

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 CENTRAL OREGON LANDWATCH,
5 *Petitioner,*

6
7 vs.

8
9 DESCHUTES COUNTY,
10 *Respondent,*

11 and

12
13
14 SHEPHERDSFIELD CHURCH,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2016-103

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from Deschutes County.

23
24 Carol Macbeth, Bend, filed the petition for review and argued on behalf
25 of petitioner.

26
27 No appearance by Deschutes County.

28
29 Daniel P. Dalton, Detroit, Michigan, filed the response brief and argued
30 on behalf of intervenor-respondent. J. Ryan Adams, Canby, also argued on
31 behalf of intervenor-respondent.

32
33 BASSHAM, Board Member; HOLSTUN, Board Chair; RYAN, Board
34 Member, participated in the decision.

35
36 REVERSED 04/26/2017

37
38 You are entitled to judicial review of this Order. Judicial review is

1 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a decision approving a church on a parcel zoned for exclusive farm use (EFU).

FACTS

The subject property is a 216-acre parcel, zoned EFU and subject to a Wildlife Area (WA) combining, or overlay, zone. The subject parcel does not have soils that qualify it as high-value farmland, and is located more than three miles from an urban growth boundary (UGB). The soils and proximity have implications for the uses that are permitted under state law. The parcel is located within the Metolius Deer Winter Range, an inventoried resource under Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces). The deer winter range has implications for the uses that are permitted under county law. 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.

John Shepherd and Stephanie Shepherd currently own the subject property, and reside in the dwelling. Since 2011, the Shepherds have operated a commercial wedding and event business on the property through their limited liability company, Shepherdsfield, LLC. Events are generally conducted

1 outdoors on a 1.6-acre landscaped lawn area, with gazebo, adjacent to the
2 dwelling. In 2013, the Shepherds first attempted to obtain land use approval
3 for their wedding and event business, by applying to the county to operate the
4 business as a “private park,” which is a use conditionally allowed under state
5 and county law in the EFU zone. The county initially denied the Shepherds’
6 application to establish a private park on the subject property based on several
7 issues, including that the application did not include an application for site plan
8 review. The Shepherds reapplied, seeking site plan review, and in 2015 the
9 county approved the proposal as a private park. That approval was appealed to
10 LUBA, and reversed. *Central Oregon Landwatch v. Deschutes County*, 72 Or
11 LUBA 61 (2015) (*Landwatch I*), *aff’d* 276 Or App 282, 367 P3d 560 (2016)
12 (*Landwatch II*). LUBA concluded that the proposed wedding and event
13 business did not, as a matter of law, qualify as a “private park,” as that land use
14 category is instantiated in the statutory EFU zone. The Court of Appeals
15 affirmed LUBA’s decision.

16 The present appeal concerns the Shepherds’ second attempt to obtain
17 land use approval for their wedding and event business. John Shepherd is a
18 pastor. In January 2014, Shepherd registered intervenor-respondent
19 Shepherdsfield Church (intervenor) with the State of Oregon’s Corporations
20 Division, and registered intervenor with the Internal Revenue Service as a
21 501(c)(3) non-profit organization, identifying the subject property as the
22 principal place of business. In March 2014, the county sent the Shepherds an

1 enforcement letter alleging violation of the county code for locating a church
2 on the property without required land use approval. In September 2015, the
3 county and the Shepherds entered into a voluntary compliance agreement, in
4 which the Shepherds agreed to schedule no further weddings or other events on
5 the property unless they obtain all required land use approvals.

6 In 2016, following the Court of Appeals' decision in *Landwatch II*, the
7 Shepherds filed applications for an administrative determination and site plan
8 review seeking approval of a church on the subject property. As described in
9 the application, the proposed church would provide:

- 10 • Weekly services, primarily conducted in the existing dwelling.
- 11 • Church related events, specifically weddings, conducted outside the
12 existing dwelling and restricted to mid-May through mid-October.
- 13 • Wedding receptions and/or wedding ceremonies outside the existing
14 dwelling and restricted to mid-May through mid-October.
- 15 • Other overflow church events conducted outside the existing dwelling.
- 16 • Family and marriage counseling.
- 17 • Church functions allowed by ORS 215.441.

