AGENDA

DESCHUTES COUNTY PLANNING COMMISSION
SEPTEMBER 12, 2019, 5:30 PM
BARNES SAWYER ROOMS
DESCHUTES SERVICES CENTER
1300 NW WALL STREET BEND, OR, 97703

I. Call to Order

II. Approval of July 25, 2019 Minutes

III. Public Comments

IV. Religious Land Use and Institutionalized Persons Act Amendments / Continuation of Public Hearing
   1. Continued Public Hearing - Religious Institution Text Amendment - Nicole Mardell, Associate Planner

V. Flood Plain Amendments / Continuation of Public Hearing
   1. Continued Public Hearing: Model Flood Amendments (247-19-000530-TA/530-PA) - Nicole Mardell, Associate Planner
   2. Continued Public Hearing - Land Division of Split Zoned Flood Plain Property (247-19-000532-TA) - Nicole Mardell, Associate Planner
   3. Continued Public Hearing - Flood Plain Cluster and PUD Amendments (247-19-000531-TA) - Nicole Mardell, Associate Planner

VI. Planning Commission and Staff Comments

VII. Adjourn
Deschutes County encourages persons with disabilities to participate in all programs and activities. This event/location is accessible to people with disabilities. If you need accommodations to make participation possible, please call (541) 617-4747.
Continued Public Hearing - Religious Institution Text Amendment

The Planning Division is proposing amendments to Deschutes County Code Title 18, County Zoning, Title 19, Bend Urban Area Zoning, and Title 23, Comprehensive Plan to address potential conflicts with the Religious Land Use and Institutionalized Persons Act (RLUIPA). This is a continuation of public hearings held on August 8 and 22, 2019.
MEMORANDUM

TO: Deschutes County Planning Commission
FROM: Nicole Mardell, Associate Planner
DATE: September 5, 2019
SUBJECT: Religious Institution Text Amendment – Continued Public Hearing

The Deschutes County Planning Commission held a public hearing on August 8, 2019 and a continued public hearing on August 22, 2019. At the conclusion of the meeting, the hearing was continued to September 12, 2019 to allow for additional oral and written testimony.

I. PROPOSAL
The Planning Division is proposing amendments to Deschutes County Code Title 18, County Zoning, Title 19, Bend Urban Area Zoning, and Title 23, Comprehensive Plan to address potential conflicts with the Religious Land Use and Institutionalized Persons Act (RLUIPA). Further background on the impetus for the proposed amendments and staff findings were included in the July 25, 2019 work session packet.

II. PUBLIC COMMENTS
All public comments presented thus far relate to one component of the proposed amendments: the removal of the prohibition on religious institutions in the Wildlife Area (WA) Combining Zone, specifically in the winter deer range, significant elk habitat, and antelope range.

Twenty-nine individuals have supplied written or oral testimony opposing the proposed amendments on the basis that the removal of a prohibition on religious institutions in the WA Combining Zone could negatively impact wildlife due to impacts commonly associated with assemblies – such as traffic, light, noise, and general human presence in habitat areas. Thirteen individuals supplied oral testimony in support of the proposed amendments as the removal of the prohibition in the WA Zone would allow for greater potential of churches in rural Deschutes County allowing for greater access to these institutions by rural residents.

Individuals spoke on the need for small scale, community oriented churches within a close proximity to their homes for reasonable transportation access.

Many of these individuals represented the Holy Redeemer Church (16137 Burgess Road, La Pine) and spoke of the benefits to wildlife from the preservation of open space on the church’s existing property. Staff notes this property received land use approval for a religious institution in 1986, prior to the adoption of the Deschutes County Goal 5 inventory and WA Combining Zone. Additionally, the property is located in the Bend-La Pine Deer Migration Range, where religious institutions are currently allowed with special standards as a conditional use. This differs from the area in which religious institutions are prohibited – in the winter deer range, antelope range, and significant elk habitat.

The list below reflects all individuals who submitted written testimony into the record as of August 22, 2019 at 4 p.m. and were presented to the Planning Commission at their last meeting.

- Alvarado
- Benson
- Brewer
- Brocker
- Caram
- Castelbaum
- Central Oregon LandWatch
- Emerson/Brayfield
- Elshoff
- Fancher
- Findling
- Frank
- D. Harris
- Kass
- Kruse
- Linford
- McKay
- Monte
- Pederson
- Pokorny
- Powell
- Quinlan
- Spencer
- Storm
- Warriner
- Vora
- Oregon Department of Fish and Wildlife

Oral testimony was provided at the hearing by Antao, Borba, Cecchi, Dunn, Doerfluer, Harris, Humeston, Kelly, Kinzer, Kuhn, MacBeth, Meeuwsen, Morrison, McCormick, Patrick, Schimmoller, and Roche.

Since that time, and as of 10 a.m. on September 5, 2019, one comment from J. Harris was received and is included as Attachment 1.

III. ALTERNATIVE AMENDMENTS PROPOSED
Carol MacBeth, Central Oregon LandWatch (COLW), proposed two alternative approaches to staff’s proposed amendments removing the prohibition on religious institutions in the winter deer range, antelope range, and significant elk habitat areas of the WA Combining Zone. Her stated purpose is to comply with RLUIPA while ensuring adequate protections for wildlife. These alternative approaches, as staff understands them, are outlined below:

2 File No: SP-86-36
1. **Amend the WA Combining Zone to maintain a prohibition on churches and add an additional prohibition to similar secular uses.**

At its core, RLUIPA established the following provisions for jurisdictions to abide by in their zoning and development codes.

1) Bars “substantial burden” on religious exercise
2) Requires “equal terms” treatment of religious and secular uses
3) Bars discrimination on the basis of religion or type of religious practice
4) Bars total or unreasonable exclusion of religious institutions

Currently, religious institutions are prohibited in portions of the WA Combining Zone, but other similar secular uses, such as wineries, agritourism operations, or fraternal organizations, are not. Both the Board of County Commissioners (Board) decision in Attachment 2 (p. 26) and the Land Use Board of Appeal decision in Attachment 3 (p. 10) found this prohibition violates the equal terms provision of RLUIPA (item 2 above). COLW provided testimony that assemblies of all types have impacts to wildlife, and as such, should all be prohibited in compliance with the equal terms provision. COLW proposed the following language in its August 22, 2019 submittal:

“18.88.040. Uses Permitted Conditionally
B. The following uses are not permitted in that portion of the WA Zone designated as deer winter ranges, significant elk habitat or antelope range:
3. Churches or assembly, institution, or membership organization similar to a church”

Staff remains concerned that the County's past practices of allowing certain secular assemblies in the WA Combining Zone renders a new prohibition on all assemblies (including religious institutions) vulnerable to a “substantial burden” claim (item 1 above). After establishing that a land use provision presents a “substantial burden” on a religious institution, an RLUIPA violation is only avoided if the local government establishes that the land use provision furthers a compelling government interest in the least restrictive means possible (Attachment 2 p. 24). It is unlikely that COLW's suggestion is the least restrictive approach to further the County's interest in protecting wildlife, as demonstrated by the County's past practice of mitigating the impacts caused by certain secular assemblies rather than flat-out prohibiting all such assemblies.

Although staff asked interested parties to address the “least restrictive means” element of the aforementioned “substantial burden” analysis, COLW's most recent written comment (dated August 22, 2019) instead only renews a previous argument first raised before the Board. As understood by County staff, COLW again argues that continuing to prohibit religious institutions from locating in the WA Combining Zone (along with all other assemblies) does not rise to the level of a “substantial burden”
because religious institutions can be located on other lands throughout Deschutes Count. Because such a prohibition is not a “substantial burden,” COLW presumably believes that the County need not reach the “least restrictive means” element.

It should be noted, however, that although the winter deer range, antelope range, and significant elk habit areas of the WA Combining Zone apply to only a portion of developable properties in the County, those areas encompass the majority of the eastern portion of the County and many of the non-federally owned lands near established residential areas to the west of Tumalo, southeast of Bend and north of Sunriver. Residents in these areas seeking to establish a religious institution in a reasonable radius of their homes could argue the prohibition limits their access to religious practice, and is therefore a “substantial burden.” More importantly, the Board directly considered and rejected COLW’s renewed argument, and it would be inappropriate for County staff (or the Planning Commission) to offer a contrary legal interpretation when the Board directly addressed the issue in a recent case.

2. Amend the WA Combining Zone to provide restrictions for churches and all similar secular uses.

This alternative approach was referenced during the August 22 public hearing but has not been described in depth. From staff’s understanding, COLW suggests religious institutions along with all secular assemblies may be allowed so long as the impacts thereof are similarly restricted to reduce impacts to wildlife. This scenario would treat secular and non-secular uses under “equal terms.” Although, an applicant could still argue that the new limitations - whether they be hours of operation, siting requirements, or a restriction of the number of events – still present a “substantial burden” to a religious institution. More importantly, developing new limitations intended to be applicable to all assemblies located in the WA Combining Zone is out of scope of the current amendment process. It would require initiating a new Post Acknowledgment Plan Amendment (PAPA) and a new public process to ensure, for example, that the appropriate notice (Measure 56) is provided to all affected property owners.³ Prior to such a drastic step, County staff would need to first consult with and receive direction from the Board.

³ Developing new limitations applicable to all assemblies located in the WA Combining Zone would create numerous legal non-conforming uses. Oregon Revised Statute 215.503 requires a “Measure 56” notice be mailed to landowners when a change in land-use laws might limit the use of their property.
IV. NEXT STEPS
The continued public hearing will be held on Thursday, September 12, 2019 at 5:30 pm, at the Deschutes Services Center, Barnes and Sawyer rooms, 1300 NW Wall Street, Bend, OR. At the conclusion of the public hearing, the Planning Commission can:

1) Continue the hearing to a date certain;
2) Close the hearing and leave the written record open to a date certain; or
3) Close the hearing, and commence deliberations.

ATTACHMENTS

1. Public Comments
2. Board Decision – Shepherd
3. Land Use Board of Appeals Decision - Shepherd
Deschutes County Planning Commission  
Deschutes Services Center  
1300 NW Wall Street, Bend, OR 97703  

August 28, 2019

RE: Consideration of the text amendment to allow “Religious Institutions to build in the Wildlife Area (WA) Combining Zone.

Zoning:

It appears the Wildlife Area Combining Zone (WA) was developed to support native wildlife. It is an appropriate action, as any disruption does cause wildlife to make adjustments and changes in their otherwise normal habits. However, considering the monumental growth of population in many areas that were at one time not inhabited by humans, deer and elk have done surprisingly well. In fact, they appear to have adapted to the intrusion of humans and all their activities. Migration trails, and the impediment to the ease of movement without injury have been addressed.

Deer and Elk Habitat:

In addition to the WA sub-zoning, it appears that Rural Residential Zoning (RR-10) also addresses consideration of wildlife, but perhaps as an unintended consequence. Owners living on properties zoned RR-10 may not have purchased with the primary thought of wildlife, but fortuitously for the wildlife it works for them as well. Many RR-10 properties are brushed and wooded. Such being the case they offer pockets wherein the animals can rest with some sense of safety, as they do learn about the habits and activities of humans.

Several pictures, recently taken, are attached which exhibit cohabitation in the general La Pine area. In fact one is of a deer peering into the Pastor’s rectory at Holy Redeemer.

Deer and Elk Habitation Periods:

In areas such as the one in which we live, deer and elk migrate and live in this area principally in the non-winter months. In doing so, cohabitate with humans about seven months every year. In Deschutes
County, their food, shelter and water requirements seem to be easily met through a plethora of sources. In fact, people often plant vegetation conducive to their dietary tastes. And some even actively feed them. People who feed deer and elk affectively create a concentrating factor, thus there are probably more animals than there would be otherwise. Further, in RR-10 neighborhoods rifle hunting doesn’t make any sense, and that also makes the deer and elk relax somewhat. The net effect is that neighborhoods present a pseudo sanctuary.

Deer and Elk Daily Habits:

Review of the daily habits of deer and elk show that, obviously, both need access to food and water. It is my experience that elk are more a herd animal than deer. Elk being a much larger animal with very thick hide and hollow hair fir need water twice daily. First, normally pretty early in the morning and then at the end of the day at dusk. Eating near the times of watering, they spend the rest of their day lying down in the coolest place they can find in order to stay as cool as possible. They can become uncomfortably overheated. Further, being a very tall animal, even five-foot high fences are not a deterrent. If they decide to go over high fences sooner or later the fence will no longer be five feet high.

Deer behave similarly but with a much lesser concern of overheating.

Major Migrations:

Winter weather is the primary, and perhaps the sole reason, for the two migrations. Our winter season is about five months. Deer and elk populations dwindle to the extent that almost no animals are seen. This cycle is a life pattern for deer and elk. Such being the case, the WA sub-zoning is effectively irrelevant, as the number of animals is effectively minimized during winter.

Human Habitat:

Throughout history churches have and continue to function as an integral and important fundamental element of society (Human Habitat) around the world. They are integrated within our communities. In fact, role of “religious institutions", aka churches, should be considered for a
preferential elevated position in society, rather than be effectively a shunned or downgraded entity. The importance of religion is spelled out clearly in our Constitution. Further, and more importantly, God created humans in his likeness. Only we have the ability and potential to join Him. However, in that regard, we do have to be respectful of God’s other creatures He has given us for our needs and enjoyment.

Approval Appropriate:

Such being reality and our position in this world it is imperative the text Amendment to allow religious institutions be permitted, constructed and operated within the Wildlife Area (WA) combining Zone be amended, approved and finalized.

Respectively Submitted:

Jon S. Harris
Manager of Facilities
Holy Redeemer Catholic Church
La Pine, Oregon

Att: Pictures of deer and elk on local RR-10 properties
DECISION OF THE BOARD OF COUNTY COMMISSIONERS
FOR DESCHUTES COUNTY

FILE NUMBERS: 247-17-000573-AD and 574-SP (247-18-000179-A and 182-A)

APPLICANTS/OWNER/ APPELLANT: John Shepherd,
Pastor and President of Shepherd'sfield Church

John and Stephanie Shepherd
71120 Holmes Road
Sisters, Oregon 97759

APPLICANTS' ATTORNEY: Dan Dalton
Dalton & Tomich PLC
719 Griswold Street, Suite 270
Detroit, Michigan 48226

APPELLANT: Central Oregon Landwatch
50 SW Bond St #4
Bend, OR 97702

REQUEST: Administrative Determination and Site Plan Review for a Church in the Exclusive Farm Use Zone.

STAFF CONTACT: Will Groves, Senior Planner

STAFF DECISION ISSUED: February 9, 2018

APPEALS FILED: February 20, 2018

BOARD HEARINGS: April 23, 2018
June 4, 2018 (continuance)

RECORD CLOSED: June 19, 2018 at 5:00 pm
I. **APPLICABLE CRITERIA:**

Title 18 of the Deschutes County Code, County Zoning
  Chapter 18.04, Title, Purpose and Definitions
  Chapter 18.16, Exclusive Farm Use
  Chapter 18.88, Wildlife Area Combining Zone
  Chapter 18.116, Supplementary Provisions
  Chapter 18.124, Site Plan Review

Title 22, Deschutes County Development Procedures Ordinance
The Religious Land Use and Institutionalized Person Act at 42 USC § 2000cc et seq. ("RLUIPA")

II. **BASIC FINDINGS:**

A. **LOCATION:** The subject property is located at 71120 Holmes Road, Sisters, and is further identified as Tax Lot 103 on Deschutes County Assessor’s Map 14-11.

B. **LOT OF RECORD:** The record indicates the county determined the subject property is a legal lot of record through a 1995 lot-of-record verification (LR-95-44).

C. **ZONING:** The subject property is zoned Exclusive Farm Use–Lower Bridge Subzone (EFU-LB), and is within a Wildlife Area Combining Zone (WA Zone). The property is designated Agriculture on the Deschutes County Comprehensive Plan map.

D. **PROPOSAL:** The Applicant's proposal remained in a state of flux until the final arguments dated June 19, 2018, precluding a basic finding. Instead, see Section 22.20.055. Modification of Application below.

E. **SITE DESCRIPTION:** The subject property is approximately 216 acres in size and irregular in shape. It is developed with a single-family dwelling, gazebo and access driveway. The property takes access from Holmes Road, a designated rural collector road, which abuts the property along its northern property boundary. The property contains steep north-facing slopes and has vegetation consisting of juniper trees and native brush and grasses. The developed area consists of approximately two acres located at the highest elevation on the property, approximately 180 feet above Holmes Road, and includes the dwelling, gazebo, a large grassy area and a circular driveway. The Assessor’s records indicate the subject property has no irrigated land, but the Applicants presented evidence they have purchased 4.6 acres of irrigation water rights.

F. **SURROUNDING LAND USES:** The subject property is surrounded by properties zoned EFU in both public and private ownership. To the north is an approximately 540-acre property engaged in cattle grazing and developed with a guest ranch (Long Hollow Ranch). Other land to the north along Holmes Road is generally engaged in farm use. To the south is a large undeveloped, publicly-owned tract owned and managed by the US Bureau of Land...
Management (BLM) that consists of juniper woodland. Also to the south is an approximately 80-acre parcel engaged in farm use and developed with a single-family dwelling. Adjacent to and east of the subject property is a 77-acre parcel engaged in farm use and developed with a dwelling. Adjacent to the west are two 40-acre parcels, each of which is developed with a single-family dwelling. Further to the west are two approximately 100-acre parcels engaged in farm use.

G. **SOILS:** According to Natural Resources Conservation Service (NRCS) maps of the area and the soil map included in the County packet, there are five soil units mapped on the subject property:

<table>
<thead>
<tr>
<th>Map Unit Symbol</th>
<th>Map Unit Name</th>
<th>Rating</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>63C</td>
<td>Holmzie-Searles complex, 0 to 15 percent slopes</td>
<td>6</td>
<td>54.8%</td>
</tr>
<tr>
<td>101E</td>
<td>Redcliff-Lickskillet-Rock outcrop complex, 30 to 50 percent south slopes</td>
<td>6</td>
<td>9.0%</td>
</tr>
<tr>
<td>106D</td>
<td>Redslide-Lickskillet complex, 15 to 30 percent north slopes</td>
<td>6</td>
<td>30.0%</td>
</tr>
<tr>
<td>138B</td>
<td>Stukel sandy loam, 3 to 8 percent slopes</td>
<td>6</td>
<td>5.8%</td>
</tr>
<tr>
<td>141C</td>
<td>Stukel-Deschutes-Rock outcrop complex, 0 to 15 percent slopes</td>
<td>6</td>
<td>0.4%</td>
</tr>
</tbody>
</table>

**Totals for Property**

100.0%

The proposed church and outdoor church event area are located on soils mapped as 63C, Holmzie-Searles complex (0-15% slopes), with a capability class of 6 without irrigation. None of these soil mapping units are rated high-value when irrigated. The Applicants testified they recently purchased approximately 4.6 acres of irrigation water from the Three Sisters Irrigation District.

