

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

3
4 CENTRAL OREGON LANDWATCH,
5 *Petitioner,*

6
7 vs.

05/15/18 AM 8:34 LUBA

8
9 DESCHUTES COUNTY,
10 *Respondent.*

11
12 LUBA No. 2018-007

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from Deschutes County.

18
19 Carol E. Macbeth, Bend, filed the petition for review and argued on
20 behalf of petitioner.

21
22 D. Adam Smith, Deschutes County Assistant Legal Counsel, Bend, filed
23 the response brief and argued on behalf of respondent.

24
25 BASSHAM, Board Member; RYAN, Board Chair; HOLSTUN Board
26 Member, participated in the decision.

27
28 REMANDED 05/15/2018

29
30 You are entitled to judicial review of this Order. Judicial review is
31 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a legislative decision that amends the county comprehensive plan and land use regulations to allow religious assemblies in the county Wildlife Area Combining Zone (WA overlay zone).

INTRODUCTION

In 1992, during periodic review, the county adopted the WA overlay zone to fulfill its obligations under Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Space) with respect to significant wildlife resources.¹ The WA overlay zone 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. 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 the uses permitted conditionally by the underlying zone are also allowed as conditional uses in the WA overlay zone, with 10

¹ Goal 5 is to “protect natural resources and conserve scenic and historic areas and open spaces.” Periodic review is a process required by statute and administrative rule in which local governments gain initial acknowledgment from the Oregon Land Conservation and Development Commission that their comprehensive plans and land use regulations comply with the statewide planning goals, including Goal 5. Generally, acknowledged plans and regulations are subject to review periodically to ensure that they remain in compliance with the goals.

1 exceptions set out in DCC 18.88.040(B). As we discuss in more detail below,
2 in adopting the WA overlay zone and the 10 exceptions, the county determined
3 that those 10 exceptions are “conflicting uses” in the parlance of the Goal 5
4 rule, which conflict with the wildlife resources protected by the identified
5 wildlife areas, and decided to prohibit those conflicting uses in the WA overlay
6 zone.

7 DCC 18.88.040(B) identifies 10 conditional uses that are not permitted
8 in the portion of the WA overlay zone that is designated as deer winter range,
9 significant elk habitat or antelope range, including a “[c]hurch.”² DCC

² From its adoption in 1992 until amended in the challenged decision, DCC 18.88.040 provided 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. 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;

1 18.88.040(B)(3). DCC 18.88.040(C) allows a church as a conditional use in
2 that portion of the WA overlay zone that is designated as the Bend/La Pine deer
3 migration corridor.

4 In 2009, as part of periodic review, the county requested a report on
5 wildlife resources from the U.S. Fish and Wildlife Service, the U.S. Forest
6 Service, the Oregon Department of Fish and Wildlife, and the U.S. Bureau of
7 Land Management. The resulting report is entitled “Updated Wildlife
8 Information and Recommendations for the Deschutes County Comprehensive
9 Plan Update” (Interagency Wildlife Report). The Interagency Wildlife Report
10 noted a decline in mule deer populations, and recommended that the county
11 continue to prohibit the 10 uses listed in DCC 18.88.040(B) because those uses
12 “generate a high level of public activity, noise, and habitat alteration, which in
13 turn can impact large geographic spaces and alter many acres of valuable
14 wildlife habitat.” Record 720. The Interagency Wildlife Report also
15 recommended that the county prohibit “new land uses” that have arisen since

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- “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.”

1 the 1992 periodic review that also involve high human use and disturbance,
2 including “[o]utdoor commercial events (*i.e.* ‘Wedding Venues, Farmers
3 Market’).” Record 719. The county subsequently amended the Deschutes
4 County Comprehensive Plan, Chapter 2, Section 2.6 (Wildlife) to note the data
5 and recommendations in the Interagency Wildlife Report.