18 A key statute in this appeal is ORS 215.441. In relevant part, ORS
19 215.441(1) provides that if a “church, synagogue, temple, mosque, chapel,
20 meeting house or other nonresidential place of worship” is allowed on real
21 property under state and local law, a county shall allow reasonable use of the
22 property for activities customarily associated with the practices of the religious

1 activity, including “weddings.”¹ ORS 215.441(2) also provides that a county
2 may subject a proposed church² to reasonable regulations, including site review
3 or design review, concerning the physical characteristics of the church.

¹ ORS 215.441 provides, in relevant part:

“(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 worship services, religion classes, weddings, funerals, child care and meal programs, but not including private or parochial school education for prekindergarten through grade 12 or higher education.

“(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.”

² For convenience only, in this opinion we shall hereafter refer to a place of worship listed in ORS 215.441(1) as a “church,” notwithstanding that the list includes other types of buildings intended for religious use, such as a synagogue, temple, mosque, etc.,

1 A county hearings officer conducted a hearing on the application, at
2 which petitioner appeared in opposition. Petitioner argued that the proposed
3 church is inconsistent with ORS 215.441, because it is located in a dwelling
4 and therefore is not a “nonresidential place of worship.” Even if ORS 215.441
5 applies to the proposed use, petitioner argued that the WA overlay zone, at
6 Deschutes County Code (DCC) 18.88.040(B), prohibits approval of a church
7 on lands designated as deer winter range, and thus prohibits the proposed
8 church on the subject property. Further, petitioner argued that the Shepherds’
9 failure to establish the cattle and hog operation on the property as required
10 under the 2001 farm management plan means that the property is in violation of
11 the 2001 conditions of approval for the dwelling in conjunction with farm use,
12 and the county cannot approve further development of the property until those
13 violations are corrected.

14 On September 1, 2016, the hearings officer issued a decision rejecting
15 petitioner’s arguments and approving the proposed church, with conditions.
16 Conditions include limiting the number of events to 18 per calendar year,
17 between May 15 and October 15, with no more than 250 guests per event, and
18 providing a 65-space parking lot. Petitioner appealed the hearings officer’s
19 decision to the county board of commissioners, which declined review. This
20 appeal followed.

1 **FIRST ASSIGNMENT OF ERROR**

2 Petitioner argues that the hearings officer misconstrued the applicable
3 law in concluding that the proposed use is consistent with ORS 215.441. *See n*
4 1. According to petitioner, the proposed use is not a “non-residential place of
5 worship,” and thus is not consistent with ORS 215.441. Intervenor responds
6 that it is petitioner who misconstrues ORS 215.441. According to intervenor,
7 while ORS 215.441 might not allow the county to approve a proposed
8 *residential* religious building, such as a monastery or convent, the statute is not
9 intended to exclude from its protections the proposed religious use of an
10 existing dwelling that is in residential use.

11 The pertinent text of ORS 215.441 is set out in footnote 1. Resolving the
12 parties’ dispute regarding the meaning of ORS 215.441 requires analysis of the
13 statute’s text and context, in light of any available legislative history.
14 *Landwatch II*, 276 Or at 289 (quoting *Greenfield v. Multnomah County*, 259 Or
15 App 687, 698, 317 P3d 274 (2013)).

16 Initially, we note that ORS 215.441 is not an independent source of
17 authority for a county to approve churches, but operates only in the express
18 contingency that a church or other nonresidential place of worship “is allowed
19 on real property under state law and rules and local zoning ordinances and
20 regulations[.]” *See n* 1. ORS 215.441 provides that, *if* a church or other
21 nonresidential place of worship is allowed under applicable law, then a county
22 must *also* allow “reasonable use of the real property for activities customarily

1 associated with the practices of the religious activity,” including a number of
2 listed activities. By itself, ORS 215.441 does not authorize a church in any
3 zone, or extend any protections if a church is not allowed in the applicable
4 zone.