H. **PUBLIC AGENCY COMMENTS:** The Planning Division mailed notice to several public agencies and received the following comments:

This section incorporates by reference the agency comments cited in the administrative decision in this matter and comments submitted prior to the June 4th hearing. The supplement comments below were received during the open record period following the June 4th hearing in response to the potential for unlimited church events at the site and/or camping at the site. Staff notes that some of these uses discussed in the following comments were explicitly omitted from this application by the Applicant's final argument dated June 19, 2018 (see Section 22.20.055. Modification of Application below).

1. **County Transportation Planner:** I've discussed this additional information with the Road Department and both myself and they find the proposal described below is at such wide variance with what was originally discussed (25 people in a home-based church with occasional wedding) that Mr. Shepherd will need to supply additional.
information, including a review of this traffic and whether it impacts Holmes Road. Transportation system development charges (SDCs) will have to be recalculated as well.

Previously, the scale of the proposal, both in few number of worshipers and a few events, enabled the County to use Home Occupation when assessing Mr. Shepherd’s proposal. Clearly, this is no longer a home occupation and the magnitude and frequency of the event meets the thresholds for Traffic Impact Studies under Deschutes County Code (DCC) 18.116.310. Additionally, the calculation for SDCs was based on Home Occupation and will need to be revised as well to match the trips of the new intensity of the use. Finally, the previous traffic assumptions assumed the event would last one day, not three.

Additionally, the previous proposal was for the weekends, but the new proposal would cause traffic to spill over into the weekday p.m. peak hour. I've cited figures from the 10th edition from the Institute of Traffic Engineers (ITE) Trip Generation Manual. I've assumed Church (Land Use 560) remains the correct category, even though campgrounds are not one of the amenities named in the ITE descriptor.

In the 10th edition of the ITE churches produce 0.44 weekday trips per seat. The resulting 110 trips (250 X 0.44) exceeds the 50 weekday trip threshold of DCC 18.116.310(C)(3). Churches produce 1.21 trips per seat on Sunday for a total of 303 trips (250 X 1.21). In the weekday p.m. peak churches produce 0.03 trips per seat for a total of 7.5 weekday p.m. peak hour trips. Churches produce 0.54 p.m. peak hour trips per seat on Sundays for a total of 135 Sunday peak hour trips (0.54 X 250). This data is provided to clearly demonstrate the stark difference between what the County reviewed and agreed to earlier and Mr. Shepherd’s latest proposal.

Unlimited events:
This basically establishes a new use on the site. One could easily anticipate consecutive three-day events, meaning the site would be generating trips six days out of seven.

30 events:
Again, based on the information provided below, this could result in the site generating traffic over 90 days, not 30. We are looking at 250 people coming to/from the site.

The Board notes that the Applicant’s final argument specified the proposed uses and these specifications have become conditions of approval. (See Section 22.20.055. Modification of Application, below.)

2. **Deschutes County Environmental Soils:** We never really discussed multiple days and camping, nor the rehearsal dinners. If the rehearsal dinners are catered and no preparation or dishwashing is conducted on site then there should not be significant
impacts. Most of the significant wastewater is addressed off site at an approved location. All these people and activities increase the need for handwashing stations and additional portable toilets. With 250 people for more than one day, it is recommended to have at least 1 toilet for every 50 people and one to two handwash stations. One of the toilets should be ADA accessible. The more people present for longer periods of time create more demand for sanitary facilities. No food preparation or dishwashing can occur on site without proper approved facilities.

1) Unlimited events: This proposal may stretch the definition of temporary and limited use in DEQ rules. For temporary and limited use events they may use portable chemical toilets that are placed, owned, operated and maintained by a licensed sewage disposal service (Oregon Administrative Rule 340-071-0330(2)). Given the length of the events and number of people with camping etc. as essentially a permanent use, it may become necessary to install proper infrastructure to provide proper sanitary facilities for this use over the long term. If health hazards occur or nuisances are created then constructed onsite wastewater facilities may become a requirement. It would be recommended to plan on constructing facilities for a permanent use, as it becomes difficult to avoid health hazard problems.

2) 30 events: This is a specific number of limited temporary events that can be addressed with portable chemical toilets and handwash stations owned, placed, operated and maintained by a licensed sewage disposal service. The existing authorization allows up to 25 limited time guests in the house for dressing or church services. These events have to be conducted to avoid health hazards etc.

This whole thing is a bit of a gray area. It can be done with limited infrastructure but the more that is done over longer times the more likely a health hazard could be created. We don’t want people exposed to hazards at events, as these can have strong potential to spread certain types of human pathogens.

3. Deschutes County Environmental Health: The change in numbers/events will not change the classification of water system. They will still be a non-EPA state regulated water system. Based on Mr. Shepherd’s proposal re: providing a place to park an RV or pitch a tent, it appears as if this may meet the definition of an RV park per OAR 333 chapter 31.

I. REVIEW PERIOD: This application was submitted on July 12, 2017 and deemed complete by the County on August 11, 2017. The Applicant tolled the clock for 161 days from August 24, 2017 through February 1, 2018. Because the Applicant tolled the clock for 161 days and consented to post hearing open record periods of 21 and 15 days, the 150th day for the County to take final action on this application is currently July 24, 2018.

G. PROCEDURAL HISTORY: The administrative decision in this matter was issued on February 9, 2018. The decision was timely appealed by the Applicant and Central Oregon LandWatch on February 20, 2018. The Board conducted hearings on April 23, 2018 and June 4, 2018.
The Board’s review included the record below before staff, as well as the record, testimony, and written submissions in the proceedings on appeal before the Board.

J. **LAND USE HISTORY:** A Hearings Officer decision for File Nos. 247-16-000159 and 161-AD provided a detailed a land use summary. It is referenced below.

**Hearings Officer Recap:**

In July of 2001, the Applicants’ predecessor, Darlene Woods, received conditional use approval to establish a farm-related dwelling on the subject property and to site the dwelling more than 300 feet from a public or private road in the WA Zone (CU-00-65). Subsequently Ms. Woods applied to modify the conditional use application (MA-01-9) to modify her farm management plan and to move the dwelling location. The modified application was approved by an administrative decision. The approval was based in part on findings that the property was currently engaged in farm use consisting of cattle grazing. Ms. Woods’ submission of a farm management plan, and her submission of a wildlife management plan, which stated, among other provisions, that human activity would be limited to the southeast corner of the plateau at the top of the property and that there would be very little vehicular usage of the access driveway. The farm dwelling approval was conditioned on implementation of the farm management plan. A Hearings Officer dismissed an appeal of the decision (A-01-15).

In 2013, the Applicants were denied conditional use approval (CU-13-13 and MA-13-3) to establish a private park on the subject property to be called “Shepherd’s Park.” The park would host weddings, wedding receptions, special events and recreational activities. Denial was based on several issues, including that the application did not include a site plan review application.

On December 18, 2014, staff issued an administrative approval of a modification (247-14-000401-MC) to the existing dwelling conditional use decision (CU-00-65/ MA-01-9). A Wildlife Management Plan (WMP) is required because the dwelling was not located near a pre-existing road or driveway in the Metolius Winter Deer Range [see DCC 18.88.060 (B)(1)]. The modification wholly removed the Wildlife Management Plan (WMP) required under the previous decision and replaced it with six conditions of approval designed to protect and enhance deer habitat on the property. This decision was appealed to the Board of County Commissioners (Board) under file number 247-14-000454-A. The Board affirmed the decision with modifications. The Board’s decision was not appealed to Land Use Board of Appeals (“LUBA”).

On February 3, 2015, staff issued an administrative approval of a conditional permit and site plan review (247-14-000228-CU 229-SP) to establish a private park on the subject property for the purpose of hosting weddings, wedding receptions, special events, and recreational activities. By Order 2015-011, dated February 4, 2015, the Board initiated review of this application under DCC 22.28.050 through a *de novo* hearing. The Board affirmed the administrative approval and included additional findings. The Board’s approval was
appealed to LUBA (LUBA No. 2015-034), where the decision was reversed on August 17, 2015. LUBA characterized the use of the property as “commercial wedding events,” and ruled that the proposed use did not qualify as a private park because the primary use – weddings – was not a recreational activity. The primary use (or “focal event”) is the ceremonial wedding, absent which guests would not be coming to the property to “recreate.”

On appeal to the Court of Appeals (276 Or App 282 2016), the Court affirmed LUBA's reversal on February 3, 2016, agreeing that the proposed use of hosting weddings and similar events did not qualify as a private park. The court cited the determination by the County that not all events would have a ceremony and when there is a wedding ceremony, it lasts for just a fraction of the time in which the event is held. The court also cited LandWatch's argument that the intention of people going to the property was not controlling, but that the court must consider the proposal to use the property as an event venue.

The Court stated:

[W]e interpret nonfarm uses listed in ORS 215.283 – which are exceptions to what is normally permitted in an EFU zone – consistently with the legislature's goal of preserving agricultural land. That is, listed nonfarm uses, “should not be expansively interpreted to encompass uses that would subvert the goal of preserving land for agricultural use.” Warburton v. Harney County, 174 Or App 322, 328, 25 P.3d 978, rev'd, 332 Or 559 (2001).

It also noted that the legislative committees, in adopting ORS 215.283 had extensive discussions regarding the allowance of “commercial activities that are in conjunction with farm use.” The Court characterized the proposed use as one in which “petitioners seek to rent out their lawn for up to 18 events per year (each involving a different group of persons), and for no other purpose.” The Court further described the proposed use as including “sound systems, catering, access to the dwelling for wedding parties, and, perhaps, lawn games.” It stated that “petitioners propose to establish a private park solely for use as a commercial event venue.” (emphasis in original).

In September 2015, the County and the Applicants entered into a Voluntary Compliance Agreement (“VCA”) in Case No. 247-14-000085-CE, Contract No. 2015-593. Among other things the VCA acknowledges that the Applicants had four remaining scheduled weddings in 2015. In light of the LUBA decision reversing the decision to grant the CUP/SP for the private park, the Applicants admitted and acknowledged that each use of the property for a 2015 scheduled event constitutes a violation of DCC 18.16.020 and 18.88.040, and a Class A Violation under DCC 18.144.050. The Applicants agreed that they would not suffer or allow use of the property for any wedding, wedding reception or similar event that is not a 2015 Scheduled Event until and unless they obtain all necessary land use approvals for such use.

Recent History:
In 2016, the Applicants filed for an administrative determination and site plan review seeking approval of a church on the subject property (247-16-000159-SP; 161-AD). A Hearings Officer approved the proposed church with conditions. Landwatch appealed the hearings officer’s decision to the Board of County Commissioners, but likewise asked the Board to decline review. Accordingly, the Board declined. Landwatch appealed to LUBA and LUBA considered only one of the four assignments of error, and reversed the Hearings Officer decision after finding that the proposed church is a prohibited use in the WA Zone that governs the subject property, *Central Oregon LandWatch v. Deschutes County*, 75 Or LUBA 284 (2017). LUBA also found that intervenor’s (Applicant’s) arguments regarding RLUIPA were undeveloped. The Oregon Court of Appeals affirmed without opinion, *Central Oregon LandWatch v. Deschutes County*, 287 Or App 239, 400 P3d 325 (2017).

IV. **CONCLUSIONARY FINDINGS:**

**TITLE 22 OF THE DESCHUTES COUNTY CODE, DESCHUTES COUNTY DEVELOPMENT PROCEDURES ORDINANCE.**

A. **CHAPTER 22.08, GENERAL PROVISIONS.**

1. **Section 22.08.010. Application Requirements.**

   A. **Property Owner.** For the purposes of DCC 22.08.010, the term "property owner" shall mean the owner of record or the contract purchaser and does not include a person or organization that holds a security interest.

   B. Applications for development or land use actions shall:

   1. Be submitted by the property owner or a person who has written authorization from the property owner as defined herein to make the application;

**FINDING:** The application lists John and Stephanie Shepherd as the Applicants. John and Stephanie Shepherd are the owners of record of the property at issue in this application. John Shepherd testified that he is both President and Pastor of Shepherdsfield Church, and that he submitted the application both as a property owner and on behalf of the Shepherdsfield Church. These criteria are met.

2. **Section 22.08.037. Withdrawal of Application.**

   **An applicant may withdraw an application in writing at any time prior to the time a land use action decision becomes final. If the landowner is not the applicant, no consent to withdraw the application is needed from the landowner.**

**DISCUSSION:** As discussed more fully below (see Section 22.20.055. Modification of Application), on Thursday, May 17, 2018, the Applicant initially withdrew this application via email in response to LUBA’s final decision and order in LUBA No. 2018-007 remanding Ordinances 2018-02 and 2018-03 for the Board of County Commissioners’ further consideration. The following Monday, May 21, 247-17-000573-AD and 574-SP (247-18-000179-A and 182-A)

**Document No. 2018-506**
2018, the Applicant instead "...concluded that we should attempt all administrative remedies on my church application, rather than withdrawing it. Therefore, I would like my application appeal to be voted on after all by the Commissioners." LandWatch objected to the County proceeding after the application was initially withdrawn. Despite being invited by County staff to do so, however, LandWatch cited no case law, state statute, or county code provision to support its objection. LandWatch also refused to articulate how it was harmed or prejudiced by the Applicant changing his mind.

FINDING: The Board finds that no case law, state statute, or county code provision precludes the County from proceeding with rendering a decision on the application despite the Applicant initially withdrawing the application per DCC 22.08.037. No other party objected or claimed that they were prejudiced or harmed by the application proceeding, and LandWatch cited no legal authority and likewise presented no evidence that it was prejudiced or harmed. Further, the Board finds persuasive that only one business day separated the Applicant initially withdrawing his application and then instead asking the Board to proceed. The Applicant’s initial withdrawal was in response to LUBA’s unexpected decision relative to the County’s related text amendment. Upon further consideration of that decision, it was determined that proceeding with the application would more expediently resolve the present dispute and thereby benefit all involved parties. Under the circumstances, requiring the Applicant to start over and submit a new application unnecessarily burdens all involved parties, including the County, by wasting time and resources and delays the final resolution of this contentious, multi-year dispute. On the other hand, rendering a decision on the application clearly benefits all parties and allows review on the merits of this proposal.

B. CHAPTER 22.20, REVIEW OF LAND USE ACTION APPLICATIONS.


   A. An applicant may modify an application at any time during the approval process up until the close of the record, subject to the provisions of DCC 22.20.052 and DCC 22.20.055.

   B. The Planning Director or Hearings Body shall not consider any evidence submitted by or on behalf of an applicant that would constitute modification of an application (as that term is defined in DCC 22.04) unless the applicant submits an application for a modification, pays all required modification fees and agrees in writing to restart the 150-day time clock as of the date the modification is submitted. The 150-day time clock for an application, as modified, may be restarted as many times as there are modifications.

   C. The Planning Director or Hearings Body may require that the application be re-noticed and additional hearings be held.

   D. Up until the day a hearing is opened for receipt of oral testimony, the Planning Director shall have sole authority to determine whether an applicant’s submittal constitutes a modification. After such time, the Hearings Body shall make such determinations. The Planning Director or Hearings Body’s determination on whether a submittal constitutes a
modification shall be appealable only to LUBA and shall be appealable only after a final decision is entered by the County on an application.

DISCUSSION: The Applicant's proposal remained in a state of flux, coalescing only with the Applicant's Final Legal Argument submitted on June 18, 2018.

DCC 22.04.020 defines "modification of application" as follows:

Modification of application means the applicant's submittal of new information after an application has been deemed complete and prior to the close of the record on a pending application that would modify a development proposal by changing one or more of the following previously described components: proposed uses, operating characteristics, intensity, scale, site lay out (including but not limited to changes in setbacks, access points, building design, size or orientation, parking, traffic or pedestrian circulation plans), or landscaping in a manner that requires the application of new criteria to the proposal or that would require the findings of fact to be changed. It does not mean an applicant's submission of new evidence that merely clarifies or supports the pending application.

The Applicant originally submitted an application on July 12, 2017 (the "First Submittal") proposing the following:

"The applicants are seeking permission to use their home for church services. The maximum attendance at any one service will be 25 persons. The church also plans to use the existing 1.6-acre lawn area and gazebo near the church/residence for weddings and church functions allowed by ORS 215.441. The applicants are willing to agree to impose a limit on weddings of one event per week beginning mid-May of each year and ending in mid-October of each year. The ceremony and receptions will be limited to eight hours and will conclude no later than 10:00 p.m. A limit of 250 wedding guests will be enforced by the applicants. Mr. Shepherd is a licensed pastor. He conducts about one half of the weddings and provides religious, pre-marital counseling for couples who choose to be married on the property. Shepherdsfield Church is an IRS 501(c)(3) entity whose Mission Statement includes charitable and community service through counseling, teaching, art and marital assistance, including the hosting of weddings afford able to those without great means."

On August 24, 2017, the Applicant requested via email that the application be tolled to provide time for Deschutes County to explore a text amendment that could be germane to the application. On January 25, 2018, following the Board's adoption of Ordinances 2018-02 and 2018-03 amending both the Deschutes County Comprehensive Plan and Deschutes County Code to allow churches in the WA Zone subject to applicable base zone provisions, the Applicant revived the tolled application by submitting a revised application (the "Second Submittal"). Based on testimony from the Applicant, the intent of the Second Submittal was to remove the originally-proposed seasonal and frequency limitations applicable to weddings and other outdoor events (the "Wedding Restrictions"). Specifically, the Second Submittal proposed the following:
“The applicants are seeking permission to use their home for church services. The maximum attendance at any one church service will be 25 persons. Shepherdsfield Church is recognized by the IRS as a 501 c 3 non-profit and thus qualifies under Deschutes County Code as a church. Shepherdsfield Church is also registered with the Oregon Secretary of State as a Religious Non-Profit (992821-97). Shepherdsfield Church began holding religious services in 2009 in the Shepherd’s house. As part of the House Church movement, they patterned their church services and ministry after the New Testament practice of churches meeting in houses, (Colossians 4:15, Romans 16:5, Acts 2:46) in order to achieve greater intimacy, authenticity and effective ministry. Members of their church, as per IRS Mission Statement, engage in outreach and ministry to the community, including tutoring, working with disabled children, family and marriage counseling, weddings services, and children’s drama productions. Mr. Shepherd is a licensed pastor and has been involved in Christian ministry for 40 plus years. Mr. Shepherd officiates about one third of the weddings and offers religious and pre-marital counseling for couples who choose to be married on the property. The wedding venue is just another aspect of Shepherdsfield Church ministry and, as such, is offered at a fraction of the price of comparable venues. The church also plans to use the existing 1.6-acre lawn area and gazebo near the church/residence for weddings and church functions allowed by ORS 215.441. The church also plans to use a 1.5 acre gravely parking area near the church/residence for guest parking.”