6 The plan and code amendments challenged in the present appeal did not
7 arise from a legislative update or review prompted by the Interagency Wildlife
8 Report, but rather from a specific quasi-judicial dispute. In 2011, John and
9 Stephanie Shepherd began using their farm dwelling and property in the
10 county’s exclusive farm use (EFU) zone and Metolius Deer Winter Range to
11 conduct commercial wedding events, a use that is not allowed in the EFU zone.
12 After the county instituted enforcement proceedings, the Shepherds attempted
13 to gain land use approval for the Shepherds’ wedding event business. In 2015,
14 a county hearings officer approved the wedding event venue as a “private
15 park,” which is a use allowed in the EFU zone under statute and administrative
16 rules. On appeal, LUBA held that as a matter of law the proposed event use
17 does not qualify as a “private park.” *Central Oregon Landwatch v. Deschutes*
18 *County*, 72 Or LUBA 61 (2015), *aff’d* 276 Or App 282, 367 P3d 560 (2016).
19 Subsequently, the Shepherds applied for approval to use their farm dwelling
20 and property as a “church,” which is a conditional use allowed in most county
21 primary zones, including the county EFU zone. The Shepherd’s church was

1 intended to function in part as a venue to offer weddings and other events.³ A
2 county hearings officer approved the application, subject to conditions limiting
3 events to 18 per calendar year, between May 15 and October 15, with no more
4 than 250 guests per event, and requiring the Shepherds to provide a 65-space
5 parking lot. With respect to the WA overlay zone, the hearings officer
6 interpreted DCC 18.88.040 to allow churches in areas designated as deer winter
7 range, as a use permitted outright. On appeal, LUBA rejected that
8 interpretation, concluding that the application is subject to the prohibition on
9 churches in deer winter range at DCC 18.88.040(B)(3), and accordingly
10 reversed the county's decision. *Central Oregon Landwatch v. Deschutes*
11 *County*, 75 Or LUBA 284, *aff'd* 287 Or App 239, 400 P3d 325 (2017).

12 Subsequently, John Shepherd wrote letters to the county threatening to
13 file a lawsuit under the federal Religious Land Use and Institutionalized
14 Persons Act (RLUIPA), 42 USC § 2000 *et seq.*, unless the county amended
15 DCC 18.88.040(B) to eliminate the prohibition on churches.⁴ Record 316, 318-

³ John Shepherd is the pastor of the Shepherdsfield Church, which was registered with the state of Oregon's Corporations Division in 2014. The Shepherds conduct weddings and other events through their separate limited liability corporation, Shepherdsfield, LLC. *Central Oregon Landwatch*, 75 Or LUBA at 286.

⁴ 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

1 29. In written comments to the county, Shepherd wrote that “the only code
2 amendment that we would accept is a simple removal of the ban on churches in

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.

“* * * * *

“(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.

“(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.”

1 [DCC] 18.88.040(B). Anything else would trigger a RLUIPA lawsuit.”
2 Record 316.

3 Shortly thereafter, county staff initiated proposed amendments to the
4 county comprehensive plan and land use code that would eliminate the
5 prohibition in DCC 18.88.040(B)(3) on churches in deer winter range,
6 significant elk habitat or antelope range. Because the proposed amendments
7 would constitute an amendment of the county’s acknowledged Goal 5 program
8 to protect significant natural resources in order to allow a new conflicting use,
9 staff provided an analysis under the requirements of the administrative rule
10 implementing Goal 5, at OAR chapter 660, division 023.

11 Briefly, as explained below, OAR chapter 660, division 023, requires the
12 county to conduct an analysis of the Economic, Social, Environmental and
13 Energy (ESEE) consequences of allowing, limiting or prohibiting uses that
14 conflict with an inventoried significant natural resource. Based on that ESEE
15 analysis, the county must then develop a program to achieve Goal 5 or, in this
16 case, determine whether to modify its acknowledged 1992 program to achieve
17 Goal 5 with respect to wildlife resources. Based on the standards in OAR 660-
18 023-0040(5), the county may decide to (1) prohibit conflicting uses, (2) allow
19 conflicting uses to a limited extent, or (3) allow conflicting uses without limit.

20 On September 28, 2017, the planning commission conducted a public
21 hearing on the staff-initiated amendments. On October 3, 2017, the planning
22 commission voted to recommend that churches continue to be prohibited in the

1 WA overlay zone, and also recommended that the county add several new uses
2 with similar negative impacts to the list of uses prohibited in the WA overlay
3 zone under DCC 18.88.040(B). Record 513-14.

4 The board of county commissioners then conducted a hearing on the
5 planning commission recommendation, considering five options presented by
6 staff. The board of county commissioners ultimately decided to approve a
7 version of the staff-initiated amendments that eliminates the prohibition on
8 churches in the WA overlay zone as applied to areas designated as deer winter
9 range, significant elk habitat, or antelope range, in effect modifying the
10 county's program to achieve Goal 5 to allow churches without limits as a new
11 conflicting use. On January 3, 2018, the board of county commissioners
12 adopted two ordinances that amend the comprehensive plan natural resource
13 chapter, and relevant DCC provisions to eliminate the prohibition on churches
14 in the WA overlay zone. This appeal followed.