5 As explained under the third assignment of error, we agree with
6 petitioner that the proposed church is a prohibited use in the WA overlay zone
7 that governs the subject property and, based on our resolution of the third
8 assignment of error, we reverse the county’s decision. It follows that, for
9 purposes of ORS 215.441, the proposed use is not a use that is “allowed on real
10 property under state law and rules and local zoning ordinances and
11 regulations[.]” For that reason, ORS 215.441 has no application or bearing on
12 the present appeal. Consequently, LUBA’s resolution of the parties’ disputes
13 regarding the meaning of ORS 215.441 would be advisory. Rendering an
14 advisory interpretation of a statute would not be consistent with sound
15 principles of judicial review. ORS 197.805. Accordingly, we do not reach the
16 first assignment of error.

17 **THIRD ASSIGNMENT OF ERROR**

18 **A. WA Overlay Zone**

19 As noted, the subject property is located entirely within the Metolius
20 Deer Winter Range, and subject to the WA overlay zone, at DCC 18.88. The
21 purpose of the WA overlay zone is to “conserve important wildlife areas” and
22 “permit development compatible with the protection of the wildlife resource.”

1 DCC 18.88.010. Two subsequent sections set out the development deemed
2 compatible with the protection of wildlife resources. The first is DCC
3 18.88.030, which provides that “[i]n a zone with which the WA Zone is
4 combined, the uses permitted outright shall be those permitted outright by the
5 underlying zone.”³ The second is DCC 18.88.040(A), which provides that the
6 conditional uses allowed in the WA zone are those permitted conditionally in
7 the underlying zone. However, DCC 18.88.040(B) goes on to provide that for
8 three particular types of wildlife resources (deer winter ranges, significant elk
9 habitat, and antelope range), certain uses, including a church, are “not
10 permitted.”⁴ Two following subsections, at DCC 18.88.040(C) and (D), allow

³ DCC 18.88.030 provides in full:

“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.”

⁴ DCC 18.88.040 provides, in relevant part:

“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 certain uses, including a church, as conditional uses in one specific wildlife
2 area, the Bend/La Pine Deer Migration Corridor, subject to restrictions. *See n*
3 9, below.

4 The uses “permitted outright” in the county EFU zone are listed in DCC
5 18.16.020.⁵ That list does not include “churches.” Churches are allowed in the
6 county EFU zone only under two provisions of DCC 18.16.025, which lists
7 uses “Permitted Subject to the Special Provisions” of certain code sections,

-
- “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.”

⁵ DCC 18.16.020 provides:

“Uses Permitted Outright. The following uses and their accessory uses are permitted outright: [followed by a number of listed uses, which do not include a church].”

1 including site review. *See* n 6. Petitioner argued to the hearings officer that the
2 proposed church is not “permitted outright” in the underlying county EFU
3 zone, and therefore not “permitted outright” for purposes of DCC 18.88.030,
4 and that because the property is located within a winter range, the the proposed
5 church is in fact not permitted at all in the WA zone, pursuant to DCC
6 18.88.040(B).

7 The hearings officer rejected that argument, concluding that the
8 prohibition in DCC 18.88.040(B) on churches in winter range applies only to
9 zones where a church is listed as a conditional use in the underlying zone.
10 Earlier in her decision, the hearings officer concluded that a church in the
11 county EFU zone is an “outright permitted use subject to certain provisions as
12 discussed above.” Record 106. In the earlier discussion referred to, the
13 hearings officer relied upon ORS 215.283(1)(a) to conclude that a church is a
14 use permitted outright in the county EFU zone. Record 103.

15 ORS 215.283(1)(a) provides that in most Oregon counties (including
16 Deschutes County) “[c]hurches and cemeteries in conjunction with churches”
17 may be established in the EFU zone. Counties generally cannot apply local
18 supplemental criteria to approve or deny a non-farm use listed under ORS
19 215.283(1). *Brentmar v. Jackson County*, 321 Or 481, 496, 900 P2d 1030
20 (1995). However, LCDC has authority to adopt administrative rules that limit
21 or even prohibit uses listed in ORS 215.283(1). *Lane County v. LCDC*, 325 Or
22 569, 583-84, 942 P2d 278 (1997). With respect to churches, LCDC has

1 adopted administrative rules that provide some limits on approval of churches
2 on agricultural lands, at OAR 660-033-0120, Table 1 and 660-033-0130(2) and
3 (18). In addition, in 2002 LCDC amended OAR 660-033-0120, Table 1, to
4 provide that a church that is “consistent with ORS 215.441” is allowed on
5 agricultural land.