Around the time the Applicant submitted the Second Submittal, the assigned County planner had an unexpected work absence. Unaware of the Second Submittal, the new assigned County planner issued an administrative decision approving the application on February 12, 2018. That administrative decision included several conditions of approval corresponding to the originally-proposed Wedding Restrictions. The Applicant objected to the conditions of approval and noted that the Second Submittal was intended to replace rather than supplement the First Submittal. To address the conditions, County staff invited the Applicant to appeal the administrative decision but cautioned that proposing unlimited events might require upgrades to the existing infrastructure onsite. Both LandWatch and the Applicant ultimately appealed the administrative decision, with the Applicant’s appeal specifically challenging the Wedding Restrictions.

To expedite resolution of the potential infrastructure issues caused by the Applicant’s Second Submittal, County staff and the Applicant met on March 16, 2018. Memorializing the outcome of that meeting, the Applicant altered the Second Submittal by proposing new Wedding Restrictions in an email sent to County staff later the same day (the “Third Submittal”). The applicable part of the email stated the following:

“I’m willing to limit the number of outdoor gatherings to 30 one day events per year, which constitutes 8% of the days in a year, far below the 50% threshold for building and sanitation. I’m also willing to have my domestic water system inspected and approved and will begin work with Jeff Freund ASAP. I think all the other concerns were addressed and resolved.”

Following receipt of the Applicant’s Third Submittal, the Board of County Commissioners considered both the Applicant and LandWatch’s appeals during a public hearing held on April 23, 2018.
to the hearing, the County's written staff report included as an attachment the Applicant's March 16th email. During the hearing and consistent with the Third Submittal, staff's verbal presentation and slides both specifically discussed the Applicant's proposal to limited outdoor events to 30 per calendar year. Likewise, the Applicant testified during the hearing, addressed the multiple submittals, and acknowledged the March 16th meeting with County staff to discuss infrastructure impacts associated with unlimited events. The Applicant during the hearing again further agreed "to limit the number of outdoor events to 30." The Applicant concluded his testimony by opining that the purpose of the County's site plan review for churches is to ensure the sufficiency of infrastructure facilities such as water, septic, and parking.

Two things occurred following the public hearing that confused the Applicant's Third Submittal. First, LandWatch added to the record evidence suggesting that the Applicant was not intending to abide by the proposal to limit "outdoor gathering to 30 one day events per year." Specifically, LandWatch provided a copy of a webpage created by a soon-to-be bride and groom scheduled to be married at Shepherdsfield on June 2, 2018. That webpage invited guests to attend both an "after party campout" the evening after the wedding as well as a "clean up party" the day following the wedding. After investigating the issue and finding similar webpages for two additional weddings scheduled to occur later in 2018, County staff informed the Applicant of the issue via email on May 23, 2018.

Second, the LUBA issued its final decision and order in LUBA No. 2018-007 remanding Ordinances 2018-02 and 2018-03 for the Board of County Commissioners' further consideration. In response to LUBA's decision, the Applicant initially withdrew the application but later reconsidered when County staff explained that proceeding with the current application potentially would afford a more expedient path to address issues relating to RLUIPA. Thereby, the Board issued Order 2018-041 reopening the record to allow the parties to brief those issues during a second public hearing on June 4, 2018.

In light of the new evidence suggesting that the Applicant was intending to allow both camping on site and multi-day events, County staff sent a cautionary email to the Applicant on May 24, 2017:

"Going forward, if you want to include multi-day events in your pending land use permit application, County staff will likely need to reevaluate the associated infrastructure impacts. As you know, your March 16th email to Will Groves proposes to "limit the number of outdoor gathering to 30 one day events per year" (emphasis added). That email was intended to address County staff's infrastructure concerns and was included in the Board's April 23rd hearing packet. If you instead intend to allow the public to utilize your property for three days per wedding as represented on your webpage (http://shepherdsfield.bix/prices/html), that seems to allow a total of only 10 weddings per year. Likewise, if you want to allow camping on your property, you will need to significantly modify the application. In either case, [County staff] recommend[s] that you consider reapplying because it is unlikely that County staff can resolve these issues prior to the June 4th hearing. Again, I would appreciate clarification from your attorney regarding your intentions by close of business, Tuesday, May 29, 2018."
Neither the Applicant nor his attorney directly responded to the aforementioned email. In part to clarify the Applicant’s proposal and in part to expedite the second public hearing by clarifying other unaddressed issues, County staff sent a list of nine questions to the parties in a May 29, 2018 email. Question 6 asked for clarity on the Applicant’s proposal:

“What are the paid services available on the property? Just weddings? Are other pre-wedding events such as camping, welcome parties, and rehearsal dinners proposed? Are such pre-wedding events ‘activities customarily associated with the practice of the religious activity’ per ORS 215.441?”

Both parties responded in writing on June 1, 2018, the Friday preceding the Board’s Monday hearing. The Applicant answered question 6 with a statement (the “Fourth Submittal”) that materially deviated from the Third Submittal limiting “outdoor gatherings to 30 one day events per year:

“Traditionally, weddings include a time for setup, rehearsal, with a rehearsal dinner, wedding ceremony, wedding reception and clean up. All those traditional functions are allowed at Shepherdsfield Church and included in the one low price. Shepherdsfield Church does not provide or prepare any food at all, either for the rehearsal dinner or the reception dinner, and thus there is no extra charge. We do not charge kegs fees, cork fees or any other additional fees, as typical wedding venues do. We do not sell wine. Pastor Shepherd does, however, officiate many of the weddings and only charges $150 for that service, including meeting with the couple for premarital counseling, ceremony design, rehearsal supervision, ceremony and paperwork. As per an earlier discussion with the Commissioners, Shepherdsfield does allow people to stay in RV’s in our parking area over night or in tents on the lawn, at no charge. As we told the Commissioners, we would rather people crash on the lawn than crash on the road.”

During the second public hearing on June 4, 2018, the Applicant was given ample opportunity to walk back the Fourth Submittal. The Applicant chose not to do so. Instead, at least as far as the Board understood the Applicant’s argument, the Applicant believed the Third and Fourth submittals were essentially the same because a wedding necessarily includes all of the activities enumerated in the Applicant’s above-quoted answer to question 6. The Applicant, however, failed to explain how the Third Submittal’s “30 one day events” harmonized with the Fourth Submittal’s list of activities that presumably must occur over a period of at least two days. Allowing wedding guests “to stay in RV’s [sic] in our parking area over night or in tents on the lawn” is not a single-day event. Thereby, during the second public hearing the Board determined via a 2-1 vote that the Fourth Submittal modified the application pursuant to DCC 22.20.055. The public hearing preceded, but the Board refused to consider “any evidence submitted by or on behalf of an applicant” relating to the modified application pursuant to DCC 22.20.055(B).

Despite the Board’s decision during the second public hearing, the Applicant’s open record materials nonetheless continued to advocate for the version of the project as represented by the Fourth Submittal. However, those open record materials are internally inconsistent. Drafted by the 247-17-000573-AD and 574-SP (247-18-000179-A and 182-A) Document No. 2018-506
applicant’s attorney, in one instance the materials described the Applicant’s testimony during the June 4th hearing as follows (underlining added):

“My client further explained that he has a firmly held religious belief that under a ministry of hospitality, allowing for setting up for the wedding the day prior to the wedding, having a rehearsal of the wedding, hosting a rehearsal dinner the day prior to the wedding, allowing people to camp in a parking area for the weekend (that does not have electrical, gas or water hook ups), hosting the wedding, the wedding reception and allowing the following day for cleanup is an integral part of the wedding and that it is his sincerely held religious belief that all should be approved.”

The submittal concluded, however, with the following statement (underlining added):

“John and Stephanie Shepherd and Shepherdsfield Church respectfully request that the County Commission allow it to have 30 weekend events per year, which include one day for set up, a rehearsal of the wedding, a rehearsal dinner; the following day of the wedding ceremony and reception and the final day of cleaning up.

Eventually, my clients would like to have permission to have overnight stay in campers and tents on their property. They are not asking for a campground. The Shepherds have never operated a campground. Rather, it has extended hospitality to the wedding guest. The Shepherds and the Church are in no way a campground nor do they wish to be a campground. They only wish to have the same rights that everyone in the county has, the right to allow guests to sleep overnight in an RV on their private property. They understand that the camping component is one that they will have to apply separately for at a future date.”

And, the aforementioned statement continued to argue in a final footnote the following (underlining added):

“All campgrounds have five traits: They charge for their services. The Church does not [sic] They provide hookups and services. The Church does not. They offer their services to the general public. The Church does not. They advertise their campground. The Church does not. They offer camping every day of the week. The Church only allows wedding guests to stay the night of the wedding.”

With regard to camping, the three underlined statements quoted above contradict one another, and continued to confuse rather than clarify the Applicant’s actual proposal. Only the statement suggesting that the Applicant would eventually “like to have permission to have overnight stay in campers and tents on [the] property,” appeared to be consistent with the Third Submittal’s limit of “30 one day events” because the statement alone suggested that overnight stays were not part of this application. But the other two statements instead suggested that Applicant did intend to “allow wedding guests to stay the night of the wedding” because, in the Applicant’s mind, doing so does not constitute camping.
With regard to both camping and rehearsal dinners, the Applicant's final legal argument, submitted on June 18, 2018 by his attorney, is yet another deviation:

"To be clear, the Applicants are seeking a permit from the County that would allow it to have thirty (30) wedding events on their property which consist of the following:

- **Friday.** Set up for the wedding and the wedding reception.
- **Saturday.** Host a wedding and wedding reception.
- **Sunday.** Clean up the property from the wedding and the reception.

Only later, and after the County presumably approves the reasonable request noted above, John and Stephanie Shepherd and Shepherdsfield Church will apply and seek permission from the County to include the following activities for their wedding guest:

- The ability to have a rehearsal dinner on the day before a wedding for the wedding guest who attended the rehearsal and helped set up the wedding.
- The ability to host wedding guest to stay overnight on the property in tents and camping trailers throughout the weekend.
- No restriction on the number of wedding and wedding receptions per year."

The County has been more than generous with its staff time and resources accommodating an ambiguous application that has remained in a state of flux due to changed circumstances, some of which were beyond the Applicant's control. At some point, ambiguity becomes detrimental to an open public process and it appears that much of the ambiguity surrounding this application has been perpetuated by the Applicant. This ambiguity required this unusually detailed summary as well as the following findings.

**FINDING:** By removing the originally proposed Wedding Restrictions, the Applicant arguably modified the application between the First and Second submittals. However, due to a benign error, County staff did not consider the Second Submittal prior to issuing the original administrative decision. Further, no party challenged that the application was inappropriately modified between the First and Second Submittals, and that question is not properly before this Board because DCC 22.20.055(D) vests "sole authority" in the Planning Director "to determine whether an Applicant's submittal constitutes a modification" "up until the day a hearing is opened for receipt of oral testimony."

**FINDING:** Also prior to this Board considering the matter, the Applicant again changed the application between the Second and Third Submittal by agreeing to limit "outdoor gathering to 30 one day events per year." Although again that question is not before this Board, we nonetheless note that we support the Planning Director's implicit determination that the changes between the
Second and Third Submittals did not rise to a formal modification because those changes decreased rather than increased infrastructure and off-site impacts.

**FINDING:** The Applicant’s proposal before the Board during the first public hearing on April 26, 2018 clearly incorporated the Third Submittal and specifically proposed to limit “outdoor gathering to 30 one day events per year.” Thereby, the question that was before this Board during our second June 4, 2018 hearing was if the Fourth Submittal formally modified the application. After extensive testimony and debate on the issue, we concluded 2-1 that the Applicant in fact modified the application. We see no reason to deviate now from that previous decision.

**FINDING:** Most if not all “events” necessarily include set-up and clean-up activities prior to and after the event. Many “events” include rehearsals to ensure the ultimate success of the actual, subsequent happening. Thereby, the Board finds for purposes of this application that a “one day event” includes set-up and rehearsal activities occurring the day before as well as clean-up activities occurring the following day. In the context of weddings, however, a rehearsal dinner is often a separate event distinct from the wedding. As such, rehearsal dinners shall be counted separately against the total events allowed in a single calendar year.

**FINDING:** Despite this Board’s previous determination, the Applicant’s open record materials suggest that allowing wedding guests to stay overnight in tents or recreational vehicles should be allowed. Regardless of the Applicant’s quibbling that such activities are not “camping,” it is clear that pursuant to DCC 22.20.055(B) the Board is precluded from considering “any evidence” that constitutes a modification of application. The Board thereby declines to consider the Applicant’s additional testimony and argument beyond making the following editorial comment. It was only after LandWatch raised the issue that the Applicant responded by arguing that his “firmly held religious belief” and “ministry of hospitality” demand that the County allow wedding guests to camp on site. The Applicant was free to include those activities in his original application. And, the Applicant is, of course, free to submit a land use application in the future for those activities. But the Applicant must follow the appropriate procedure for doing so to thereby provide the public the opportunity to comment and County staff the opportunity to comprehensively address the infrastructure and off-site impacts.

**FINDING:** The following condition of approval will ensure compliance with the foregoing findings:

The following use limitations are imposed in order to limit infrastructure improvement obligations and off-site impacts. As conditions of this approval:

1) **Outdoor church events may include set-up/rehearsal the day prior to an event and clean up the day after the event. Events shall:**
   a. Be limited to 250 guests;
   b. Not begin before 7:00 a.m. or end after 10:00 p.m.;
   c. Limit set-up and take down of all temporary structures and facilities up to one day prior to the event and one day after the event between 7:00 a.m. and 10:00 p.m.;
   d. Not include food service, including but not limited to rehearsal dinners, on set-up/rehearsal or take down days;
e. Not include overnight use of the property by the public.

2) Set-up/rehearsal activities the day prior to an event or clean-up activities that exceed these limitation shall be counted as a separate event against the total allowed in a calendar year.

3) Indoor church functions only including 25 or fewer members of the church shall not count toward the annual outdoor event limit.

2. Section 22.20.010, Code Enforcement and Land Use.

A. Except as described in (D) below, if any property is in violation of applicable land use regulations, and/or the conditions of approval of any previous land use decisions or building permits previously issued by the County, the County shall not:

1. Approve any application for land use development;
2. Make any other land use decision, including land divisions and/or property line adjustments;
3. Issue a building permit.

C. A violation means the property has been determined to not be in compliance either through a prior decision by the County or other tribunal, or through the review process of the current application, or through an acknowledgement by the alleged violator in a signed voluntary compliance agreement ("VCA").

FINDING: LandWatch argues that the Shepherds' failure to establish the cattle and hog operation on the property as required under the 2001 farm management plan means that the property is in violation of the 2001 conditions of approval for the dwelling in conjunction with farm use. Such a finding could preclude further development of the property until this violation is corrected.

Condition #1 of CU-00-65 specified:

1. Approval is based upon the farm management plan and the plot plan. Any substantial alteration of the farm management plan or the plot plan shall require submittal of a new land use permit.

The Board adopts and incorporates by reference the findings of the Hearing Officer in File No. 247-16-000159-SP/161-AD with regard to farming activity on the property. The evidence in that matter appears to be consistent with the information available in the current record. The Board concurs with the Hearings Officer that:

Specifically, a "violation" may be found if a "substantial alteration of the farm management plan" has occurred.

A property owner has reasonable latitude under an FMP to change the types and numbers of livestock to be raised on the property. Although the FMP has been altered via a change in
farming operations, and there has been a period of time during which farming operations were not taking place on the subject property, there is no evidence that the Applicant is currently out of compliance with the conditions of approval for the farm dwelling on the property.

Therefore, the Board finds that there is no "violation" under these criteria with regard to the farm management plan in file no. CU-00-65.

C. ORS 215.441(1) AND (2), USE OF REAL PROPERTY FOR RELIGIOUS ACTIVITY; COUNTY REGULATION OF REAL PROPERTY USED FOR RELIGIOUS ACTIVITY.

(1) If a church, synagogue, temple, mosque, chapel, meeting house or other nonresidential place of worship is allowed on real property under state law and rules and local zoning ordinances and regulations, a county shall allow the reasonable use of the real property for activities customarily associated with the practices of the religious activity, including:
   (a) Worship services.
   (b) Religion classes.
   (c) Weddings.
   (d) Funerals.
   (e) Meal programs.
   (f) Child care, but not including private or parochial school education for prekindergarten through grade 12 or higher education.
   (g) Providing housing or space for housing in a building that is detached from the place of worship, provided:
      (A) At least 50 percent of the residential units provided under this paragraph are affordable to households with incomes equal to or less than 60 percent of the median family income for the county in which the real property is located;
      (B) The real property is in an area zoned for residential use that is located within the urban growth boundary; and
      (C) The housing or space for housing complies with applicable land use regulations and meets the standards and criteria for residential development for the underlying zone.

(2) A county may:
   (a) Subject real property described in subsection (1) of this section to reasonable regulations, including site review or design review, concerning the physical characteristics of the uses authorized under subsection (1) of this section; or
   (b) Prohibit or restrict the use of real property by a place of worship described in subsection (1) of this section if the county finds that the level of service of public facilities, including transportation, water supply, sewer and storm drain systems is not adequate to serve the place of worship described in subsection (1) of this section.
DISCUSSION: Much of the dispute between the Applicant and LandWatch stems from the interface of ORS 215.441 and the definition of “church” in the DCC. No party cited to a definition of “church” in state statutes. Instead, this Board must rely on DCC 18.04.030 which defines “church” as follows:

"Church" means an institution that has nonprofit status as a church established with the Internal Revenue Service.

As the Board understands the issue, LandWatch is arguing that the Applicant’s religious activities on the property do not rise to level of being a “church” requiring a land use permit. Instead, the Applicant’s “house church” activities may proceed without a land use permit. Presumably, LandWatch is arguing that such “house church” activities do not fall into ORS 215.441 and thereby “weddings” and “activities customarily associated with the practices of the religious activity” are not necessarily allowed pursuant to ORS 215.441. In the alternative, LandWatch appears to argue that the Applicant’s “house church” is in actuality a “residential place of worship” and excluded from ORS 215.441. ORS 215.441 notably only addresses a “nonresidential place of worship.”

The Applicant, on the other hand, clearly believes the religious activity occurring on the property rises to the level of being a “church” and in any case the Applicant is clearly applying for a land use permit for a church. It is irrelevant if the Applicant’s motivation for applying for a land use permit is to solidify the “house church” activities or instead is to authorize “weddings” and other “activities customarily associated with the practices of the religious activity” so long as all requisite approval criteria are met.

FINDING: The fifth question submitted by County staff to the Applicant and LandWatch via email on May 29, 2018, suggested that the definition of “church” in the DCC requires two separate inquiries. First, is an applicant an “institution,” and second, does that institution have “nonprofit status as a church established with the Internal Revenue Service?” The record shows, however, that the second inquiry implicitly includes the first. This Board thereby interprets the definition of “church” in DCC 18.04.030 to require only that an applicant provide an applicable determination letter from the Internal Revenue Service.

Chapter 3 of IRS Publication 557 states that “[t]o qualify [for exemption from federal income tax], the organization must be organized as a corporation (including a limited liability company), unincorporated association, or trust. Sole proprietorships, partnerships, individuals, or loosely associated groups of individual won’t qualify.” Relying on the verbiage from the DCC, not all “institutions” may qualify for federal income tax exemptions, but only “institutions” may apply. The Board thereby finds that providing documentation of nonprofit status as a church established with the Internal Revenue Service ensures that an applicant is an “institution.”