15 **FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR**

16 OAR 660-023-0250(3) requires local governments to apply Goal 5 and
17 the requirements of OAR chapter 660, division 023, in considering a post-
18 acknowledgment plan amendment, if the amendment would allow new uses
19 that could be conflicting uses with a particular significant Goal 5 resource site.
20 OAR 660-023-00250(3)(b). As noted, under OAR 660-023-0040(4), the
21 county must analyze the ESEE consequences that could result from a decision

1 to allow, limit, or prohibit a conflicting use.⁵ OAR 660-023-0010(2) defines
2 “ESEE consequences” as “the positive and negative economic, social,
3 environmental, and energy (ESEE) consequences that could result from a
4 decision to allow, limit, or prohibit a conflicting use.”

5 Based on that ESEE analysis, under OAR 660-023-0040(5), the county
6 must develop a program to achieve Goal 5, and determine whether to allow,
7 limit, or prohibit conflicting uses.⁶ Under these assignments of error, petitioner

⁵ OAR 660-023-0040(4) provides:

“Analyze the ESEE consequences. Local governments shall analyze the ESEE consequences that could result from decisions to allow, limit, or prohibit a conflicting use. The analysis may address each of the identified conflicting uses, or it may address a group of similar conflicting uses. A local government may conduct a single analysis for two or more resource sites that are within the same area or that are similarly situated and subject to the same zoning. The local government may establish a matrix of commonly occurring conflicting uses and apply the matrix to particular resource sites in order to facilitate the analysis. A local government may conduct a single analysis for a site containing more than one significant Goal 5 resource. The ESEE analysis must consider any applicable statewide goal or acknowledged plan requirements, including the requirements of Goal 5. The analyses of the ESEE consequences shall be adopted either as part of the plan or as a land use regulation.”

⁶ OAR 660-023-0040(5) provides:

“Develop a program to achieve Goal 5. Local governments shall determine whether to allow, limit, or prohibit identified conflicting uses for significant resource sites. This decision shall be based upon and supported by the ESEE analysis. A decision to prohibit or limit conflicting uses protects a resource site. A decision to

1 argues that the county erred in its ESEE analysis and in its ultimate decision to
2 modify its acknowledged Goal 5 program, when it relied in part on the cost of
3 defending its existing Goal 5 program against a hypothetical RLUIPA lawsuit,
4 to support its decision to achieve Goal 5 by allowing without limits a new
5 conflicting use.

6 **A. Cost of Defending the Existing Goal 5 Program Against a**
7 **RLUIPA Lawsuit.**

8 In discussing the economic consequences of allowing, limiting or
9 prohibiting churches in the WA overlay zone, the county's analysis of

allow some or all conflicting uses for a particular site may also be consistent with Goal 5, provided it is supported by the ESEE analysis. One of the following determinations shall be reached with regard to conflicting uses for a significant resource site:

- “(a) A local government may decide that a significant resource site is of such importance compared to the conflicting uses, and the ESEE consequences of allowing the conflicting uses are so detrimental to the resource, that the conflicting uses should be prohibited.
- “(b) A local government may decide that both the resource site and the conflicting uses are important compared to each other, and, based on the ESEE analysis, the conflicting uses should be allowed in a limited way that protects the resource site to a desired extent.
- “(c) A local government may decide that the conflicting use should be allowed fully, notwithstanding the possible impacts on the resource site. The ESEE analysis must demonstrate that the conflicting use is of sufficient importance relative to the resource site, and must indicate why measures to protect the resource to some extent should not be provided, as per subsection (b) of this section.”

1 economic consequences states that “permitting churches alleviates the risk that
2 the County will be required to expend resources defending an unnecessary
3 RLUIPA lawsuit.” Record 42-44.

4 In portions of the first and third assignments of error, petitioner argues
5 that the county improperly construed OAR 660-023-0040(4) to the extent its
6 ESEE analysis and its ultimate decision to fully allow a new conflicting use are
7 based on the risk of expending resources to defend the county’s currently
8 acknowledged Goal 5 program against a hypothetical RLUIPA lawsuit.
9 Petitioner argues that the county’s ESEE analysis provides no legal analysis
10 indicating that the current Goal 5 program *violates* RLUIPA, or that the county
11 would be legally vulnerable to losing a hypothetical RLUIPA lawsuit if one
12 were brought. Instead, petitioner argues, the ESEE analysis suggests that the
13 mere *possibility of expending county resources* to defend against a hypothetical
14 RLUIPA lawsuit—presumably including even a non-meritorious one that the
15 county is likely to win—is a negative economic consequence of a sufficient
16 magnitude to conclude that a new conflicting use should be allowed without
17 limitation in the WA overlay zone.