6 The county’s EFU zone implements OAR 660, division 033 by providing
7 in relevant part for “[c]hurches and cemeteries in conjunction with churches
8 consistent with ORS 215.441 and OAR 660-033-0130(2) on non-high value
9 farmland.” DCC 18.16.025(C).⁶ As authorized by ORS 215.441(2)(a), the
10 county adopted regulations that subject churches in the EFU zone to site review
11 provisions at DCC 18.124.

⁶ DCC18.16.025 provides, in relevant part:

“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.

“A. Dwellings customarily provided in conjunction with farm use (farm-related dwellings), subject to DCC 18.16.050.

“* * * * *

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

“D. Expansion of an existing church or cemetery in conjunction with a church on the same tract as the existing use, subject to Oregon Administrative Rules 660-033-0130.”

1 On appeal, petitioner argues, and we agree, that the hearings officer
2 misconstrued the relevant provisions of DCC 18.88 and 18.16. ORS
3 197.835(9)(a)(D). The hearings officer based her conclusion that the proposed
4 church is “permitted outright” under the WA zone for purposes of DCC
5 18.88.030 not on an analysis of the uses listed in the underlying county EFU
6 zone, but instead based solely on ORS 215.283(1)(a). The problem with that
7 reasoning, as petitioner argues, is that the question under DCC 18.88.030 is not
8 how a use is categorized under ORS 215.283, which does not use the terms
9 “permitted outright” or “permitted conditionally” at all. The question is how
10 the use is categorized in the underlying county EFU zone. And there is no
11 possible dispute that the county EFU zone does not list a church under the
12 category of uses at DCC 18.16.020 that are “permitted outright,” in the words
13 of DCC 18.88.030.

14 The county EFU zone of course implements the statutory EFU
15 provisions, as well as the OAR 660, division 033 rules, both of which are
16 available context for interpreting the county EFU zone. However, petitioner
17 notes, correctly, that a use allowed under ORS 215.283(1) may be limited or
18 even prohibited if required under a statewide planning goal such as Goal 5.
19 *Lane County v. LCDC*, 325 Or at 582. Thus, the DCC 18.88 provisions that
20 implement Goal 5 certainly could limit or prohibit uses on winter range that
21 would otherwise be authorized on agricultural land under ORS 215.283(1).
22 Under these circumstances, determining whether a proposed use is “permitted

1 outright” in the underlying county EFU zone for purposes of DCC 18.88.030
2 requires evaluation of the terms of DCC 18.16 and DCC 18.88, read together,
3 and cannot be resolved simply by reference to ORS 215.283(1)(a), as the
4 hearings officer did.

5 In any case, even if ORS 215.283(1)(a) were the sole source of
6 categorization for purposes of DCC 18.88.030, ORS 215.283(1)(a) must be
7 read in context with the applicable provisions of OAR 660, division 033, which
8 impose on churches fairly discretionary regulations at OAR 660-033-0130(2)
9 and (18). The rule also limits churches to those that are consistent with ORS
10 215.441. ORS 215.441(1) requires county review to determine whether
11 proposed activities constitute the “reasonable use of the real property for
12 activities customarily associated with the practices of the religious activity,”
13 which in many cases will require a highly discretionary inquiry. *See* n 1; *see*
14 *also Catholic Diocese of Baker v. Crook County*, 60 Or LUBA 157, 169-72
15 (2009) (evaluating whether a proposed pastoral center is a use “customarily
16 associated” with the practices of chapel and retreat facility). Further, ORS
17 215.441(2)(a) and (b) authorize counties to impose reasonable regulations such
18 as site review on churches, and even authorize counties to prohibit churches if
19 the level of service of public facilities is not adequate to serve the place of
20 worship. Thus, notwithstanding that ORS 215.283(1)(a) places a church in a
21 category of non-farm uses that is generally free of supplemental local standards
22 under *Brentmar*, the legislature and LCDC have chosen to subject churches in

1 the EFU zone to several discretionary reviews, and further authorized counties
2 to subject churches to discretionary local standards, which authority the county
3 has exercised in the present case. Given the discretionary reviews that are
4 required or authorized under OAR 660-033 and ORS 215.441, it is simply not
5 accurate to characterize a church as a use “permitted outright” in the statutes
6 governing the EFU zone, or to extrapolate from ORS 215.283(1)(a) that
7 churches are deemed to be “permitted outright” in the county EFU zone.