In this particular case, the Applicant provided a determination letter from the Internal Revenue Service dated January 19, 2016 and addressed to Shepherdsfield Church. That letter states that “[o]rganizations exempt under IRC Section 501(c)(3) are further classified as either public charities or private foundation. We determined you’re a public charity under the IRC Section at the top of this letter.” The top of the letter references 170(b)(1)(A)(i) under “Public Charity Status.” That references refers to 26 U.S.C. § 170(b)(1)(A)(i) which lists “a church or a convention of association of
churches.” The Board finds that Shepherdsfield Church meets the definition of church in DCC 18.04.030 and ORS 215.441 thereby applies. By determining that Shepherdsfield Church is in fact a “church,” it is not necessary to address LandWatch’s alternative argument that ORS 215.441 does not apply to a “residential place of worship.”

C. RLUIPA.

1. 42 USC § 2000cc-3, Rules of Construction

... (e) Governmental discretion in alleviating burdens on religious exercise. A government may avoid the preemptive force of any provision of this Act by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

...

(g) Broad construction. This Act shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution.

DISCUSSION: County staff emailed questions to the parties prior to the second public hearing and, in part, recommended that the parties address if “the plain language of the Safe Harbor prong of RLUIPA (42 USC § 2000cc-3(e)) provide[s] the County an independent basis to approve the application.” The first of the two RLUIPA Rules of Construction quoted above is frequently referred to as the “Safe Harbor” provision. One of the primary reasons for the second public hearing on June 4, 2018, was to address both the Safe Harbor and other RLUIPA provisions.

Few court decisions interpret the Safe Harbor provision. That is not surprising because the entire purpose of the provision is to provide a mechanism to “avoid the preemptive force” of RLUIPA – i.e. to avoid litigation. Litigation, of course, is a condition precedent to court decisions. One noteworthy decision is Civil Liberties for Urban Believers v. City of Chicago, which concludes that the Safe Harbor provision is not limited to Substantial Burden claims but rather “affords a government the discretion to take corrective action” to address any manner of RLUIPA issues. 342 F3d 752, 762 (7th Cir 2003).

The Applicant also cited Civil Liberties for Urban Believers to demonstrate that other federal jurisdictions have concluded that “a government can avoid liability under RLUIPA by amending ... land use regulations to remove ... burdensome or discriminatory provisions, even after such provisions have caused harm.” Id. As noted by the Applicant, Civil Liberties for Urban Believers considered land use code amendments that a local government passed in reaction to several
religious institutions filing RLUIPA suits and arguing that the pre-amended code provisions already had caused damages. Thereby, *Civil Liberties for Urban Believers* considers the Safe Harbor provision’s relevance to a text amendment case and is distinguishable from the present matter questioning the provision’s relevance to a pending land use application.

The Applicant also cited at least one other RLUIPA Safe Harbor case not involving a text amendment, *Grace Church of Roaring Fork Valley v. Board of Cty. Comm’rs*, 742 F Supp 2d 1156 (D Colo 2010). In that Colorado case, without first amending its land use code, the governing body of Pitkin County passed a resolution reversing its prior denial of a proposed church. The board’s resolution states that “[t]his action of the [Board of County Commissioners] is taken pursuant to 42 U.S.C. § 2000cc-3(e),” the Safe Harbor provisions. Thereby, *Grace Church of Roaring Fork Valley* demonstrates that the Safe Harbor provision is an independent grant of authority allowing Deschutes County to approve the proposed church without first amending the applicable code provisions.

Differing from the Applicant, LandWatch provided no analysis or case law but nonetheless opined that the Safe Harbor provision does not provide a basis for approval of the current application because it “is just a means of achieving compliance with RLUIPA.” LandWatch instead focused its argument on reiterating that in LandWatch’s opinion, the Deschutes County Code does not violate RLUIPA. As such, LandWatch attempted to avoid rather than argue the Safe Harbor issue. To the extent that LandWatch offered an argument, it appears to be predicated on only a partial read of the Safe Harbor provision, which clearly provides four options for a government to “avoid the preemptive force” of RLUIPA:

1. Change the policy or practice that results in a substantial burden on religious exercise (e.g. amend a land use code provision);
2. Retain the policy or practice and exempt the substantially burdened religious exercise (e.g. approve a variance or special exception);
3. Provide exemptions from the policy or practice for applications that substantially burden religious exercise; or
4. By any other means, eliminate the substantial burden.

Although the first two options rely on tools typically codified in land use codes, LandWatch’s selective reading of the Safe Harbor provision ignores the second two options. Those two options appear to authorize a local government to step away from codified land use tools to resolve RLUIPA issues. This broader interpretation of the Safe Harbor provision is further buoyed by the second *Rule of Construction* quoted above, 42 USC § 2000cc-3(g)). Interpreting the Safe Harbor provision “in favor of a broad protection of religious exercise” suggests that the provision grants a government the necessary authority to approve a land use application for a church by “any ... means.”

**FINDING:** The Board finds that the Safe Harbor provision of RLUIPA, interpreted “in favor of a broad protection of religious exercise,” provides the County an independent basis to approve the current application. Nothing in the Safe Harbor provisions requires a local government to find that its land

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use code violates RLUIPA as a prerequisite to invoking the Safe Harbor provision. Making such findings likely would invite rather than "avoid the preemptive force" of RLUIPA. Nonetheless, as discussed below, the Board recognizes that the Deschutes County Code, as interpreted by LUBA in Central Oregon LandWatch v. Deschutes County, 75 Or LUBA 284, aff'd 287 Or App 239, 400 P3d 325 (2017), exposes the County to subsequent RLUIPA litigation that the County could potentially lose. It is impractical to predict with certainty the outcome of RLUIPA litigation because fact specific circumstances may become known that presumably would dictate the outcome. More importantly, RLUIPA litigation stemming from this land use application would present matters of first impression for Oregon courts. Nonetheless, as discussed below, the Applicant has likely raised prima facie issues in both the Substantial Burden and Equal Terms contexts, thus shifting the burden to Deschutes County to disprove RLUIPA violations. Rather than undertaking that burden, the Board instead elects to invoke the authority granted by the Safe Harbor provision to avoid the preemptive force of RLUIPA litigation.

**FINDING:** In Central Oregon LandWatch v. Deschutes County, 75 Or LUBA 284, aff'd 287 Or App 239, 400 P3d 325 (2017), LUBA interpreted DCC 18.88.040(B)(3) to prohibit churches in the portion of the WA Zone designated as deer winter ranges, significant elk habitat, or antelope range. As authorized by the Safe Harbor provision of RLUIPA, the Board finds that DCC 18.88.040(B)(3) does not apply to this application. All other relevant and applicable DCC provisions still apply.

**FINDING:** In the alternative, as authorized by the Safe Harbor provision, the Board incorporates by reference into this decision the more comprehensive interpretation of case law, state statutes, and Deschutes County Code provisions contained in the findings of the Hearing Officer in File No. 247-16-000159-SP/161-AD, and applies that interpretation to this application. Specifically, the Hearings Officer determined that DCC 18.88.040(B)(3) does not prohibit churches when the WA Zone overlaps an Exclusive Farm Use Zone because "church use is allowed outright subject to certain provisions ... as opposed to conditionally in the [Exclusive Farm Use Zone]." Although the Hearings Officer decision only indirectly addressed RLUIPA, it did not directly interpret the Safe Harbor provision. Likewise, page 25 of LUBA's decision in Central Oregon LandWatch v. Deschutes County characterizes the Applicant's RLUIPA argument as "undeveloped," and thereby did not interpret or apply the Safe Harbor provisions. 75 Or LUBA 284, aff'd 287 Or App 239, 400 P3d 325 (2017).

**FINDING:** The Board also finds that to the extent it may be argued that procedural irregularities or potential unresolved violations on the property prevent the application's approval, the Safe Harbor provision also provides a basis for overlooking those procedural irregularities or potential violations. Stated another way, the Board finds that the Safe Harbor provision supports all of the Board's findings in this decision, particularly those findings concerning ORS 215.441 and DCC 22.08.010, DCC 22.08.037, DCC 22.20.055, and DCC 22.20.010.

2. 42 USC § 2000cc(a), Substantial burdens

   **(1) General rule.** 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.

DISCUSSION: Neither party cited to applicable Oregon case law applying the Substantial Burden prong of RLUIPA. LandWatch failed to substantively address the issue and instead just about conceded the matter to the Applicant by arguing only the following:

“The lands zoned for winter range in Deschutes County are a fraction of the County’s hundreds of thousands of acres of land area. Where there is plenty of land on which religious organizations can build churches, the fact that they are not permitted to build everywhere does not create a substantial burden under RLUIPA. Merely classifying land into agricultural lands or winter range lands does not discriminate against churches. Hale O Kaula Church v. Maui Planning Commission, 229 F. Supp. 2d 1056.”

The Applicant responded to LandWatch’s singular assertion by arguing that a Substantial Burden may “exist even if other suitable properties might be available, because the delay, uncertainty, and expense of selling the current property and finding a new one are themselves burdensome.” Bethel World Outreach Ministries v. Montgomery Cty. Council, 706 F3d 548 (4th Cir 2007).

Differing from the parties, the Board elects to rely on Oregon cases to decide the Substantial Burden issue. Timberline Baptist Church v. Wash. Cty. affirms the Applicant’s argument that the likelihood of building a church in another zone is not dispositive of a Substantial Burden claim:

“Nothing in RLUIPA requires a religious institution, in order to take advantage of its provisions, to purchase only property on which the desired use is permitted outright. It follows that the dispositive question is whether implementation of [a zoning regulation] in relation to [a church’s] property imposes a substantial burden on [the church’s] religious exercise for the purpose of RLUIPA, that is, whether it forces [a church] to choose between adhering to a religious practice and obtaining a desired government benefit.”

211 Or App 437, 450-51, 154 P3d 759 (2007). Citing an Oregon Supreme Court decision, Timberline Baptist Church further describes the process for adjudicating a Substantial Burden claim: the “plaintiff has [the] burden to show that regulation substantially burdens religious exercise; where plaintiff produces prima facie evidence, [the] burden shifts to government as to other elements of [the] claim.” 211 Or App at 448. The “other elements,” of course, are that the land use regulations that impose a Substantial Burden are (1) in “furtherance of a compelling governmental interest,” and (2) are the “least restrictive means of furthering that compelling governmental interest.”

The Applicant’s proposal is a unique vision of a church necessitating a unique Substantial Burden analysis. Another land use application for a larger, more traditional sanctuary in the WA Zone would 247-17-000573-AD and 574-SP (247-18-000179-A and 182-A)

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require a different analysis. The record confirms that County staff repeatedly clarified that the Applicant's small "house church" activities that have occurred to date do not require a land use permit because they are on par with a bible study, and are incidental and accessory to the residential use of the property. Even LandWatch conceded that such small, incidental uses that have occurred to date do not require a land use permit. The issue, thereby, is if an outright ban on larger indoor church activities consisting of up to 25 people, or even larger, outdoor events including up to 250 people forces the Applicant to "choose between adhering to a religious practice and obtaining a desired government benefit."

**FINDING:** The Applicant testified that his sincerely held religious belief, best described as a "Ministry of Hospitality," included "minister[ing] to both those within the church and those without, including strengthening the family through marriage and family counseling, through nurturing and encouraging marriage and weddings and by showing the love and hospitality of Christ." LandWatch did not present a counter-argument to the Applicant's assertion. The Board finds that an outright ban on indoor church activities including up to 25 people likely forces the Applicant to "choose between adhering to a religious practice and obtaining a desired government benefit." The Board further finds that an outright ban on outdoor church events whereby the contemplated 25-person congregation is precluded from hosting even a single wedding or other large evangelical event also likely forces a choice "between adhering to a religious practice and obtaining a desired government benefit." These findings are implicitly supported by ORS 215.441, which allows "weddings" and other "activities customarily associated with the practices of the religious activity" to occur onsite along with a church. Stated simply, compliance with state statutes in this case likely ensures compliance with the Substantial Burden prong of RLUIPA.

**FINDING:** Recognizing that this matter likely presents a *prime facie* Substantial Burden claim that was not countered by LandWatch, the burden appears to have shifted to the County to demonstrate that the regulations are (1) in "furtherance of a compelling governmental interest," and (2) are the "least restrictive means of furthering that compelling governmental interest." As previously discussed, the Board elects to rely on the Safe Harbor provision to approve the application rather than undertaking the burden of disproving potential RLUIPA violations and thereby only offers the following editorial comments. Assuming that protecting deer winter range habitat is a "compelling government interest," the Board is nonetheless skeptical that an outright ban on outdoor church events is the "least restrictive means" of protecting that habitat. Even when overlaid by the WA Zone, outdoor events such as weddings are specifically allowed on an Exclusive Farm Use parcel when associated with "agri-tourism and other commercial events and activities" pursuant to DCC 18.16.025. "Commercial events and activities" are defined in DCC 18.04.030 to include "any meeting, celebratory gathering, wedding, party, or similar uses consisting of any assembly of persons and the sale of good or services ... related to and supportive of agriculture." Thereby, allowing "agri-tourism" and "other commercial events" demonstrates that it is possible to both protect deer winter range habitat while likewise allowing at least some large outdoor events in the WA zone.

**FINDING:** The Board is cognizant, however, that "agri-tourism" and "other commercial events" are not allowed without limitation in the WA Zone. In fact, it is more accurate to reflect that "agri-tourism" and "other commercial events" are heavily regulated by state statutes and DCC 18.16.042. For example, no more than 18 commercial events may be approved in a single calendar year (DCC 247-17-000573-AD and S74-SP (247-18-000179-A and 182-A)

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18.16.042(C)(3)(d)), and no events may occur "[w]ithin the County adopted big game winter ranges during the months of December through March" (DCC 18.16.042(C)(3)(13)(a)). These strict limitations correspond to the invaluable habitat protection the WA Zone seeks to protect. Although those limitations are suitable to protect winter deer range habitat while likewise promoting agricultural uses, they do not correlate exactly to the present application concerning a church. A church and a farm are not the same, and the most effective method of protecting winter deer habitat for a farm is unlikely the "least restrictive means" of achieving the same policy goal for a church’s ministry that includes weekly weddings and other outdoor events during the warmer months. Nonetheless, the Applicant's self-imposed limitation of 30 events per year to avoid infrastructure impacts may be too aggressive considering the WA Zone’s stated purposes of “conserve[ning] important wildlife areas in Deschutes County; ... protect[ing] an important environmental, social and economic element of the area; and ... permit[ting] development compatible with the protection of the wildlife resource.” For example, if the Applicant began hosting weekly outdoor events on April 1 of any given year, 30 consecutive events would last through October and could pose a risk to winter range habitat. Instead, the Board finds that 27 annual events is a more reasonable limitation to ensure a substantial temporal buffer between outdoor events occurring in the warmer months and the deer relying on their winter range in the colder months. If the Applicant began hosting weekly outdoor events on April 1 any given year, 25 consecutive events would end sometime in September. And, the Applicant would then have two remaining outdoor events to address unique situations.

**FINDING:** The following condition of approval will ensure compliance with the foregoing findings:

Outdoor church events shall be limited to 27 occurrences each calendar year, with no more than two events occurring after October 1 and before April 1 of the following year.

3. **42 USC § 2000cc(B)(1), Equal Terms.**

   (1) Equal terms. 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.

**DISCUSSION:** County staff emailed questions to the parties prior to the second public hearing and, in part, invited the parties to address the Equal Terms prong of RLUIPA by analyzing LUBA’s decision in Young v. Jackson County, 58 Or LUBA 64 (2008), aff’d 227 Or App 290, 205 P3d 890 (2009). Both parties declined that invitation. The Applicant instead noted that “[t]here exists an inter-circuit split with respect to the proper [Equal Terms] test and the Ninth Circuit has adopted one test with a modification.” Thereby, the Applicant argued that “[t]he only case [the Board] need look at is the Ninth Circuit’s decision of Centro Familiar Cristiano v. City of Yuma, 651 F3d 1163 (2011).” Despite the circuit-split, LandWatch nonetheless cited inapplicable cases from the 7th Circuit in addition to Centro Familiar Cristiano. Because both parties cited Centro Familiar Cristiano, the Board will rely on that 9th Circuit case.
Centro Familiar Cristiano directs that a violation of the Equal Terms provisions is found when (1) there is “an imposition or implementation of a land-use regulation, (2) by a government, (3) on a religious assembly or institution” with (4) the imposition being “on less than equal terms with a nonreligious assembly or institution.” 651 F3d at 1170-71. Centro Familiar Cristiano continues by describing what “equal” means in the Equal Terms context:

"Under the equal terms provision, analysis should focus on what ‘equal’ means in the context. Equality is always with respect to a characteristic that may or may not be material. For example, one can legitimately treat a tall person differently from a short person for the purposes of picking a basketball team, but not for the purposes of picking a jury. Likewise, a ten-member book club is equal to a ten-member church for purposes of parking burdens on a street, but unequal to a 1000-member church. Equality, ‘except when used of mathematical or scientific relations, signifies not equivalence or identity, but proper relation to relevant concerns.’ Thus, an ordinance that allowed membership organizations below some size would not have to allow churches substantially above that size, if parking were a relevant concern.”

651 F3d at 1172 (internal citations omitted). With respect to the burden of persuasion, Centro Familiar Cristiano notes that the same “strict scrutiny” standard applicable to Substantial Burden arguments does not apply. Id. at 1171. However, “[t]he burden is not on [a] church to show a similarly situated secular assembly, but on [a local government] to show that the treatment received by [a] church should not be deemed unequal, where it appears to be unequal on the face of the [land use regulation].” Id. at 1173. Last, differing from other federal circuits, Centro Familiar Cristiano notes the following regarding a government’s intentions:

[A local government] may be able to justify some distinctions drawn with respect to churches, if it can demonstrate that the less than equal terms are on account of a legitimate regulatory purpose, not the fact that the institution is religious in nature.

FINDING: The Board finds that LUBA’s interpretation of DCC 18.88.040(B)(3) in Central Oregon LandWatch v. Deschutes County likely treats churches unequally because that interpretation precludes religious public assemblies from occurring on Exclusive Farm Use parcels overlaid by the WA Zone but allows secular public assemblies as part of “agri-tourism” and “commercial events or activities.” 75 Or LUBA 284, aff’d 287 Or App 239, 400 P3d 325 (2017).

