 4

38. Were Santa Fe to permit this religious organization, which routinely uses controlled substances as part of its worship services, to locate in a residential neighborhood, it could not, consistent with the First Amendment's Religion Clauses deny a religious Applicant who uses a different controlled substance in another neighborhood. It is a bedrock constitutional principle that the government must be neutral "between religion and religion and between religion and nonreligion." Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968); Torcaso v. Watkins, 367 U.S. 488, 495 (1961); Fowler v. Rhode Island, 345 U.S. 67, 70 (1953); Zorach v. Clauson, 343 U.S. 306, 314 (1952); Illinois ex rel. McCollum v. Bd. of Educ., 333 U.S. 203 (1948); Everson v. Bd. of Educ., 330 U.S. 1, 16, 18 (1947).

39. The UDV has benefitted from this entrenched constitutional principle, when it argued that the federal government could not prosecute it for using a Schedule I drug when the government had permitted the Native American Church to use another Schedule I drug. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 433 (2006).

40. 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. Guam v. Guerrero, 290 F.3d 1210, 1218-20 (9th Cir. 2002) (Rastafarians' use of marijuana); United States v. Bauer, 84 F.3d 1549, 1559 (9th Cir. 1996) (same); Leary v. United States, 383 F.2d 851, 860-61 (5th Cir. 1967) (Timothy Leary's practice of Hinduism with marijuana), *rev'd on other grounds*, 395 U.S. 6, 89 S. Ct. 1532 (1969); United States v. Meyers, 95 F.3d 1475, 1481 (10th Cir. 1996), *cert. denied* 522 U.S. 1006 (1997) (Church of Marijuana); United States v. Quaintance, 471 F. Supp. 2d 1153, 1160-61 (D.N.M. 2006) (Church of Cognizance use of marijuana); Randall v. Wyrick, 441 F. Supp. 312, 314 (W.D. Mo. 1977) (Aquarian Brotherhood Church); United States v. Kuch,

288 F. Supp. 439, 445-46 (D.D.C. 1968) (Neo-American Church use of marijuana and LSD); State v. Hardesty, 214 P.3d 1004 (Ariz. 2009) (allegedly religiously motivated use of marijuana).

41. Based on the Application, staff reports and other evidence including testimony submitted during the hearing, the Application should not be approved because the proposed Facility does not meet the standards for a community service facility as it is not compatible with existing development in the area and is not compatible with development permitted under the Code as required by Article III, Section 7.1.2 of the Code and failed to establish sufficient water supply to meet .

WHEREFORE, the BCC hereby **DENIES** the Application.

IT IS SO ORDERED:

This Order is approved by the Board of County Commissioners on this ____ day of _____, 2011.

THE BOARD OF COUNTY COMMISSIONERS
OF SANTA FE COUNTY

By_____
Virginia Vigil, Chair

ATTEST:

_____
Valerie Espinoza, County Clerk

APPROVED AS TO FORM:

_____
Stephen C, Ross, County Attorney