8 On appeal, we understand intervenor to argue that uses that are
9 “Permitted Subject to the Special Provisions” listed at DCC 18.16.025 should
10 be viewed as a subset of uses that are “permitted outright,” for purposes of
11 DCC 18.88, notwithstanding that such uses are not expressly listed as
12 “permitted outright” under DCC 18.16.020. There are two problems with that
13 response. First, the hearings officer did not interpret the relevant provisions of
14 DCC 18.16 and 18.88 to that effect. Second, even if the hearings officer had
15 made that attempt, we agree with petitioner that such an interpretation would
16 be inconsistent with the express language of DCC 18.16 and 18.88, read in
17 context. The term “permitted outright” used in DCC 18.88.030 is clearly a
18 reference to the uses expressly listed as “permitted outright” in each county
19 zone, which in the EFU zone are the uses listed at DCC 18.16.020. *See* n 5.
20 Uses listed in other sections of DCC 18.16, however they are categorized, are
21 not uses that are “permitted outright in the underlying zone,” in the words of
22 DCC 18.88.030.

1 Petitioner also argues that any such interpretation would be inconsistent
2 with the purpose of the WA zone, which is to conserve wildlife habitat
3 resources designated under Goal 5 and allow only development that is
4 compatible with those resources. DCC 18.88.010. Petitioner argues that the
5 prohibition on churches in DCC 18.88.040(B) reflects the recommendations in
6 a 2009 interagency report on wildlife in the county, which recommended that
7 churches and similar uses be prohibited in winter range because they generate
8 high levels of public activity, noise and habitat alterations.⁷

9 We agree with petitioner that it would be inconsistent with the purpose
10 of the WA zone, which implements Goal 5, to interpret DCC 18.88 and 18.16
11 as implicitly allowing churches in the county EFU zone as “permitted
12 outright,” and thus permitted outright on lands designated as winter range,
13 while treating churches in all other county zones as prohibited uses on winter
14 range.⁸ Intervenor offers no basis to presume that a church in an EFU zone

⁷ Petitioner also notes that the interagency report recommended prohibiting on winter range any outdoor commercial events, including “wedding venues,” a recommendation noted in the Deschutes County Comprehensive Plan (DCCP), 2.6, page 51.

⁸ As far as we can tell, all county zones that allow churches (with the sole exception of the EFU zone) expressly list churches under the category of conditional uses. *See, e.g.*, DCC 18.60.030(O) (listing a “church” as a conditional use in the Rural Residential-10 zone). No county zone, including the EFU zone, categorizes a church as a use “permitted outright.” Thus, under the hearings officer’s interpretation that the DCC 18.88.040(B) prohibition on churches on winter range is exclusively limited to underlying zones where churches are listed as conditional uses, the prohibition would appear to apply

1 would have any fewer conflicts with winter range than the same church on
2 winter range in any other county zone. The county WA zone is intended to
3 implement Goal 5, and if its terms are ambiguous the county cannot choose an
4 interpretation that is contrary to the goal it implements over an interpretation
5 that is consistent with the goal. *White v. Lane County*, 68 Or LUBA 423, 434
6 (2013); *see also* ORS 197.829(1)(d) (LUBA must affirm a local government’s
7 interpretation of a local provision, unless the interpretation is contrary to the
8 goal, rule or statute the provision implements); *Friends of Neabeck Hill v. City*
9 *of Philomath*, 139 Or App 39, 50 n7, 911 P2d 350 (1996) (a code interpretation
10 is reversible under ORS 197.829(1)(d) where the code provision is capable of
11 being applied consistent with the goal it implements, but the interpretation is
12 not). Intervenor’s proposed interpretation—that a church that is categorized in
13 the underlying zone as “Permitted Subject to the Special Provisions” listed in
14 DCC 18.16.025 should nonetheless be deemed to be “permitted outright” for
15 purposes of DCC 18.88.030—seems contrary to the purposes of the WA zone
16 and Goal 5, which the WA zone implements. Under intervenor’s interpretation,
17 the relevant DCC provisions would categorically prohibit churches on winter
18 range in nearly all county zones, presumably due to the inherent
19 incompatibility of churches with winter range, yet allow churches with the
20 same impacts on winter range in the EFU zone, as an implicit subset of outright

on winter range in all county zones, with the sole exception of the county EFU zone.