FINDING: Recognizing that this matter likely presents a prime facie Equal Terms claim, the burden appears to have shifted to the County “show that the treatment received [by the Applicant] ... should not be deemed unequal.” As previously discussed, the Board elects to rely on the Safe Harbor provision to approve the application rather than undertaking the burden of disproving potential RLUIPA violations and thereby only offers the following editorial comments. The dispositive question in any subsequent RLUIPA litigation will likely focus on if Deschutes County has a “legitimate regulatory purpose” to ban religious public assemblies to protect wildlife habitat while allowing secular public assemblies to promote agriculture. Centro Familiar Cristiano described “equality” with regard to the Equal Terms prong of RLUIPA as “a proper relation to relevant concerns.” Certainly, the relevant concern of protecting wildlife habitat applies equally to secular
and religious public assemblies. Nonetheless, when adopting amendments aimed at supporting agriculture by allowing both “agri-tourism and other commercial events and activities” the County implicitly entertained the notion that wildlife habitat protection even in the WA Zone need not be absolute. As such, the Board is concerned that refusing to entertain the same notion to support churches could be a difficult position to defend.

**TITLE 18 OF THE DESCHUTES COUNTY CODE, COUNTY ZONING**

**A. CHAPTER 18.16, EXCLUSIVE FARM USE ZONES.**

1. **Section 18.16.025. Uses Permitted Subject to the Special Provisions Under DCC Section 18.16.038 or DCC Section 18.16.042 and a Review Under DCC Chapter 18.124 where applicable.**

2. **C. Churches and cemeteries in conjunction with churches consistent with ORS 215.441 and OAR 660-033-0130(2) on non-high value farmland.**

**FINDING:** The Applicants are proposing use of the property as a church. Compliance with ORS 215.441 and OAR 660-033-0130(2) is discussed above. DCC 18.04.030 defines “church” as:

"Church" means an institution that has nonprofit status as a church established with the Internal Revenue Service.

The Board incorporates by reference findings made above regarding ORS 215.441 determining that the present application constitutes a “church”.

LandWatch has expressed concern that the entity conducting weddings has and will be the property owners as individuals. To ensure that the church events are conducted by the church, the Board includes the following conditions of approval:

1) The Applicants shall maintain its non-profit status with the IRS to qualify as a church.

2) The Board's intention is to permit a non-profit church institution to conduct outdoor events on the property, not to approve a commercial event center. Thereby, only the non-profit church institution is authorized to provide paid services and events under this approval. The church shall maintain records at all times demonstrating that the non-profit church institution is the entity conducting and being paid for any paid services and events under this approval. Such records shall be made available to Deschutes County upon request. Third parties may provide services accessory to the church events, such as officiant services, catering and equipment rental.

3. **Section 18.16.070, Yards**
A. The front yard shall be a minimum of: 40 feet from a property line fronting on a local street, 60 feet from a property line fronting on a collector street, and 100 feet from a property line fronting on an arterial street.

B. Each side yard shall be a minimum of 25 feet, except that for a nonfarm dwelling proposed on property with side yards adjacent to property currently employed in farm use, and receiving special assessment for farm use, the side yard shall be a minimum of 100 feet.

C. Rear yards shall be a minimum of 25 feet, except that for a nonfarm dwelling proposed on property with a rear yard adjacent to property currently employed in farm use, and receiving special assessment for farm use, the rear yard shall be a minimum of 100 feet.

D. In addition to the setbacks set forth herein, any greater setbacks required by applicable building or structural codes adopted by the State of Oregon and/or the County under DCC 15.04 shall be met.

**FINDING:** No new structures are proposed and all existing structures associated with proposed use are located over 100 feet from any property line. These criteria are met.

4. **Section 18.16.060, Dimensional Standards**

   **E. Building height.** No building or structure shall be erected or enlarged to exceed 30 feet in height, except as allowed under DCC 18.120.040.

**FINDING:** No new structures are proposed. This criterion is inapplicable.

5. **Section 18.16.080, Stream Setbacks**

   To permit better light, air, vision, stream pollution control, protection of fish and wildlife areas and preservation of natural scenic amenities and vistas along streams and lakes, the following setbacks shall apply:

   A. All sewage disposal installations, such as septic tanks and septic drainfields, shall be set back from the ordinary high water mark along all streams or lakes a minimum of 100 feet, measured at right angles to the ordinary high water mark. In those cases where practical difficulties preclude the location of the facilities at a distance of 100 feet and the County Sanitarian finds that a closer location will not endanger health, the Planning Director or Hearings Body may permit the location of these facilities closer to the stream or lake, but in no case closer than 25 feet.

   B. All structures, buildings or similar permanent fixtures shall be set back from the ordinary high water mark along all streams or lakes a minimum of 100 feet measured at right angles to the ordinary high water mark.
FINDING: No new structures are proposed. No rivers or streams are located near the subject property. These criteria are inapplicable.

6. Section 18.16.090, Rimrock Setback

*Notwithstanding the provisions of DCC 18.16.070, setbacks from rimrock shall be as provided in DCC 18.116.160 or 18.84.090, whichever is applicable.*

FINDING: No new structures are proposed. No “rimrock”, as defined in DCC 18.04.030, exists on the subject property. This criterion is inapplicable.

B. CHAPTER 18.88, WILDLIFE AREA COMBINING ZONE

1. Section 18.88.030, Uses Permitted Outright.

*In a zone with which the WA Zone is combined, the uses permitted outright shall be those permitted outright by the underlying zone.*

FINDING: The Board incorporates herein by reference the findings made under the RLUIPA section, above.

2. Section 18.88.040, Uses Permitted Conditionally.

A. Except as provided in DCC 18.88.040(B), in a zone with which the WA Zone is combined, the conditional uses permitted shall be those permitted conditionally by the underlying zone subject to the provisions of the Comprehensive Plan, DCC 18.128 and other applicable sections of this title.

B. The following uses are not permitted in that portion of the WA Zone designated as deer winter ranges, significant elk habitat or antelope range:

1. Golf course, not included in a destination resort;
2. Commercial dog kennel;
3. Church;
4. Public or private school;
5. Bed and breakfast inn;
6. Dude ranch;
7. Playground, recreation facility or community center owned and operated by a government agency or a nonprofit community organization;
8. Timeshare unit;
9. Veterinary clinic;
10. Fishing lodge.

FINDING: The WA Zone, as interpreted by LUBA, currently precludes churches. The County initiated a text amendment amending the Comprehensive Plan and Deschutes County Code (DCC) Chapter 18.88 to permit churches in the WA Zone for several reasons, including ensuring compliance with 247-17-000573-AD and 574-SP (247-18-000179-A and 182-A)

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RLUIPA. The Board adopted amendments on January 3, 2018, which are the basis for the present application. LandWatch appealed Ordinances Nos. 2018-002 and 2018-003 to LUBA, where the ordinances were remanded back to the County and provided the County options on how to amend its ESEE Analysis underpinning the Amendments. (LUBA No. 2018-007). The County is appealing that decision to the Court of Appeals because it believes the remand is unnecessary. The Applicant elected to go forward with the application based on the argument that RLUIPA provides a basis for the County to approve the proposed land use.

The Board incorporates by reference the findings made under RLUIPA, above. In the event that the text amendment, which removes the prohibition on churches in the Wildlife Area Combining Zone, is approved on appeal or remand, the Board finds that the present application would also be approved in those circumstances.

3. **Section 18.88.060, Siting Standards**

   **A.** Setbacks shall be those described in the underlying zone with which the WA Zone is combined.

   **B.** The footprint, including decks and porches, for new dwellings shall be located entirely within 300 feet of public roads, private roads or recorded easements for vehicular access existing as of August 5, 1992 unless it can be found that:

   1. Habitat values (i.e., browse, forage, cover, access to water) and migration corridors are afforded equal or greater protection through a different development pattern; or,

   2. The siting within 300 feet of such roads or easements for vehicular access would force the dwelling to be located on irrigated land, in which case, the dwelling shall be located to provide the least possible impact on wildlife habitat considering browse, forage, cover, access to water and migration corridors, and minimizing length of new access roads and driveways; or,

   3. The dwelling is set back no more than 50 feet from the edge of a driveway that existed as of August 5, 1992.

**FINDING:** No new dwelling is included in this proposal. These criteria do not apply.

4. **Section 18.88.070, Fence Standards.**

   The following fencing provisions shall apply as a condition of approval for any new fences constructed as a part of development of a property in conjunction with a conditional use permit or site plan review.

   **A.** New fences in the Wildlife Area Combining Zone shall be designed to permit wildlife passage. The following standards and guidelines shall apply unless an alternative fence design which provides equivalent wildlife passage is approved by the County after consultation with the Oregon Department of Fish and Wildlife:

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1. The distance between the ground and the bottom strand or board of the fence shall be at least 15 inches.
2. The height of the fence shall not exceed 48 inches above ground level.
3. Smooth wire and wooden fences that allow passage of wildlife are preferred. Woven wire fences are discouraged.

B. Exemptions:
1. Fences encompassing less than 10,000 square feet which surround or are adjacent to residences or structures are exempt from the above fencing standards.
2. Corrals used for working livestock.

FINDING: No new fencing is included as part of this proposal. This criterion is inapplicable.

C. CHAPTER 18.116, SUPPLEMENTARY PROVISIONS


   A. In all zones, a clear vision area shall be maintained on the corners of all property at the intersection of two streets or a street and a railroad. A clear vision area shall contain no planting, fence, wall, structure, or temporary or permanent obstruction exceeding three and one-half feet in height, measured from the top of the curb or, where no curb exists, from the established street centerline grade, except that trees exceeding this height may be located in this area provided all branches and foliage are removed to a height of eight feet above the grade.

   B. A clear vision area shall consist of a triangular area on the corner of a lot at the intersection of two streets or a street and a railroad. Two sides of the triangle are sections of the lot lines adjoining the street or railroad measured from the corner to a distance specified in DCC 18.116.020(B)(1) and (2). Where lot lines have rounded corners, the specified distance is measured from a point determined by the extension of the lot lines to a point of intersection. The third side of the triangle is the line connecting the ends of the measured sections of the street lot lines. The following measurements shall establish clear vision areas within the County:
   1. In an agricultural, forestry or industrial zone, the minimum distance shall be 30 feet or at intersections including an alley, 10 feet.
   2. In all other zones, the minimum distance shall be in relationship to street and road right of way widths as follows:

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<thead>
<tr>
<th>Right-of-Way Width</th>
<th>Clear Vision</th>
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<tbody>
<tr>
<td>80 feet or more</td>
<td>20 feet</td>
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<tr>
<td>60 feet</td>
<td>30 feet</td>
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<tr>
<td>50 feet and less</td>
<td>40 feet</td>
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FINDING: No new structures are proposed. The proposed church and associated church events will not impact a clear vision area of 30 feet at the intersection of two streets or a street and a railroad. The Applicants will be required to contact Mike Martin, Deschutes County Road Department, to ensure there is adequate sight distance at the driveway to/from Holmes Road, a County collector. The Applicant needs to either provide proof of an approach road permit from Deschutes County or obtain one prior to initiating the use.

2. **Section 18.116.030, Off-street Parking and Loading.**

   **A. Compliance.** No building or other permit shall be issued until plans and evidence are presented to show how the off-street parking and loading requirements are to be met and that property is and will be available for exclusive use as off-street parking and loading. The subsequent use of the property for which the permit is issued shall be conditional upon the unqualified continuance and availability of the amount of parking and loading space required by DCC Title 18.

FINDING: The Applicant has demonstrated, through plans and evidence, including but not limited to Exhibit H and I of the burden of proof, how the off street parking and loading requirements are to be met and that property is and will be available for exclusive use as off-street parking and loading. This parking area is buffered by approximately 1/3 mile of juniper trees and native plants and is not visible from off of the property. Applicants are proposing to cover the parking area with an all-weather surface. The parking area has been sized to accommodate the parking needs of weddings conducted by and at the church. A limit of 250 guests per event will be imposed on church weddings.

   **B. Off-Street Loading.** Every use for which a building is erected or structurally altered to the extent of increasing the floor area to equal a minimum floor area required to provide loading space and which will require the receipt or distribution of materials or merchandise by truck or similar vehicle, shall provide off-street loading space on the basis of minimum requirements as follows:

FINDING: This proposal does not include a “use for which a building is erected or structurally altered.” This criterion is inapplicable.

   **C. Off-Street Parking.** Off-street parking spaces shall be provided and maintained as set forth in DCC 18.116.030 for all uses in all zoning districts. Such off-street parking spaces shall be provided at the time a new building is hereafter erected or enlarged or the use of a building existing on the effective date of DCC Title 18 is changed.

FINDING: The Board confirmed the administrative decision findings for this criterion, quoted below, for this criterion in 247-14-000229-SP:

DCC 18.116.030(C) first requires that, “Off-street parking spaces shall be provided and maintained as set forth in DCC 18.116.030 for all uses in all zoning districts.” Staff finds that provision of parking spaces is plainly required under this section. The second portion of this criterion states, “Such off-street parking spaces shall be provided at the time a new building is hereafter erected or enlarged or the use of a building existing on the effective date of DCC Title 18 is changed.” Staff finds that the second sentence of the criterion specifies the timing for the provision of parking for certain specified uses, but does not negate the requirement that parking be “provided and maintained as set forth in DCC 18.116.030 for all uses”.

A condition of approval shall specify that all required parking shall be in place prior to the initiation of the use and maintained for the duration of the use. This criterion is met.

D. Number of Spaces Required. Off-street parking shall be provided as follows:
   1. Residential.
      
      | Use                              | Requirements                  |
      |----------------------------------|-------------------------------|
      | One, two and three family dwellings | 2 spaces per dwelling unit    |
      
      ...  

4. Places Of Public Assembly.

<table>
<thead>
<tr>
<th>Use</th>
<th>Requirements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Church</td>
<td>1 space per 4 seats or 8 feet of bench length in the main auditorium or 1 space for each 50 sq. ft. of floor area used for assembly</td>
</tr>
</tbody>
</table>

...  

9. Other uses not specifically listed above shall be provided with adequate parking as required by the Planning Director or Hearings Body. The above list shall be used as a guide for determining requirements for said other uses.

FINDING: Use of the existing dwelling unit as a single-family residence requires 2 spaces. The Applicants have proposed a maximum indoor church use of 25 persons. While the indoor church is not constrained by bench length or auditorium size, the requirement in DCC 18.116.030.D.4 for one parking space per 4 seats supports a determination that a minimum of 7 parking spaces is required to serve a 25 person church use.

The Board concluded in 247-14-000229-SP that 18 weddings per year on the subject property with up to 250 guests required permanent developed parking spaces for that use. The proposed church event use in these applications is similar in scope to the proposed private park event use previously proposed and likewise requires permanent parking.

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The church event use falls under DCC 18.116.030(D)(9), “other uses not specifically listed”. Following the Board decision in 247-14-000229-SP, the listed uses should be used “as a guide for determining requirements for said other uses.” Specifically, that this use is similar to the use “church”, in that church use typically includes weddings. DCC 18.116.030(D)(4) requires 1 space per 4 seats for church use. As such, a minimum of 63 spaces (250 / 4 = 62.5) should be provided for the church event use, plus two spaces for residential use of the dwelling, for a total of 65 spaces.

Sixty-five spaces will be adequate to address church event use and would be more than adequate to address the regular church service and residential use of the property. This criterion is met.

**E. General Provisions. Off-Street Parking.**

1. **More Than One Use on One or More Parcels.** In the event several uses occupy a single structure or parcel of land, the total requirement for off-street parking shall be the sum of requirements of the several uses computed separately.

**FINDING:** The total requirement for off-street parking equals the sum of the requirements of the several uses (church use including events and residential) computed separately. This criterion is met.

2. **Joint Use of Facilities.** The off-street parking requirements of two or more uses, structures or parcels of land may be satisfied by the same parking or loading space used jointly to the extent that it can be shown by the owners or operators of the uses, structures or parcels that their operations and parking needs do not overlap at any point of time. If the uses, structures or parcels are under separate ownership, the right to joint use of the parking space must be evidenced by a deed, lease, contract or other appropriate written document to establish the joint use.

**FINDING:** No joint use facilities are proposed. This criterion is inapplicable.

3. **Location of Parking Facilities.** Off-street parking spaces for dwellings shall be located on the same lot with the dwelling. Other required parking spaces shall be located on the same parcel or another parcel not farther than 500 feet from the building or use they are intended to serve, measured in a straight line from the building in a commercial or industrial zone. Such parking shall be located in a safe and functional manner as determined during site plan approval. The burden of proving the existence of such off-premise parking arrangements rests upon the applicants.

**FINDING:** All parking is located on the subject parcel. This criterion is met.
4. Use of Parking Facilities. Required parking space shall be available for the parking of operable passenger automobiles of residents, customers, patrons and employees only and shall not be used for the storage of vehicles or materials or for the parking of trucks used in conducting the business or used in conducting the business or use.

FINDING: A condition of approval shall be required such that required parking spaces shall be available for the parking of operable passenger automobiles of residents, customers, patrons and employees only and shall not be used for the storage of vehicles or materials or for the parking of trucks used in conducting the business or used in conducting the business or use. This criterion is met.

5. Parking, Front Yard. Required parking and loading spaces for multi-family dwellings or commercial and industrial uses shall not be located in a required front yard, except in the Sunriver UUC Business Park (BP) District and the La Pine UUC Business Park (LPBP) District and the La Pine UUC Industrial District (LPI), but such space may be located within a required side or rear yard.

FINDING: No parking in a required front yard is proposed. This criterion is inapplicable.

F. Development and Maintenance Standards for Off-Street Parking Areas. Every parcel of land hereafter used as a public or private parking area, including commercial parking lots, shall be developed as follows:

1. Except for parking to serve residential uses, an off-street parking area for more than five vehicles shall be effectively screened by a sight obscuring fence when adjacent to residential uses, unless effectively screened or buffered by landscaping or structures.

FINDING: The proposed parking is located over 400 feet from any property line. Evidence in the record shows that that vegetation and topography will effectively screen the parking area from any adjacent residential use. This criterion is met.

2. Any lighting used to illuminate off-street parking areas shall be so arranged that it will not project light rays directly upon any adjoining property in a residential zone.

FINDING: No adjoining property is in a residential zone. This criterion does not apply.

3. Groups of more than two parking spaces shall be located and designed to prevent the need to back vehicles into a street or right of way other than an alley.
FINDING: Evidence shows that parking spaces are located and designed to prevent the need to back vehicles into a street or right-of-way. This criterion is met.

4. Areas used for standing and maneuvering of vehicles shall be paved surfaces adequately maintained for all weather use and so drained as to contain any flow of water on the site. An exception may be made to the paving requirements by the Planning Director or Hearings Body upon finding that:
   a. A high water table in the area necessitates a permeable surface to reduce surface water runoff problems; or
   b. The subject use is located outside of an unincorporated community and the proposed surfacing will be maintained in a manner which will not create dust problems for neighboring properties; or
   c. The subject use will be in a Rural Industrial Zone or an Industrial District in an unincorporated community and dust control measures will occur on a continuous basis which will mitigate any adverse impacts on surrounding properties.