18 The county agrees that its ESEE analysis considered only the
19 “hypothetical” risk of defending against a RLUIPA lawsuit and that the ESEE
20 analysis does not address whether the current Goal 5 program actually violates
21 RLUIPA. Response Brief 13. However, the county argues that the county’s
22 desire to minimize the financial risk of being forced to defend the current Goal

1 5 program against a potential RLUIPA lawsuit is a legitimate consequence to
2 consider under the “Economic” element of the ESEE analysis, even if the
3 county believes that it would likely prevail in any such lawsuit. The county
4 contends that in considering potential negative economic consequences in its
5 ESEE analysis, the county is not required to conduct any legal analysis of
6 whether its current Goal 5 program actually violates RLUIPA. Finally, the
7 county also argues that, based on the positive social impacts of churches that
8 are identified in the ESEE analysis, the county could choose to allow churches
9 in the WA overlay zone even if there were no hypothetical risk of a RLUIPA
10 lawsuit and even if the county concluded that its current Goal 5 program does
11 not violate RLUIPA.

12 As framed by the parties, we understand the issue on appeal to be
13 whether it is consistent with OAR 660-023-0040(4) and (5) to consider as a
14 negative economic consequence the possibility that the county could be (1)
15 sued by a private landowner and (2) forced to spend resources to defend its
16 current Goal 5 program, as a basis to ultimately conclude that the program
17 should be modified to provide that a formerly prohibited conflicting use will be
18 allowed without limits. As framed, the issue is strictly a matter of
19 interpretation of state law, specifically OAR 660-023-0040(4) and (5), and one
20 that appears to constitute an issue of first impression. The parties’ briefs
21 include a discussion of RLUIPA and cases interpreting that federal statute.
22 However, because the county takes the position that the decision on appeal

1 does not include (and is not required to include) any analysis or determinations
2 regarding whether the county's Goal 5 program is inconsistent with RLUIPA,⁷
3 on appeal we have no basis to review (or decide in the first instance) the legal
4 merits of whether the county's acknowledged Goal 5 program does or does not
5 violate RLUIPA. Accordingly, the primary issue on appeal is the legal
6 sufficiency of the county's ESEE analysis and the decision to modify its
7 acknowledged Goal 5 program, under the applicable state statutes and
8 administrative rules.

9 Turning to the interpretation of OAR 660-023-0040(4) and (5), the text
10 and context of the rule do not include express language clarifying whether the
11 economic consequences to the county of defending its acknowledged Goal 5
12 program against a hypothetical lawsuit filed by private landowners is the kind
13 of consequence that can be considered in an ESEE analysis and form a basis for
14 the ultimate decision to allow, limit or prohibit a conflicting use. OAR 660-
15 023-0010(2) defines "ESEE consequences" as "the positive and negative
16 economic, social, environmental, and energy (ESEE) consequences that could
17 result from a decision to allow, limit, or prohibit a conflicting use." That
18 language is unqualified, and does not include express limitations on the types

⁷ In its brief, the county states that it "does not necessarily disagree" with petitioner that the county's Goal 5 program does not violate RLUIPA, and that if the county were "required to defend a RLUIPA lawsuit, the County may deploy arguments similar to those invoked" by petitioner. Response Brief 35.

1 of economic or other consequences that can be considered in the ESEE
2 calculus.

3 Generally, local governments have discretion to consider a broad range
4 of impacts on a resource site attributable to a conflicting use, which could
5 include impacts of a legal nature. *See Hegele v. Crook County*, 190 Or App
6 376, 385, 78 P3d 1254 (2003) (interpreting the provisions of the former Goal 5
7 rule at OAR chapter 660, division 016). In *Hegele*, the Court of Appeals
8 rejected an argument that the scope of the initial identification of “conflicting
9 uses” for purposes of developing a program to achieve the Goal does not
10 include impacts on a Goal 5 mining site from adjoining residential uses unless
11 the impacts on the mining operation consist of legal claims for trespass or
12 nuisance.