1 permitted uses. Such an interpretation cannot possibly be consistent with Goal
2 5, or what the county intended when it adopted the WA zone to implement the
3 goal.

4 We note that the WA zone describes only two categories of uses allowed
5 in the WA zone, set out in DCC 18.88.030 and DCC 18.88.040. As petitioner
6 points out, the binary structure of the WA zone tracks the structure of almost
7 all county zones, which typically set out only two primary categories of uses:
8 those permitted outright and those permitted conditionally. *See, e.g.*, the RR-
9 10 zone at DCC 18.60.020 (uses permitted outright) and DCC 18.60.030
10 (conditional uses permitted). By contrast, the structure of the county EFU zone
11 is much more complex than other county zones, presumably because it
12 implements a complex statutory scheme that is elaborated by a complex goal-
13 based and administrative rule scheme. The county EFU zone includes at least
14 eight distinct use categories governed by separate sections. These include
15 DCC 18.16.020 (permitted outright); DCC 18.16.025 (permitted subject to
16 special provisions); DCC 18.16.030 (conditional uses permitted on both high-
17 value and non-high-value farmland); DCC 18.16.031 (conditional uses on non-
18 high value farmland only); DCC 18.16.033 (conditional uses on high value
19 farmland only); DCC 18.16.035 (destination resorts); DCC 18.16.037 (guest
20 ranch); and DCC 18.16.042 (agri-tourism). How the complex structure of the
21 EFU zone is applied to the more binary WA zone structure, and the role that

1 DCC 18.88.040(B) plays as applied to the complex categorizations in the EFU
2 zone, is not obvious.

3 Petitioner argues that DCC 18.88.040(B), read in context with the other
4 provisions of DCC 18.88.040, should be understood as applying to a specific
5 subset of particularly problematic uses in specific types of wildlife habitat,
6 even if those uses are not labeled “conditional uses” in the underlying zone.
7 DCC 18.88.040(B), the text of which is quoted at n 4, prohibits certain uses in
8 three particular types of wildlife habitat: deer winter range, significant elk
9 habitat, and antelope range. Other provisions of DCC 18.88.040 similarly focus
10 on specific uses in particular wildlife areas. DCC 18.88.040(C) and (D) quoted
11 in the margin, allow as conditional uses certain uses in one particular wildlife
12 habitat, the Bend/La Pine Deer Migration Corridor, subject to certain
13 standards.⁹ DCC 18.88.040(F) allows the expansion of a use listed in DCC

⁹ DCC 18.88.040(C), (D) and (F) provide:

“C. Subject to DCC 18.88.040(E), the following uses are permitted in that portion of the WA zone designated as the Bend/La Pine Deer Migration Corridor as conditional uses:

- “1. Church;
- “2. Public or private school;
- “3. Bed and breakfast inn;
- “4. Playground, recreation facility or community center owned and operated by a government agency or a nonprofit community organization;

1 18.88.040(B), which would include churches, if lawfully established prior to
2 August 5, 1992, subject to applicable standards. Petitioner argues that the
3 applicability of DCC 18.88.040(B), (C), (D) and (F) to the specific uses and
4 circumstances described are not expressly contingent on whether the uses at
5 issue are listed as conditional uses in the underlying zone.

6 We agree with petitioner’s reading of the relevant code provisions, in
7 context. The hearings officer interpreted DCC 18.88.040(B) in context with
8 DCC 18.88.040(A) to the effect that the former is *exclusively* concerned with
9 uses that are listed as conditional uses in the underlying zone. That contextual
10 reading is less persuasive when the other provisions of DCC 18.88.040 are
11 considered, and when DCC 18.88.040 is applied to a zone such as the EFU
12 zone, which categorizes uses in a complex, non-binary way. The text of DCC
13 18.88.040(B), (C), (D) and (F) does not expressly limit the applicability of

“D. Subject to DCC 18.113, destination resorts are allowed as a conditional use in that portion of the WA zone designated as the Bend/La Pine Deer Migration Corridor as long as the property is not in an area designated as “Deer Migration Priority Area” on the 1999 ODFW map submitted to the South County Regional Problem Solving Group.