FINDING: The Applicant has requested an exception to the paving required under this criterion. The Applicant has placed ¾ minus gravel along the driveway that accesses the parking area from Holmes Road, as required by a condition of approval in File No. 247-14-000228-CU 229-SP, with respect to the proposed private park. ¾ minus gravel constitutes an all-weather surface in areas used for standing of vehicles. The Applicant also proposes to use ¾ minus gravel in the parking area following permit approval and prior to any event related parking. Use of ¾ minus gravel for the parking area is intended to eliminate dust from vehicles using the site. Any storm water drainage from the driveway and parking area will drain to adjacent pervious surfaces and will be contained on-site. The evidence shows that the parking area and access driveway are located far from adjacent property and stormwater drainage will continue to be directed to groundwater infiltration in natural and landscaped open space. A condition of approval requiring the Applicant to complete and maintain a ¾ minus gravel base on the access driveway and parking areas shall be imposed. An exception to the paved surface requirement is approved under subsection (b) above. This criterion is met.

5. Access aisles shall be of sufficient width for all vehicular turning and maneuvering.

FINDING: Table 1 at the end of DCC Chapter 18.116 requires, at a minimum, a twenty-four-foot-wide surface for two-way traffic and 12-foot-wide surface for one-way traffic. The Applicant has proposed a minimum of a thirty-two-foot-wide surface for two-way traffic and 16-foot-wide surface for one-way traffic. The proposed parking area includes travel surfaces of sufficient width for all vehicular turning and maneuvering with the imposition of a condition of approval requiring the Applicants to complete and maintain access aisles at a minimum of a 32-foot wide surface for two-way traffic and a 16-foot wide surface for 1-way traffic. This criterion is met.
6. Service drives to off-street parking areas shall be designed and constructed to facilitate the flow of traffic, provide maximum safety of traffic access and egress and maximum safety of pedestrians and vehicular traffic on the site. The number of service drives shall be limited to the minimum that will accommodate and serve the traffic anticipated. Service drives shall be clearly and permanently marked and defined through the use of rails, fences, walls or other barriers or markers. Service drives to drive in establishments shall be designed to avoid backing movements or other maneuvering within a street other than an alley.

FINDING: No service drives are proposed. This criterion is inapplicable.

7. Service drives shall have a minimum vision clearance area formed by the intersection of the driveway centerline, the street right of way line and a straight line joining said lines through points 30 feet from their intersection.

FINDING: No service drives are proposed. This criterion is inapplicable.

8. Parking spaces along the outer boundaries of a parking area shall be contained by a curb or bumper rail placed to prevent a motor vehicle from extending over an adjacent property line or a street right of way.

FINDING: The proposed parking is located over 400 feet from any property line or a street right of way. Therefore, it is impossible for a motor vehicle to extend over an adjacent property line or street right of way. Accordingly, evidence in the record supports a finding that no curbs or bumper rails are required to prevent a motor vehicle from extending over an adjacent property line or a street right of way. This criterion is inapplicable.

G. Off-Street Parking Lot Design. All off-street parking lots shall be designed subject to County standards for stalls and aisles as set forth in the following drawings and table:

(SEE TABLE 1 AT END OF CHAPTER 18.116)

1. For one row of stalls use "C" + "D" as minimum bay width.
2. Public alley width may be included as part of dimension "D," but all parking stalls must be on private property, off the public right of way.
3. For estimating available parking area, use 300-325 square feet per vehicle for stall, aisle and access areas.
4. For large parking lots exceeding 20 stalls, alternate rows may be designed for compact cars provided that the compact stalls do not exceed 30 percent of the total required stalls. A compact stall shall
be eight feet in width and 17 feet in length with appropriate aisle width.

FINDING: The Applicant has proposed nine-foot-wide by twenty-foot-deep head-in parking spaces. As set forth above, the Applicants has proposed a minimum of a thirty-two-foot-wide surface for two-way traffic and 16-foot-wide surface for one-way traffic. The proposed spaces comply with County standards for stalls and aisles as set forth Table 1. A condition of approval requiring the Applicants to complete and maintain all required parking spaces with dimensions of 9-feet wide by 20-feet deep. This criterion is met.


New development and any construction, renovation or alteration of an existing use requiring a site plan review under DCC Title 18 for which planning approval is applied for after the effective date of Ordinance 93-005 shall comply with the provisions of DCC 18.116.031.

A. Number and Type of Bicycle Parking Spaces Required.

   a. All uses that require off-street motor vehicle parking shall, except as specifically noted, provide one bicycle parking space for every five required motor vehicle parking spaces.
   c. When the proposed use is located outside of an unincorporated community, a destination resort, and a rural commercial zone, exceptions to the bicycle parking standards may be authorized by the Planning Director or Hearings Body if the applicants demonstrates one or more of the following:
      i. The proposed use is in a location accessed by roads with no bikeways and bicycle use by customers or employees is unlikely.
      ii. The proposed use generates less than 50 vehicle trips per day.
      iii. No existing buildings on the site will accommodate bicycle parking and no new buildings are proposed.
      iv. The size, weight, or dimensions of the goods sold at the site makes transporting them by bicycle impractical or unlikely.
      v. The use of the site requires equipment that makes it unlikely that a bicycle would be used to access the site. Representative examples would include, but not be limited to, paintball parks, golf courses, shooting ranges, etc.

FINDING: The proposed church is located outside of an unincorporated community, a destination resort, or a rural commercial zone. An exception to the bicycle parking standards is warranted since

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the use of the site (church use and church events), requires equipment (formal attire, catering equipment) that makes it unlikely that a bicycle would be used to access the site. An exception to the bicycle parking is appropriate for this use.

D. CHAPTER 18.124, SITE PLAN REVIEW

1. Section 18.124.030, Approval Required.

   A. No building, grading, parking, land use, sign or other required permit shall be issued for a use subject to DCC 18.124.030, nor shall such a use be commenced, enlarged, altered or changed until a final site plan is approved according to DCC Title 22, the Uniform Development Procedures Ordinance.

   B. The provisions of DCC 18.124.030 shall apply to the following:
   1. All conditional use permits where a site plan is a condition of approval;
   2. Multiple family dwellings with more than three units;
   3. All commercial uses that require parking facilities; remand
   4. All industrial uses;
   5. All other uses that serve the general public or that otherwise require parking facilities, including, but not limited to, landfills, schools, utility facilities, churches, community buildings, cemeteries, mausoleums, crematories, airports, parks and recreation facilities and livestock sales yards; and
   6. As specified for Flood Plain Zones (FP) and Surface Mining Impact Area Combining Zones (SMIA).

FINDING: The site is proposed for use as a church that requires parking facilities. The provisions of this chapter apply.

2. Section 18.124.060, Approval Criteria.

   Approval of a site plan shall be based on the following criteria:

   A. The proposed development shall relate harmoniously to the natural environment and existing development, minimizing visual impacts and preserving natural features including views and topographical features.

FINDING: No new structures or earthmoving are included in the proposal. The record shows that topography, vegetation and distance will either completely or significantly buffer the outdoor church uses visually from nearby properties. The proposal minimizes visual impacts and preserves views and topographical features.

IMPACTS ON SURROUNDING PROPERTIES

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The subject property is surrounded by properties zoned EFU in both public and private ownership. To the north is an approximately 540-acre property engaged in cattle grazing and developed with a guest ranch (Long Hollow Ranch). Other land to the north along Holmes Road is generally engaged in farm use. To the south is a large undeveloped, publicly-owned tract owned and managed by the US Bureau of Land Management (BLM) that consists of juniper woodland. Also to the south is an approximately 80-acre parcel engaged in farm use and developed with a single-family dwelling. Adjacent to and east of the subject property is a 77-acre parcel engaged in farm use and developed with a dwelling. Adjacent to the west are two 40-acre parcels, each of which is developed with a single-family dwelling. Further to the west are two approximately 100-acre parcels engaged in farm use.

As set forth above, the proposed church and church event use would be visually screened by distance, topography, and vegetation so as not be disharmonious with surrounding farm, open space, recreational, or residential use. However, the proposed use of amplified sound could be disharmonious with surrounding residential and recreational use. The Applicant has not proposed a limit regarding amplified sound as measured at any property line. The Applicant has proposed that any use of amplified sound will end by 10 p.m. In the previous application, the Applicant identified 30 decibels. These limitations are sufficient to prevent off-site noise impacts, as 30 decibels is the typical background noise level found in quiet rural environments. A condition of approval will be required to ensure compliance with this criterion.

Consistent with the analysis provided in 247-14-000228-CU and 247-14-000229-SP, there is no evidence of adverse impact to off-site livestock from the use of amplified music at the site.

No evidence of any adverse impacts of the proposed uses to the off-site natural environment, topography, or visual resources has been identified in the record.

**IMPACTS ON THE NATURAL ENVIRONMENT**

The natural environment on the property consists of juniper scrub woodland in the mapped Tumalo Winter Deer Range. Destruction or conversion of natural habitat on the subject property would also potentially be disharmonious with the natural environment of the property, as it could adversely impact forage areas in the Tumalo Winter Deer Range. No church related development or activities are proposed in areas currently in natural vegetation. A condition of approval precluding conversion or clearing of naturally vegetated areas for church use shall be required to ensure a harmonious relationship between the proposal and the natural environment.

Recommended findings regarding the Wildlife Management Plan are included in the Existing Development section below, as this plan was required in association with the farm related dwelling.

**EXISTING DEVELOPMENT**

Existing development of the property consists of residential and agricultural use. Existing structures include a dwelling, barn, and gazebo. The existing farm-related dwelling was approved under 247-17-000573-AD and 574-SP (247-18-000179-A and 182-A) Document No. 2018-506
County File Nos. MA-01-9/CU-00-65 and included a Farm Management Plan (FMP) and Wildlife Management Plan (WMP).

**Residential Use**

The church and church event uses will only occur at the discretion of the Applicant, are of limited duration, and involve no significant changes to the residence. Therefore, the proposed church use would not preclude or significantly interfere with residential use of the property.

**Agricultural Use**

*Prior Approvals*

The existing farm-related dwelling was approved in conjunction with a Farm Management Plan (FMP). The prior approval (MA-01-9/CU-00-65), granted to the Applicants’ predecessor, required that the property be “...currently employed in farm use, as evidenced by a farm management plan...”. In CU-00-65/MA-01-9 the following findings were made regarding farm use of the property:

The applicants have proposed to modify the submitted application for a conditional use permit (CU-00-65) to allow the establishment of a farm-related dwelling on an approximate 216 acre, unirrigated, non-high value parcel. The applicants propose to modify CU-00-65 by proposing a new homesite location and modifying the farm management plan. The modified application indicates that the property currently supports 24 head of cattle, has perimeter fencing and watering troughs. The applicants have submitted financial documents, photographs, soils and irrigation maps, a site plan and burden of proof statement in support of this application, which are incorporated herein by reference. According to the modified farm management plan and business plan, and verified by staff during a visit to the property on May 31, 2001, the subject property currently supports 24 head of cattle, has perimeter fencing along the boundary of the subject property, watering troughs for livestock that are filled with water that according to the applicants will be hauled onto the property until such time a well is installed and electricity provided to the property. The applicants also indicate that they intend to obtain water rights from Squaw Creek Irrigation District. In addition, the applicants indicate that they propose to incorporate approximately 30 hogs into the livestock operation following occupancy of the proposed farm dwelling. The applicants’ plot plan depicts the location of areas that are used for livestock grazing. Based on the above findings and the applicants’ burden of proof statement, staff finds this criterion to be satisfied.

The site plan review criterion requires that the proposed development relate harmoniously to existing development. The agricultural operations contemplated in the FMP no longer exist on the subject property and have been replaced by the current farm operations described below. As such, there is no requirement under this criterion that the church uses be harmonious with such operations.

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Current Farm Use

At the time of the Board’s decision in 247-14-000229-SP, the agricultural use of the property included approximately two acres used to raise poultry for-profit and small-scale livestock grazing (limited to a single ewe at the time of application). The Applicants presented evidence that, as per their Farm Management Plan, they currently own and raise 10 cattle as well as poultry for eggs. The Applicants purchased the cattle as bottle calves in spring of 2015; they are now over 1000 pounds. The cattle graze on irrigated acreage on the subject property (4.6 acres of irrigation water rights) and will be sold for profit in fall 2016. Photographic evidence shows that the cattle are penned and hayed near the barn in the winter and briefly grazed on the 210 acres outside of the house and lawn area in the spring, and on the pasture area 500 feet from the house and lawn area in the summer. The house and two-acre adjoining lawn area and parking are set aside from farm use.

These farm uses are or will be conducted outside of the proposed church use area and that they would not be precluded by or significantly interfered with by the proposed church uses.

Future Farm Use

At the time of the Board’s decision in 247-14-000229-SP, the Applicants indicated that 3.5 (now 4.6) acres of Three Sisters Irrigation District water rights were being obtained and would be applied to the existing lawn area (0.9 acres) and a new fenced grazing area in the southeast corner of the property. The grazing area would encompass approximately 17 acres that would include 2.5 acres of future irrigation. No fewer than 10 head of cattle will be kept in this grazing area during the months of park operation.

During winter months, the cattle would be penned and hayed in an area adjacent to the Applicants’ barn. During the spring, the cattle would graze other areas of the property, but not the dwelling area. The Applicants also had proposed an indoor/outdoor penned chicken operation on the property, to be located within the existing barn area.

The Applicants did not provide any evidence of future farm use that would differ from the current farm use. A condition of approval requiring any future farm uses to be conducted outside of the proposed church use area shall be required.

Wildlife Management Plan

The Wildlife Management Plan (WMP) approved under (MA-01-9/CU-00-65) and modified under 247-14-000401-MC includes required actions on the part of the landowner as part of the dwelling location approval.

The WMP conditions, as modified, primarily focus on required activities located outside the proposed church use area of the property, with the exclusion of condition #3 of 247-14-000401-MC. This condition requires:
3. A vegetative buffer shall be maintained by the property owner at all times around the existing house to provide visual screening and forage opportunities for deer. This buffer shall consist of various screening trees, including Junipers and Aspen, various shrubs, garden and lawn, all located within 500 feet of the dwelling and as configured in the record figure labeled “Google Maps Aerial Photo - 2014”. This vegetation shall be maintained, kept alive, or be replaced in-kind within one year in the event of disease or death of the vegetation.

There is nothing in the record to support a finding that the present proposal precludes compliance with the WMP. The Applicants’ observation that weddings and other outdoor church events will occur primarily during the summer months, such that impacts to the Metolius Winter Range, which contemplates the presence of deer during winter months, would be minimal and not result in a violation of the WMP. The following condition of approval will ensure that church use of the property is not disharmonious with the residential use of the property, which includes compliance with the WMP:

The land owner shall comply with the Wildlife Management Plan (WMP) for the subject property. Where the final WMP for the subject property includes required actions that conflict with church operations, the required actions of that WMP shall take precedence and the operations of the church use shall be curtailed to the extent necessary to allow full compliance with the WMP.

B. The landscape and existing topography shall be preserved to the greatest extent possible, considering development constraints and suitability of the landscape and topography. Preserved trees and shrubs shall be protected.

FINDING: No new structures or topographical changes are included in this proposal. The existing structures and lawn area were developed in association with residential use of the property and are not part of this proposal. The previously-cleared, approximately 1-acre parking area preserves the existing landscape to the greatest extent possible, considering development constraints (required parking needed to accommodate the proposed use). No removal of vegetation outside the church use area is proposed for the church use. This criterion is met.

C. The site plan shall be designed to provide a safe environment, while offering appropriate opportunities for privacy and transition from public to private spaces.

FINDING: Transitions from public to private spaces occur at the driveway entering the property, the long vegetated drive to the site, and in the existing dwelling, which will be partially used in support of the church. As set forth below, this criterion is met.

Safety – Structural

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The Deschutes County Building Division comment, quoted above and incorporated herein by reference, identifies required electrical, fire safety, and structural requirements. A condition of approval shall be required that directs the Applicants to provide written documentation from the Building Division that the on-site structures and electrical systems are suitable for the proposed uses, prior to the initiation of the uses.

**Safety- Wastewater**

The Deschutes County Environmental Soils division noted in its public comment incorporated herein by reference that the septic system has been authorized for this use or essentially the same use under septic authorization notice 247-15-002329 for the proposed private park in File Nos. 247-14-000-228-CU and 229-SP. The proposal for the church is not significantly different from the septic authorization; therefore, the septic system should be adequate to serve the proposal. A similar condition of approval as included in File Nos. 247-14-000-228-CU and 229-SP shall be included to require portable toilets to be provided for events at a rate of one toilet for every 50-100 persons attending an event.

**D. When appropriate, the site plan shall provide for the special needs of disabled persons, such as ramps for wheelchairs and Braille signs.**

**FINDING:** The County Building Division will notify the Applicants of any accessibility requirements. A condition of approval requiring compliance with any required accessibility requirements shall be included. This criterion is met.

**E. The location and number of points of access to the site, interior circulation patterns, separations between pedestrians and moving and parked vehicles, and the arrangement of parking areas in relation to buildings and structures shall be harmonious with proposed and neighboring buildings and structures.**

**FINDING:** The site plan provides a single point of access to the site via the driveway from Holmes Road. Interior circulation includes a driveway circling the lawn area and accessing the barn, vehicle parking area, and existing dwelling. Given the significant setback between the church and church event use area, property lines, and adjacent uses, there is no evidence there will be any conflict with off-site uses regarding access and circulation. The proposed site plan will result in access and circulation that is harmonious with on- and off-site development. This criterion is met.

**F. Surface drainage systems shall be designed to prevent adverse impacts on neighboring properties, streets or surface and subsurface water quality.**

**FINDING:** The evidence shows that storm water drainage will continue to be directed to undeveloped juniper scrub woodland. This will prevent adverse impacts on neighboring properties, streets or surface and subsurface water quality. This criterion is met.
G. Areas, structures and facilities for storage, machinery and equipment services (mail, refuse, utility wires, and the like), loading and parking and similar accessory structures shall be designed, located and buffered or screened to minimize adverse impacts on the site and neighboring properties.

FINDING: No new structures or facilities regulated under this criterion are proposed. The parking area will be screened by existing vegetation, minimizing adverse impacts on the site and neighboring properties. This criterion is met.

H. All aboveground utility installations shall be located to minimize adverse visual impacts on the site and neighboring properties.

FINDING: No new aboveground utility installations are proposed. This criterion is inapplicable.

I. Specific criteria are outlined for each zone and shall be a required part of the site plan (e.g. lot setbacks, etc.)

FINDING: The proposal's compliance with specific zoning standards for the site is addressed above. This criterion is met.

J. All exterior lighting shall be shielded so that direct light does not project off-site.

FINDING: A condition of approval shall require that all exterior lighting shall be shielded so that direct light does not project off-site. This criterion is met.

K. Transportation access to the site shall be adequate for the use.
   1. Where applicable, issues including, but not limited to, sight distance, turn and acceleration/deceleration lanes, right-of-way, roadway surfacing and widening, and bicycle and pedestrian connections, shall be identified.
   2. Mitigation for transportation-related impacts shall be required.
   3. Mitigation shall meet applicable County standards in DCC 17.16 and DCC 17.48, applicable Oregon Department of Transportation (ODOT) mobility and access standards, and applicable American Association of State Highway and Transportation Officials (AASHTO) standards.