13 “Legal consequences potentially qualify as economic and social
14 ones, and curtailing use of a resource site through a nuisance or
15 trespass action therefore readily falls within the range of
16 contemplated impacts. But so do a wide variety of other impacts,
17 such as social pressures that could come to bear within the zoning
18 district in an effort to restrict, confine, or limit activity on the Goal
19 5 resource site. In other words, when the negative impacts *of* the
20 Goal 5 resource likely will create social, legal, or other pressures
21 that can result in negative impacts *on* the Goal 5 resource.

22 “We therefore reject petitioner's argument that the only negative
23 impacts on a Goal 5 resource that permit identifying something as
24 a conflicting use are trespass or nuisance actions that would
25 impose legal burdens and liabilities on the Goal 5 resource site.
26 The rule is not so limited but is, instead, written in broad terms to
27 permit consideration of all negative impacts that allowed or
28 allowable uses in the zoning district may have on the proposed
29 resource site.” *Id.* at 384-85 (italics in original; footnote omitted).

1 In the omitted footnote, the court explained:

2 “For example, if operation of an aggregate mine (a Goal 5
3 resource) were predicted to engender social protests or economic
4 boycotts because of perceived negative impacts of the resource on
5 local residents, such activity might be deemed a ‘negative impact’
6 on the Goal 5 resource itself.” *Id.* at 384 n 4.

7 *Hegele* concerned what uses fell within the scope of a “conflicting use,”
8 for purposes of the first step of the Goal 5 planning process: identifying
9 conflicting uses with the resource site. The court’s main holding is that in the
10 first step of the Goal 5 planning process, identifying conflicting uses, the local
11 government can consider only impacts *from* allowed conflicting uses (the
12 residential uses) *on* the resource site (the mining site), and not vice versa. *Id.* at
13 383. However, the court went on to note that once an allowed use is deemed a
14 conflicting use and the local government proceeds to the ESEE analysis, the
15 local government at that point can consider impacts *from* the resource site *on*
16 conflicting uses, including the negative impacts of the mining operation on
17 nearby residential uses, if those impacts engender legal, economic or social
18 pressures *against* the resource site as a reaction to negative impacts of the
19 resource site on residential uses. *Id.* at 385.

20 *Hegele* holds that, for purposes of the first step in the Goal 5 planning
21 process, at least some types of potential legal conflicts between allowed uses
22 and a resource site are proper subjects for an ESEE analysis. However, in our
23 view there is a significant difference between a post-acknowledgement plan
24 amendment based on analysis of (1) potential legal disputes between private

1 landowners engendered by direct conflicts between a proposed resource site
2 and nearby allowed uses, and (2) a landowner's threat of a potential federal
3 lawsuit against the county's acknowledged Goal 5 program, concerning
4 whether the existing program is inconsistent with federal law.

5 Based on periodic review in 1992 and 2009, the county adopted and
6 subsequently reconfirmed its program to achieve Goal 5 with respect to
7 wildlife resources, and that program is acknowledged to comply with Goal 5.
8 Those exercises in legislative planning were based on extensive study and
9 scientific analysis, subject to review and approval by the Land Conservation
10 and Development Commission, in order to gain acknowledgement of its
11 program as consistent with Goal 5. In our view, the mere *threat* of potential
12 litigation against the county by a single landowner is an insufficient basis under
13 OAR 660-023-0040(4) and (5), and the definition of "ESEE" at OAR 660-023-
14 0010(2) for the county to abandon or disavow a portion of its acknowledged
15 Goal 5 program. The county will invariably be threatened with legal action for
16 any number of reasons by any number of persons, including private landowners
17 and organizations such as petitioner.

18 In our view, to the extent a county regards threats of litigation against its
19 acknowledged Goal 5 program as a negative economic consequence in its
20 ESEE analysis, such consideration can form a basis for modifying the existing
21 Goal 5 program only if the county evaluates and establishes as part of the
22 public ESEE process that its existing Goal 5 program is indeed vulnerable to a

1 legal challenge. However, as noted, in the present case the county's decision
2 does not include analysis of the merits of a potential RLUIPA claim, or
3 determine even tentatively that the county's acknowledged Goal 5 program is
4 vulnerable to a challenge under RLUIPA. Indeed, the county seems to
5 acknowledge that it may replicate some of petitioner's arguments as defenses
6 against such a suit.