“* * * * *

“F. Expansion of any use listed in DCC 18.88.040(B) that was lawfully established prior to August 5, 1992, is allowed, subject to provisions of DCC Title 18 applicable to the establishment of such uses. Expansion of golf courses under DCC 18.88.040 shall be limited to a final size of 18 holes.”

1 those subsections to uses that are listed as conditional uses in the underlying
2 zone. If the hearings officer’s interpretation is extended to all sub-sections of
3 DCC 18.88, such that all sub-sections are deemed to be exclusively concerned
4 with uses that are listed as conditional uses in the underlying zone, several
5 textual anomalies surface. There would be no need, for example, to specify in
6 DCC 18.88.040(C) and (D) that the described uses are permitted in the
7 Bend/La Pine Deer Migration Corridor “as conditional uses,” if all uses subject
8 to DCC 18.88.040 are already categorized as conditional uses in the underlying
9 zone.

10 Further, we note that DCC 18.88.040(F) allows the expansion of an
11 existing use listed in DCC 18.88.040(B), including a church, subject to
12 restrictions. In the EFU zone, expansion of an existing church is a specific use
13 listed in DCC 18.16.025, which is not one of the use categories expressly
14 labeled for conditional uses. *See* n 4. That suggests that DCC 18.88.040(F)
15 operates by its terms, and is not limited to uses that are labeled as a
16 “conditional use” in the underlying zone. Because DCC 18.88.040(F)
17 references DCC 18.88.040(B), that also suggests that the latter operates by its
18 terms, and is not limited to uses that are expressly categorized as “conditional
19 uses” in the underlying zone.

20 Most importantly, petitioner’s interpretation—that DCC 18.88.040(B),
21 (C), (D) and (F) operate by their own terms and are not limited to uses listed as
22 conditional uses in the underlying zones—is more consistent with the purpose

1 of the WA zone and the goal it implements than the hearings officer's
2 interpretation. Under petitioner's view, the uses listed in DCC 18.88.040(B),
3 which are deemed to be inherently incompatible with winter range, are
4 uniformly prohibited on winter range in all cases. Under the hearings officer's
5 contrary view, uses deemed incompatible with winter range such as a church or
6 a dude ranch would be prohibited on winter range in some zones, but allowed
7 in others, notwithstanding that a given church or dude ranch would presumably
8 have the same impacts on winter range no matter what the underlying zone or
9 how uses are categorized in that zone. As explained above, that result cannot
10 possibly be consistent with the intent of the WA zone, or the Goal 5
11 requirements the WA zone implements. Accordingly, we agree with petitioner
12 that, read in context, DCC 18.88.040(B) is not exclusively concerned with uses
13 that are listed as "conditional uses" in the underlying zone, but applies more
14 broadly to other categorizations in the underlying zone, at least those that, as in
15 the present case, are subject to categories that require discretionary reviews and
16 are not "permitted outright in the underlying zone." It follows that the hearings
17 officer erred in concluding that DCC 18.88.040(B) does not apply to the
18 proposed church to be located within winter range. Under DCC 18.88.040(B),
19 a church on winter range is "not permitted."

20 **B. Religious Land Use and Institutionalized Persons Act**

21 Intervenor argues that any interpretation of DCC 18.88 that effectively
22 prohibits a church on winter range would bring the county into conflict with

1 the Religious Land Use and Institutionalized Persons Act (RLUIPA), at 42
2 U.S.C. section 2000cc *et seq.* Among other things, RLUIPA prohibits a
3 government from imposing a land use regulation in a manner that treats a
4 religious assembly or institution on less than equal terms with a nonreligious
5 assembly or institution. 42 USC section 2000cc(b)(1). Intervenor argues that if
6 DCC 18.88 is interpreted to prohibit a church on the subject property, it would
7 run afoul of the “equal terms” provisions of RLUIPA, because the county has
8 approved a dude ranch, at which wedding events are conducted, on an
9 adjoining ranch to the north of the subject property. In addition, intervenor
10 argues that the county recently approved a permit for a farm stand, which
11 includes commercial dinners, on another adjoining parcel. According to
12 intervenor, the county would violate the “equal terms” provision of RLUIPA if
13 it adopts, implements or enforces regulations that allow a secular assembly
14 such as a dude ranch or a farm stand that offers farm-to-table dinners, without
15 also allowing a religious assembly on the same terms.