FINDING: As discussed above, the Deschutes Transportation Planner's comment on the application recommended the Applicants will be required to contact Mike Martin, Deschutes County Road Department, to ensure there is adequate sight distance at the driveway to/from Holmes Road, a County collector. The Applicant needs to either provide proof of an approach road permit from Deschutes County or obtain one prior to initiating the use.
B. Required Landscaped Areas.

1. The following landscape requirements are established for multi-family, commercial and industrial developments, subject to site plan approval:
   a. A minimum of 15 percent of the lot area shall be landscaped.
   b. All areas subject to the final site plan and not otherwise improved shall be landscaped.

FINDING: The proposed church use is not a multi-family, commercial\(^1\), or industrial development and is not subject to the provisions of 18.124.070(B). These criteria are inapplicable.

2. In addition to the requirement of DCC 18.124.070(B)(1)(a), the following landscape requirements shall apply to parking and loading areas:
   a. A parking or loading area shall be required to be improved with defined landscaped areas totaling no less than 25 square feet per parking space.

FINDING: The 65 required parking spaces require 1,625 square feet of landscaping under this criterion. The proposed parking is wholly surrounded with natural landscaping\(^2\) and will comply with this criterion.

b. In addition to the landscaping required by DCC 18.124.070(B)(2)(a), a parking or loading area shall be separated from any lot line adjacent to a roadway by a landscaped strip at least 10 feet in width, and from any other lot line by a landscaped strip at least five feet in width.

c. A landscaped strip separating a parking or loading area from a street shall contain:
   i. Trees spaced as appropriate to the species, not to exceed 35 feet apart on the average.
   ii. Low shrubs not to reach a height greater than three feet zero inches, spaced no more than eight feet apart on the average.
   iii. Vegetative ground cover.

FINDING: The proposed parking area is located over 400 feet from any property line and is separated from those lot lines by extensive natural and introduced landscaping. These criteria are met.

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\(^1\) DCC 18.04.030 - “Commercial use” means the use of land primarily for the retail sale of products or services, including offices. It does not include factories, warehouses, freight terminals or wholesale distribution centers.

\(^2\) DCC 18.04.030 - “Landscaping” means trees, grass, bushes, shrubs, flowers, and garden areas, and incidental arrangements of fountains, patios, decks, street furniture and ornamental concrete or stonework and artificial plants, bushes or flowers.
d. Landscaping in a parking or loading area shall be located in defined landscaped areas which are uniformly distributed throughout the parking or loading area.

e. The landscaping in a parking area shall have a width of not less than five feet.

f. Provision shall be made for watering planting areas where such care is required.

g. Required landscaping shall be continuously maintained and kept alive and attractive.

h. Maximum height of tree species shall be considered when planting under overhead utility lines.

FINDING: The proposed parking area is wholly surrounded with natural landscaping and will comply with these criteria.

C. Non-motorized Access.

1. Bicycle Parking. The development shall provide the number and type of bicycle parking facilities as required in DCC 18.116.031 and 18.116.035. The location and design of bicycle parking facilities shall be indicated on the site plan.

FINDING: As discussed above, no bicycle parking is required for this use under DCC 18.116.031. This criterion is inapplicable.

2. Pedestrian Access and Circulation:

a. Internal pedestrian circulation shall be provided in new commercial, office and multi-family residential developments through the clustering of buildings, construction of hard surface pedestrian walkways, and similar techniques.

FINDING: The proposed church is not a new commercial, office, or multi-family residential development. This criterion does not apply.

b. Pedestrian walkways shall connect building entrances to one another and from building entrances to public streets and existing or planned transit facilities. On site walkways shall connect with walkways, sidewalks, bikeways, and other pedestrian or bicycle connections on adjacent properties planned or used for commercial, multi family, public or park use.

c. Walkways shall be at least five feet in paved unobstructed width. Walkways which border parking spaces shall be at least seven feet wide unless concrete bumpers or curbing and landscaping or other similar improvements are provided which
4.1.c

prevent parked vehicles from obstructing the walkway. Walkways shall be as direct as possible.

d. Driveway crossings by walkways shall be minimized. Where the walkway system crosses driveways, parking areas and loading areas, the walkway must be clearly identifiable through the use of elevation changes, speed bumps, a different paving material or other similar method.

e. To comply with the Americans with Disabilities Act, the primary building entrance and any walkway that connects a transit stop to building entrances shall have a maximum slope of five percent. Walkways up to eight percent slope are permitted, but are treated as ramps with special standards for railings and landings.

FINDING: Subsections (b) through (e) apply to any use subject to site plan review. The Applicants did not show any pedestrian walkways associated with outdoor church uses, or the indoor church use of the residence. In the decision in CU-14-7, the Hearings Officer found that, "...these criteria have limited application to the Applicants’ proposal inasmuch as there is only one commercial use proposed for the subject property, and there will be a single building entrance for that use. Therefore, there is no need to apply these criteria to require particular pedestrian circulation or walkways on the property."

Therefore, there is no need for the Applicants to provide pedestrian walkways as: 1) there is only a single building entrance, 2) it is unlikely that anyone would access the site on foot, and 3) there are no existing or planned transit facilities in the area.

OREGON ADMINISTRATIVE RULES

A. DIVISION 33 - AGRICULTURAL LAND

1. Section 660-033-0130 - Use of real property for religious activity; county regulation of real property Minimum Standards Applicable to the Schedule of Permitted and Conditional Uses

The following requirements apply to uses specified, and as listed in the table adopted by OAR 660-033-0120. For each section of this rule, the corresponding section number is shown in the table. Where no numerical reference is indicated on the table, this rule does not specify any minimum review or approval criteria. Counties may include procedures and conditions in addition to those listed in the table, as authorized by law.

FINDING: This finding references a Hearings Officer decision, File Nos. 247-16-000159 and 161-AD.

Church use is listed in the table adopted by OAR 660-033-0120 as "2,*18(a)" for "HV Farmland" and "R2" for "Other". The table adopted by OAR 660-033-0120 includes the following notations:

247-17-000573-AD and 574-SP (247-18-000179-A and 182-A)
Document No. 2018-506

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R Use may be allowed, after required review. The use requires notice and the opportunity for a hearing. Minimum standards for uses in the table that include a numerical reference are specified in OAR 660-033-0130. Counties may prescribe additional limitations and requirements to meet local concerns.

* Use not allowed.

# Numerical references for specific uses shown on the table refer to the corresponding section of OAR 660-033-0130. Where no numerical reference is noted for a use on the table, this rule does not establish criteria for the use.

The church site is subject to the “R2” requirement. The “R” code specifies that the use may be allowed, after required review. The use requires notice and the opportunity for a hearing. The notice of this administrative decision and the opportunity for a public hearing if appealed, satisfy this criterion.

The “R2” code is also a numerical reference to sections specified in OAR 660-033-0130. OAR 660-033-0130(2) requires:

(2)(a) No enclosed structure with a design capacity greater than 100 people, or group of structures with a total design capacity of greater than 100 people, shall be approved in connection with the use within three miles of an urban growth boundary, unless an exception is approved pursuant to ORS 197.732 and OAR chapter 660, division 4, or unless the structure is described in a master plan adopted under the provisions of OAR chapter 660, division 34.

(b) Any enclosed structures or group of enclosed structures described in subsection (a) within a tract must be separated by at least one-half mile. For purposes of this section, “tract” means a tract as defined by ORS 215.010(2) that is in existence as of June 17, 2010.

(c) Existing facilities wholly within a farm use zone may be maintained, enhanced or expanded on the same tract, subject to other requirements of law, but enclosed existing structures within a farm use zone within three miles of an urban growth boundary may not be expanded beyond the requirements of this rule.

The subject property is over 9 miles from the closest urban growth boundary (Redmond), such that the criteria in OAR 660-033-0130(2)(a) and (b) are inapplicable. Subsection (c) is inapplicable because it pertains to an existing church, which this is not. Further, the prohibition on expansion only applies to a church within three miles of a UGB.

IV. CONCLUSION:
Based on the application materials submitted by the Applicants and the above analysis, the Board concludes this application for an Administrative Determination and Site Plan Review for a Church in the Exclusive Farm Use/Lower Bridge Subzone (EFU-LB), within a Wildlife Area (WA) Combining Zone conforms to the standards for approval.

Other permits may be required. The applicants are responsible for obtaining any necessary permits from the Deschutes County Building Division and Deschutes County Environmental Soils Division as well as any required state and federal permits.

V. DECISION:

APPROVAL, subject to the following Conditions of Approval.

VI. CONDITIONS OF APPROVAL:

1. Approval is based on the submitted burden of proof, supplemental materials, and written and oral testimony. Any substantial changes to the approved plan will require a new application.

2. The Applicants shall obtain all necessary permits from the Deschutes County Environmental Soils, Environmental Health, and Building Safety Divisions prior to initiation of the use. Specifically, the Applicants shall provide written documentation from Deschutes County Environmental Soils, Environmental Health, and Building Safety Divisions to Deschutes County Planning Division that all church structures and facilities are adequate for the proposed outdoor church uses and comply with all applicable regulations, prior to the initiation of the use.

3. Outdoor church events shall be limited to 27 occurrences each calendar year, with no more than two events occurring after October 1 and before April 1 of the following year.

4. The following use limitations are imposed in order to limit infrastructure improvement obligations and off-site impacts. As conditions of this approval:
   A. Outdoor church events may include set-up/rehearsal the day prior to an event and clean up the day after the event. Events shall:
      i. Be limited to 250 guests;
      ii. Not begin before 7:00 a.m. or end after 10:00 p.m.;
      iii. Limit set-up and take down of all temporary structures and facilities up to one day prior to the event and one day after the event between 7:00 a.m. and 10:00 p.m.;
      iv. Not include food service, including but not limited to rehearsal dinners, on set-up/rehearsal or take down days;
      v. Not include overnight use of the property by the public.
B) Set-up/rehearsal activities the day prior to an event or clean-up activities that exceed these limitations shall be counted as a separate event against the total allowed in a calendar year.

C) Indoor church functions only including 25 or fewer members of the church shall not count toward the annual outdoor event limit.

5. Off-street parking areas used to fulfill the requirements of DCC Title 18 shall not be used for loading and unloading operations except during the periods of the day when not required to take care of parking needs.

6. All areas used for standing and maneuvering of vehicles shall be paved or shall consist of an all-weather base of ¾- gravel, surfaces adequately maintained for all weather use and maintained in a matter that will not create dust problems for neighboring properties.

7. The Applicants shall complete and maintain access aisles at a minimum of a 32-foot wide surface for 2-way traffic and a 16-foot wide surface for 1-way traffic.

8. All exterior lighting shall be shielded so that direct light does not project off-site.

9. Subsequent use of the property for which this permit is issued is conditional upon the unqualified continuance and availability of the amount of parking and loading space required by DCC Title 18.

10. Required parking space shall be available for the parking of operable passenger automobiles of residents, customers, patrons and employees only and shall not be used for the storage of vehicles or materials or for the parking of trucks used in conducting the business or use.

11. Sixty-five (65) spaces of required parking shall be in place prior to the initiation of the use. Required parking spaces shall be 9-feet wide by 20-feet deep.

12. The Applicant shall either provide proof of an approach road permit from Deschutes County or obtain one prior to the initiation of the use. Contact Mike Martin, Deschutes County Road Department, to ensure there is adequate sight distance at the driveway to/from Holmes Road, a County collector.

13. The Applicant shall provide documentation from the Deschutes County Environmental Soils Division that the septic system is adequate for the proposed outdoor church events, prior to the initiation of the use.

14. At a minimum, one portable toilet shall be provided per 50 attendees (or fraction thereof) at outdoor events.
15. Applicants and/or their permittees and invitees shall comply at all times with the requirements of DCC Chapter 8.08, noise control.

16. The Applicants shall maintain required permits for a public water system, as required by the Deschutes County Health Department.

17. The Applicants shall maintain its non-profit status with the IRS to qualify as a church.

18. If the County Building Division determines accessibility requirements are applicable to the proposed use, Applicants shall comply with any such required accessibility requirements within the time directed by the County Building Division.

19. The land owner shall comply with the Wildlife Management Plan (WMP) for the subject property. Where the final WMP for the subject property includes required actions that conflict with church operations, the required actions of that WMP shall take precedence and the operations of the church use shall be curtailed to the extent necessary to allow full compliance with the WMP.

20. Any future farm uses shall be conducted outside of the proposed church use area.

21. Conversion or clearing of naturally vegetated areas for church use is prohibited to ensure a harmonious relationship between the proposal and the natural environment.

22. Church and church event noise shall be limited to 30 decibels from amplified sound as measured at any property line. In addition, any use of amplified sound shall end by 10 p.m.

23. The Board's intention is to permit a non-profit church institution to conduct outdoor events on the property, not to approve a commercial event center. Thereby, only the non-profit church institution is authorized to provide paid services and events under this approval. The church shall maintain records at all times demonstrating that the non-profit church institution is the entity conducting and being paid for any paid services and events under this approval. Such records shall be made available to Deschutes County upon request. Third parties may provide services accessory to the church events, such as officiant services, catering, and equipment rental.

24. All required parking shall be in place prior to the initiation of the use and maintained for the duration of the use.

25. Any on-site camping in association with church activities or any church events conducted in a manner that is not consistent with the limitations imposed by Condition #4 is a violation of this decision. Violation of any requirement of this decision may be subject to revocation of this permit in accordance with 22.36.060, Revocation of Approvals.
Dated this 18 day of July, 2018

BOARD OF COUNTY COMMISSIONERS FOR DESCHUTES COUNTY

Anthony DeBone, Chair

Philip G. Henderson, Vice Chair

Tammy Baney, Commissioner

THIS DECISION BECOMES FINAL WHEN SIGNED. PARTIES MAY APPEAL THIS DECISION TO THE LAND USE BOARD OF APPEALS WITHIN 21 DAYS OF THE DATE ON WHICH THIS DECISION IS FINAL.
BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

CENTRAL OREGON LANDWATCH,

Petitioner,

vs.

DESCHUTES COUNTY,

Respondent,

and

JOHN SHEPHERD AND STEPHANIE SHEPHERD,

Intervenors-Respondents.

LUBA No. 2018-095

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Carol Macbeth, Bend, filed the petition for review and argued on behalf of petitioner.

D. Adam Smith, Deschutes County Assistant Legal Counsel, Bend, filed a response brief and argued on behalf of respondent.

Lisa Klemp, Redmond, filed a response brief and argued on behalf of intervenors-respondents. With her on the brief was Bryant Emerson LLP.

RYAN, Board Chair; BASSHAM, Board Member; ZAMUDIO, Board Member, participated in the decision.

AFFIRMED 12/14/2018
You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.
Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a decision by the board of county commissioners approving an application for an administrative determination and site plan review to authorize weddings and other events associated with a religious use.

MOTION TO INTERVENE

John Shepherd and Stephanie Shepherd (intervenors) move to intervene on the side of the respondent in this appeal. There is no opposition to the motion and it is granted.

FACTS

Intervenors own a 216-acre property zoned Exclusive Farm Use (EFU) and located in the Metolius Deer Winter Range. The property’s location in the winter range subjects it to the standards of the county’s Wildlife Area (WA) overlay zone. The property is developed with a 6,000-square-foot single-family dwelling that received conditional use approval in 2001 as a dwelling in conjunction with farm use, pursuant to an approved farm management plan proposing a commercial farm operation that included grazing cattle and raising hogs. Intervenors currently reside in the dwelling.

John Shepherd is pastor of Shepherdsfield Church, which is registered with the State of Oregon’s Corporations Division and with the Internal Revenue Service as a 501(c)(3) non-profit organization, and which identifies the subject property as the organization’s principal place of business. In July 2017,
intervenors sought county land use approval to conduct church services and
associated activities, including weddings and wedding receptions, on a 1.6-acre
portion of the subject property. The same or similar proposal has been the subject
of prior county decisions that were appealed to LUBA. A comprehensive
summary of prior LUBA decisions regarding county decisions on intervenors’
proposal is included in Central Oregon Landwatch v. Deschutes County, ___ Or
LUBA ___ (LUBA No. 2018-007, May 15, 2018) (slip op at 5-6).

In July 2017, intervenors submitted an application for an administrative
determination and site plan review for their proposal. In January 2018,
intervenors submitted a revised application, and in March 2018, intervenors
submitted another revised application. The March 2018 application proposed
outdoor events limited to 30 one-day events annually. In April 2018, the board of
county commissioners held a public hearing on the March 2018 application, and
that public hearing was continued to June 4, 2018.

In a meeting on June 18, 2018, the board of county commissioners
approved intervenors’ application, and subsequently adopted the challenged
decision approving the application. In the decision, the county concluded that the
Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42
USC sections 2000cc to 2000cc-5 (2000), prohibited the county from applying
provisions of the Deschutes County Code (DCC) that would require denying
intervenors’ application, for reasons that we discuss in more detail below.

This appeal followed.
FOURTH ASSIGNMENT OF ERROR

We briefly describe the local and federal law that applies to our resolution of this appeal before turning to petitioner’s fourth assignment of error.

A. The Deschutes County Code (DCC)

As explained above, intervenors’ property is zoned EFU and is subject to the county-designated Wildlife Area (WA) overlay zone. Deschutes County Code (DCC) 18.88 sets out the regulations that govern uses in areas subject to the WA overlay zone. DCC 18.88.040(A) provides that, except as provided in (B), the uses permitted conditionally by the underlying zone are also allowed as conditional uses in the WA overlay zone. We discuss DCC 18.88.040(A) in more detail below. DCC 18.88.040(B) identifies 10 conditional uses that are prohibited in the portion of the WA overlay zone that is designated as deer winter range, significant elk habitat or antelope range, including a “church.”

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1 The WA overlay zone was first adopted in 1992 and is intended to conserve all important wildlife areas identified in the Deschutes County Comprehensive Plan as a deer winter range, significant elk habitat, antelope range or deer migration corridor.

2 DCC 18.88.040 provides in relevant part:

“A. Except as provided in DCC 18.88.040(B), in a zone with which the WA Zone is combined, the conditional uses permitted shall be those permitted conditionally by the underlying zone subject to the provisions of the Comprehensive Plan, DCC 18.128 and other applicable sections of this title.
B.  RLUIPA

Three provisions of RLUIPA are relevant to our disposition of this appeal.

First, RLUIPA at 42 USC section 2000cc(b)(1) provides that:

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

We refer to that provision as the Equal Terms provision.

A different provision of RLUIPA, codified at 42 USC section 2000cc(a), prohibits local and state governments from applying a land use regulation in a

"B. The following uses are not permitted in that portion of the WA Zone designated as deer winter ranges, significant elk habitat or antelope range:

1. Golf course, not included in a destination resort;

2. Commercial dog kennel;

3. Church;

4. Public or private school;

5. Bed and breakfast inn;

6. Dude Ranch;

7. Playground, recreation facility or community center owned and operated by a government agency or a non-profit community organization;

8. Timeshare unit;

9. Veterinary clinic; [and]

10. Fishing lodge."

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manner that imposes a “substantial burden” on the religious exercise of a person, religious assembly or institution, unless the government demonstrates that the burden is in furtherance of a compelling governmental interest, and is the least restrictive means of furthering that compelling governmental interest.3 We refer

3 RLUIPA, 42 USC § 2000cc, provides in relevant part:

“(a) Substantial burdens.