16 However, intervenor does not argue that the subject property and the
17 adjoining properties on which a dude ranch and a farm stand operate are
18 subject to the same zoning scheme, including winter range protected under the
19 WA zone. Intervenor does not explain how it is possible to violate the
20 RLUIPA equal terms provision where the properties in question are subject to
21 different zoning schemes serving different regulatory purposes. *See Young v.*
22 *Jackson County*, 58 Or LUBA 65 (2008), *aff'd* 227 Or App 290, 205 P3d 890

1 (2009) (finding a violation of the equal terms provision where a state
2 administrative rule prohibits churches on agricultural land within three miles of
3 an urban growth boundary, but allowed secular assemblies in the same
4 circumstances). DCC 18.88.040(B) prohibits both a church and a dude ranch on
5 property zoned WA, and thus on its face the county’s code treats both uses
6 within the WA zone precisely the same. *See* n 4. That a dude ranch exists on
7 the property to the north suggests either that that property is not zoned WA, or
8 possibly that it is a lawful nonconforming use established or approved under a
9 prior zoning scheme. Without more information about the adjacent property’s
10 zoning and history, intervenor cannot establish a violation of RLUIPA’s equal
11 terms clause.

12 DCC 18.88.040(B) does not prohibit a farm stand on property on winter
13 range protected by the WA zone, as it does a dude ranch, but again intervenor
14 does not argue that the farm stand on the adjoining property is located within
15 winter range, or subject to the WA zone. Intervenor’s arguments regarding
16 RLUIPA are undeveloped, and in any case do not demonstrate any basis to
17 affirm the hearings officer’s erroneous interpretations of DCC 18.88.

18 The third assignment of error is sustained.

19 **SECOND ASSIGNMENT OF ERROR**

20 Under the second assignment of error, petitioner argues that the hearings
21 officer erred in concluding that proposed non-religious commercial events,
22 including wedding receptions, are “accessory uses” to the primary church use.

1 As explained below, under our disposition of the third assignment of
2 error, the county’s decision must be reversed. Petitioner’s arguments under the
3 second assignment of error, if sustained, would at most result in remand to the
4 county to remove some accessory components of the proposed use from the
5 approval. Given that we must reverse the county’s decision under our
6 disposition of the third assignment of error, no purpose would be served by
7 resolving petitioner’s arguments under the second assignment of error.

8 We do not reach the second assignment of error.

9 **FOURTH ASSIGNMENT OF ERROR**

10 DCC 22.20.15 provides in relevant part that if any property is in
11 violation of the conditions of approval of any previous land use decisions, the
12 county shall not approve any application for land use development, unless the
13 approval results in the property coming into full compliance with the
14 conditions of approval. Under the fourth assignment of error, petitioner argues
15 that the Shepherds are in violation of the 2001 farm management plan, which
16 requires that a cattle and hog operation of a certain size and with certain
17 improvements be established on the property. Petitioner argued to the hearings
18 officer, and now on appeal, that the Shepherds have never implemented the
19 2001 farm management plan, and thus DCC 22.20.15 prohibits the county from
20 approving a new application for land use development until the plan is fully
21 implemented. As noted, the hearings officer rejected petitioner’s arguments.

1 Sustaining the fourth assignment of error would at most result in remand
2 to the county to require that the subject property be brought into compliance
3 with the 2001 farm management plan. Because we must reverse the county’s
4 decision under our disposition of the third assignment of error, we see no
5 purpose in resolving the parties’ arguments under the fourth assignment of
6 error.

7 We do not reach the fourth assignment of error.

8 **DISPOSITION**

9 OAR 661-010-0073(1)(c) provides that LUBA shall reverse a land use
10 decision when the decision “violates a provision of applicable law and is
11 prohibited as a matter of law.” Based on our disposition of the third
12 assignment of error, we conclude that the county’s decision violated DCC
13 18.88.040(B), and is prohibited as a matter of law. Accordingly, the decision is
14 reversed.