“(1) General rule. 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.

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“(b) Discrimination and exclusion.

“(1) Equal terms. 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.

“(2) Nondiscrimination. No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.
to that provision as the Substantial Burden provision. A provision of RLUIPA at 42 USC section 2000-cc-3(e) provides a so-called “safe harbor” from liability for a government’s violation of the Substantial Burden provision, and authorizes a local government to take one of a number of listed actions or “by any other means that eliminates the substantial burden.” We refer to that provision as the Safe Harbor provision.

C. Fourth Assignment of Error

1. Equal Terms Provision

The board of county commissioners concluded that DCC 18.88.040(B)(3)’s prohibition on a “church” in the WA overlay zone violates RLUIPA’s Equal Terms provision. The board of county commissioners concluded that DCC 18.88.040(B)(3) prohibits religious assemblies or institutions from occurring in the WA overlay zone, but DCC 18.88.040(A) allows nonreligious assemblies and institutions as conditional uses in the WA overlay zone. Record 69. In its fourth assignment of error, we understand

“(3) Exclusions and limits. No government shall impose or implement a land use regulation that—

“(A) totally excludes religious assemblies from a jurisdiction; or

“(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.”

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petitioner to argue that the board of county commissioners’ conclusion that DCC 18.88.040(B)(3) violates the Equal Terms provision improperly construes the Equal Terms provision and DCC 18.88.040. Petitioner argues that “[a]ll uses similarly situated to churches are equally prohibited in the [WA overlay zone].” Petitioner cites our decision in 1000 Friends of Oregon v. Clackamas County, 46 Or LUBA 375 (2004) in support of its argument.

In 1000 Friends v. Clackamas County, 46 Or LUBA 375, 398-401, appeal dismissed 194 Or App 212, 94 P3d 160 (2004), we rejected a challenge under the Equal Terms provision to an Oregon Administrative Rule (Three Mile Rule) that prohibited a church on high value farmland within three miles of the urban growth boundary (UGB). We rejected the argument that the provisions of the Three Mile Rule allowing a “rural community center” that served a rural

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4 LUBA’s standard of review for decisions like the challenged decision is set out at ORS 197.835(8) and (9). Petitioner argues that our “standard of review” is that the county is precluded from considering the Equal Terms provision for the same reasons petitioner sets out in its first assignment of error. Petitioner for Review 36. For the reasons we explain in our resolution of the first assignment of error, we reject that as our standard of review.

5 In its fourth assignment of error, petitioner also argues, similar to its argument in the second assignment of error, that intervenors’ activities are not a “religious assembly or institution,” but does not further develop that argument in the fourth assignment of error. Accordingly, we address that argument in our resolution of petitioner’s second assignment of error.
population on high value farmland within three miles of a UGB, while
prohibiting a church on the same land, treated religious assemblies and
institutions on less than equal terms than rural community centers. We explained
our understanding of the purpose of the Three Mile Rule as intended to help
preserve the urban-rural boundary protected by Statewide Planning Goal 14
(Urbanization), by limiting urban uses on rural land close to UGBs. Id. at 399-401. The key fact in that case was that the proposed church served an urban
congregation within the City of Mollala. However, we suggested that if the
church served a rural population, the Three Mile Rule would likely violate the
Equal Terms provision, because there would then be no legally significant
distinction between the prohibited religious use and the allowed non-religious
use, with respect to the purpose of the Three Mile Rule. Id.

1000 Friends does not assist petitioner because, for the reasons we explain
below, the key factual distinction that was present in that case in not present here.
Rather, this case presents the factual situation that we suggested would violate
the Equal Terms provision: there is no legally significant distinction between the
prohibited religious use and the allowed non-religious uses in the WA overlay
zone.

RLUIPA is concerned with protecting “religious assembl[ies] or
institution[s]” from unequal treatment under zoning laws. 42 USC §
2000cc(b)(1). Intervenors’ activities on their property qualify as a “religious
assembly [or] institution” within the meaning of the Equal Terms provision.
In *Young v. Jackson County*, 58 Or LUBA 64, 74 (2008), aff’d 227 Or App 229, 205 P3d 890 (2009), we explained the question to be answered in resolving a challenge under the Equal Terms provision is whether the applicable zoning scheme allows religious assemblies and institutions in the applicable zone on less than equal terms than non-religious assemblies and institutions. DCC 18.88.040(A) allows various non-religious assemblies and institutions to operate as conditional uses in the WA overlay zone, including: wineries (DCC 18.16.025(F)); “Agri-tourism and other commercial events and activities subject to DCC 18.16.042” (DCC 18.16.025(J));⁶ “Commercial activities that are in conjunction with farm use” (DCC 18.16.030(E)); a living history museum (DCC 18.16.030(W)); extended outdoor mass gatherings (DCC 18.16.030(AA)); destination resorts (DCC 18.16.035); and guest ranches (DCC 18.16.037).

⁶ DCC 18.04.030 defines “Commercial event or activity” as “any meeting, celebratory gathering, wedding, party, or similar uses consisting of any assembly of persons and the sale of goods or services. It does not include agri-tourism. In DCC 18.16.042, a commercial event or activity shall be related to and supportive of agriculture.”

DCC 18.04.030 defines “Agri-tourism” as “a commercial enterprise at a working farm or ranch that is incidental and subordinate to the existing farm use of the tract that promotes successful agriculture, generates supplemental income for the owner and complies with Oregon Statute and Rule. Any assembly of persons shall be for the purpose of taking part in agriculturally based operations or activities such as animal or crop care, picking fruits or vegetables, cooking or cleaning farm products, tasting farm products; or learning about farm or ranch operations. Agri-tourism does not include ‘commercial events or activities.’ Celebratory gatherings, weddings, parties or similar uses are not agri-tourism.”
Churches are not treated equally in the WA overlay zone, because churches, which encompass elements of both a religious institution and a religious assembly, are prohibited in the WA overlay zone. The provisions of the DCC cited above allow properties like intervenors’ — that are zoned EFU and located in the WA overlay zone — to be used for assemblies and institutions that are not religious, such as secular weddings and wedding receptions, but that have similar impacts on agricultural lands and on the wildlife corridor that is protected by the WA overlay zone. For example, property in the EFU/WA overlay zone is allowed to be used by a “winery” for weddings and other commercial events in conjunction with agricultural activities, which are secular assemblies, but is not allowed to be used by a church for religious assembly. Record 665, 703-04 (approving a winery and “private events” on property located in the EFU/WA overlay zone). While the county presumably has a legitimate governmental interest in preserving wildlife migration corridors, under RLUIPA the county cannot treat religious assemblies in the WA Overlay zone on less favorable terms than non-religious assemblies with similar impacts on wildlife. See Lighthouse Institute for Evangelism v. City of Long Branch, 510 F3d 253, 270 (3rd Cir 2007), cert den 553 US 1605 (2008) (the focus under the Equal Terms provision is less

7 An “assembly” for purposes of the Equal Terms provision has been defined as places where groups or individuals dedicated to similar purposes, whether social, educational, recreational or otherwise, meet together to pursue their interests. Midrash Sephardi, Inc. v. Town of Surfside, 366 F3d 1214, 1230-31 (11th Cir 2004), cert den 543 US 1146 (2005).
on functional similarities or dissimilarities and more on whether the secular
assembly “causes no lesser harm to the interests the regulation seeks to
advance”). Accordingly, we agree with intervenors that the board of county
commissioners correctly concluded that the express exclusion of churches in
DCC 18.88.040(B)(3) from the WA overlay zone, while allowing nonreligious
assemblies and institutions pursuant to DCC 18.88.040(A), violates the Equal
Terms provision.

Finally, we understand petitioner to argue that even if DCC
18.88.040(B)(3) violates the Equal Terms provision, ORS 197.175(2)(d)
nonetheless requires the county to apply DCC 18.88.040(B)(3) to intervenors’
proposal. We understand petitioner to argue that a conclusion that DCC
18.88.040(B)(3) violates the Equal Terms provision does not operate to waive
application of that code provision, as required by the county’s comprehensive
plan and land use regulations. Accordingly, petitioner argues that the county
must deny the applications under DCC 18.88.040(B)(3), notwithstanding the
county’s conclusion that that code provision is inconsistent with the Equal Terms
provision.

Under the Article VI of the United States Constitution, the Supremacy
Clause, the county would almost certainly lack authority to deny the applications,
based on nonconformance with local or state regulations that the county had
concluded cannot be applied to the proposed use consistently with RLUIPA. Accordingly, we conclude that the board of county commissioners properly declined to apply DCC 18.88.040(B)(3) to intervenors’ application.

2. Substantial Burden/Safe Harbor

The board of county commissioners also concluded that DCC 18.88.040(B)(3) substantially burdens intervenors’ religious exercise, and relied on the Safe Harbor provision to not apply DCC 18.88.040(B)(3) to intervenors’ application. See n 3. Because we have affirmed the county’s conclusion that application of DCC 18.88.040(B)(3) to the proposed use would violate the Equal Terms provision, we do not address the county’s alternative basis for approving the application — that application of DCC 18.88.040(B)(3) to deny intervenors’ application would also substantially burden intervenors’ religious exercise.

The fourth assignment of error is denied.

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8 As noted, the WA overlay zone and the provisions of DCC 18.88 were first adopted in 1992, eight years before Congress enacted RLUIPA.

9 We understand the express language of the Safe Harbor provision to provide protection from liability and authorization for a government to take measures to avoid violation of the Substantial Burden provision, but not to apply to violations or corrective measures under the Equal Terms provision. But see Civil Liberties for Urban Believers v. City of Chicago, 342 F3d 752, 762 (7th Cir 2003), cert den 541 US 1096 (2004) (the Safe Harbor provision is a potential option to cure violations of both the Equal Terms and Substantial Burden provisions).
SECOND ASSIGNMENT OF ERROR

Consistent with ORS 215.283(1)(b), DCC 18.16.025(1)(C) allows “churches” in the EFU zone. In addition, ORS 215.441, initially adopted in 2001, limits local authority to deny land use approval for activities customarily associated with a church or similar place of worship. In relevant part, ORS 215.441(1) provides that if a “church, synagogue, temple, mosque, chapel, meeting house or other nonresidential place of worship” is allowed on real property under state and local law, the county must allow reasonable use of the property for activities customarily associated with the practices of the religious activity, including “weddings.”

The board of county commissioners adopted findings concluding that intervenors’ use of its property is a “church” within the meaning of DCC 18.04.030, which defines “church” as used in the DCC as “an institution that has nonprofit status as a church established with the Internal Revenue Service.” Therefore, the board of county commissioners concluded, ORS 215.441 also requires the county to allow “activities customarily associated with the practices of the religious activity” to be conducted on the property, including weddings and wedding receptions.

10 By itself, ORS 215.441 does not authorize a church in any zone, or extend any protections if a church is not allowed in the applicable zone.

11 ORS 215.283(1)(a) allows “churches” in the EFU zone but does not define the term “church.”

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In its second assignment of error, petitioner argues that the activities that intervenors conduct on their property do not qualify as a “church,” and therefore the proposed activities of holding weddings and wedding receptions are not authorized under ORS 215.441. Petitioner argues that the event activities intervenors seek to conduct generate income, and a profit, and therefore the property cannot serve as a church. We also understand petitioner to argue that even if intervenors’ property qualifies as a church, the “reasonable use of the real property for activities customarily associated with the practices of the religious activity” is not authorized under ORS 215.441 because there is no “nonresidential place of worship” on the property, since intervenors live on the property and more specifically, in the dwelling on the property. Petitioner argues that ORS 215.441 authorizes activities customarily associated with the practices of the religious activity only if the “church” that is the subject of the religious practice is a “nonresidential place of worship.”

We concluded above that DCC 18.88.040(B)(3) violates the Equal Terms provision, which is concerned with protecting “religious assembl[ies] or institution[s]” from unequal treatment under local zoning laws. DCC 18.88.040(A) allows assemblies (weddings and receptions) to occur on land in the WA overlay zone as an accessory to secular land uses, such as wineries, but

12 We note that notwithstanding the county’s reliance on the DCC definition of “church,” it is the meaning of “church” in ORS 215.283(1)(a) that controls. Bechtold v. Jackson County, 42 Or LUBA 204, 212 (2002).
DCC 18.88.040(B)(3) prohibits them if they are proposed to be conducted as an accessory to a religious land use. Accordingly, because RLUIPA’s focus is on protecting religious assembly from unequal treatment, petitioner’s argument that intervenors’ religious use of their dwelling does not qualify as a “church,” and therefore that ORS 215.441 does not apply to authorize activities customarily associated with the practice of the religious activity, does not provide a basis for us to remand the decision. Stated differently, even if intervenors’ religious use of their dwelling and property does not constitute a “church” for purposes of ORS 215.441 or ORS 215.283(1)(a), that has no bearing on whether the county is obligated, under the Equal Terms provision, to treat religious assemblies and institutions no less favorably than secular assemblies and institutions in the WA overlay zone.

The second assignment of error is denied.

**FIRST ASSIGNMENT OF ERROR**

In its first assignment of error, we understand petitioner to argue that the board of county commissioners improperly construed the applicable law in approving the application. ORS 197.835(9)(a)(D). We understand petitioner to argue that principles of issue preclusion operate to preclude the county from considering issues that were decided adversely to intervenors in *Central Oregon Landwatch v. Deschutes County*, 75 Or LUBA 284, *aff’d* 287 Or App 239, 400 P3d 325 (2017) (*COLW*). In *COLW*, LUBA concluded that DCC 18.88.040(B)(3) prohibits a church in the WA overlay zone. Petitioner argues that because we
concluded in COLW that DCC 18.88.040(B)(3) prohibits churches in the WA overlay zone, the county and intervenors are "precluded from relitigating this claim." Petition for Review 16.

The county and intervenors respond that the principles of issue preclusion and claim preclusion do not apply to the county’s decision, because the decision is one on a new application. We agree.

The principle of issue preclusion bars relitigation of an issue in subsequent proceedings when the issue has been determined by a valid and final determination in a prior proceeding. Nelson v. Emerald People’s Utility Dist., 318 Or 99, 103, 862 P2d 1293 (1993). We set out the five requirements for issue preclusion from Nelson in our decision in Lawrence v. Clackamas County, 40 Or LUBA 507, 519 (2001), aff’d 180 Or App 495, 43 P3d 1192 (2002):

“When an issue has been decided in a prior proceeding, the prior decision on that issue may preclude relitigation of the issue if five requirements are met: (1) the issue in the two proceedings is identical; (2) the issue was actually litigated and was essential to a final decision on the merits in the prior proceeding; (3) the party sought to be precluded had a full and fair opportunity to be heard on that issue; (4) the party sought to be precluded was a party or was in privity with a party to the prior proceeding; and (5) the prior proceeding was the type of proceeding to which preclusive effect will be given. Nelson v. Emerald People’s Utility Dist., 318 Or at 104.”

Petitioner does not cite Nelson, or otherwise develop any argument that any of the factors in Nelson are met. In addition, in Lawrence, we concluded that quasi-judicial land use proceedings are generally not the kind of proceedings that
should be given preclusive effect on subsequent land use applications. The
decision challenged in \textit{COLW} was a decision on an application for a permit, and
the decision challenged in the present appeal is a decision on a different, more
recent application for a permit, based on an entirely different legal theory for
approving the permit \textit{(i.e., RLUIPA)}. The nature of successive land use
applications and land use decisions is such that it will be a rare circumstance, if
ever, that a prior land use proceeding precludes the ability of the applicant to file
a new land use application, based on different evidence or a different legal theory,
and obtain a new land use decision on the new application.

The first assignment of error is denied.

\textbf{THIRD ASSIGNMENT OF ERROR}

DCC 22.20.15 prohibits the county from approving a land use application
if a property is in violation of conditions of approval of previous land use
decisions. In its third assignment of error, petitioner argues that the board of
county commissioners improperly construed DCC 22.20.15. Petition for Review
18-19, 29. According to petitioner, the property is in violation of a condition of
approval of the 2001 decision approving intervenors' farm dwelling that required
a cattle and hog operation to be implemented. Petitioner cites to evidence that in
2015 there was no irrigation on the subject property, and that in a 2014
proceeding in the Oregon Tax Court, intervenor Shepherd stated that he would
have to spend considerable money to purchase and maintain livestock.
Intervenors respond by arguing that under DCC 22.20.15(C) there must be a determination of noncompliance. DCC 22.20.15(C) provides that: 

"[a] violation means the property has been determined to not be in compliance either through a prior decision by the County or other tribunal, or through the review process of the current application, or through an acknowledgement by the alleged violator in a signed voluntary compliance agreement."

Intervenors argue that no violation has been determined to have occurred either in a prior decision or in the current decision. The board of county commissioners considered petitioner’s arguments and concluded that a property owner has “reasonable latitude” in changing the types and numbers of livestock to be raised, and that the evidence is that intervenors are complying with the conditions of approval for the farm dwelling. We agree with intervenors that the board of county commissioners properly concluded that DCC 22.20.15 did not prohibit the county from approving the application.

The third assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

In its fifth assignment of error, petitioner argues that the county’s decision violates the Establishment Clause of the First Amendment to the U.S.
Constitution, by expressing governmental preference for religious land uses over secular land uses.\textsuperscript{13}

The county and intervenors respond that the issue presented in the fifth assignment of error was not raised prior to the close of the initial evidentiary hearing and therefore petitioner is precluded from raising the issue for the first time at LUBA. ORS 197.763(1); ORS 197.835(3). In the petition for review section entitled “Preservation of Issues,” petitioner states “Please refer to the preservation of error for the Fourth Assignment of Error.” Petition for Review 48. That section of the petition cites Record 1164. We have reviewed the cited record page, and we agree with respondents that the issue raised in the fifth assignment of error was not raised.

The fifth assignment of error is denied.

The county’s decision is affirmed.

\textsuperscript{13} The First Amendment to the U.S. Constitution states in relevant part that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]”
IN THE COURT OF APPEALS OF THE STATE OF OREGON

CENTRAL OREGON LANDWATCH, Petitioner,

v.

DESCHUTES COUNTY, JOHN SHEPHERD, and STEPHANIE SHEPHERD, Respondents.

Land Use Board of Appeals
2018095
A169788

Argued and submitted on March 11, 2019.
Before Ortega, Presiding Judge, and Powers, Judge, and Landau, Senior Judge.
Attorney for Petitioner: Carol Macbeth.
Attorney for Respondent Deschutes County: D. Adam Smith.
Attorney for Respondents John Shepherd and Stephanie Shepherd: Lisa Klemp.

AFFIRMED WITHOUT OPINION

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevaling party: Respondents

[ ] No costs allowed.
[X] Costs allowed, payable by Petitioner.