7 Further, LUBA's review of the legal sufficiency of the county's ESEE
8 analysis and ultimate decision to modify its Goal 5 program is complicated by
9 the absence of an analysis of the merits of a potential RLUIPA claim in the
10 findings or the record. While the petition for review argues that the county's
11 existing Goal 5 program does not violate RLUIPA, and the county's response
12 brief offers somewhat equivocal counter-arguments that the existing Goal 5
13 program *could* violate RLUIPA, on review we have no idea whether and how
14 such arguments played a role in the board of commissioners' decision to allow
15 conflicting church uses without limit in the WA overlay zone. The merits of
16 such arguments possibly played no role at all, and the county's decision to
17 allow conflicting church uses without limit in the WA overlay zone may have
18 been based instead on the mere *threat* of litigation by the Shepherds. However,
19 the threat of litigation in itself is essentially unreviewable under any legal or
20 evidentiary standard. For LUBA to perform its review function, considerations
21 that play a significant role in a local government decision to modify its Goal 5

1 program to allow, limit or prohibit new conflicting uses must be capable of
2 review.

3 For the foregoing reasons, we agree with petitioner that the mere threat
4 of potential litigation under RLUIPA and the hypothetical cost to the county of
5 defending its existing Goal 5 program are not legitimate bases for the county's
6 ultimate decision to modify its Goal 5 program, in the absence of an ESEE
7 analysis that evaluates the vulnerability of the county's Goal 5 program to a
8 legal challenge under RLUIPA.⁸

9 **A. Determining Whether to Allow, Limit, or Prohibit Conflicting**
10 **Uses**

11 In portions of the first and third assignment of error, and in the second
12 assignment of error, we understand petitioner to argue that even if RLUIPA or
13 other considerations identified in the ESEE analysis provide a basis to modify
14 the WA overlay zone, the county erred in ultimately modifying its Goal 5
15 program to allow churches without limit as a new conflicting use.

16 As noted, OAR 660-023-0040(5)(c) provides:

⁸ As we understand it, John Shepherd argued to the county that the existing Goal 5 program is vulnerable under the "Equal Terms" element of RLUIPA, 42 USC § 2000cc(b)(1), *see* n 4, in part because in 2012 the county amended its exclusive farm use zone to allow agricultural enterprises to apply for a permit to conduct so-called "agri-tourism" events, subject to a number of limitations, including a prohibition on conducting agri-tourism events in winter deer range during winter months. DCC 18.16.042(C)(13). However, the county's decision does not evaluate the merits of that argument, and we express no opinion in that regard.

1 “A local government may decide that the conflicting use should be
2 allowed fully, notwithstanding the possible impacts on the
3 resource site. The ESEE analysis must demonstrate that the
4 conflicting use is of sufficient importance relative to the resource
5 site, and must indicate why measures to protect the resource to
6 some extent should not be provided, as per subsection (b) of this
7 section.” *See* n 6.

8 Thus, to allow a conflicting use without limit under OAR 660-023-0040(5)(c),
9 the ESEE analysis must (1) demonstrate that the conflicting use is of sufficient
10 importance relative to the resource site, and (2) must indicate why measures to
11 protect the resource “to some extent should not be provided.”

12 The county’s ESEE analysis of the consequences of fully allowing the
13 conflicting use list several positive and negative consequences, but do not
14 include, at least explicitly, any evaluation of the importance of the conflicting
15 use relative to the resource, or attempt to demonstrate that the conflicting use is
16 of “sufficient” importance to warrant the negative consequences to the resource
17 from fully allowing the conflicting use.⁹ Nonetheless, reading between the

⁹ The county’s findings on this point state:

“(a) Allow the conflicting use.

“Finding: Under this scenario, Deschutes County would permit churches and outdoor events and activities that remove vegetation and disturb mule deer, elk, and antelope habitat without limitations.

“Economic Consequences: Permitting churches, consistent with RLUIPA, would have positive consequences by allowing religious institutions, which are non-profits, to establish a presence in certain areas of the rural county, where they presently are not

allowed, and to use land and buildings for religious purposes. Churches also provide valuable contributions to communities in the areas of direct economic contributions, social services and community volunteering, education and civics skills training. Lastly, permitting churches alleviates the risk that the County will be required to expend resources defending an unnecessary RLUIPA lawsuit.

“It could also have negative consequences based on testimony from the Oregon Department of Fish and Wildlife (ODFW). In some parts of the county, mule deer populations may have declined up to 70 [percent], since 2000. As a result, [ODFW] made adjustments to hunting seasons so as not to cause additional declines through harvest. Their testimony identified other elements contributing to reductions in mule deer populations tied to human caused habitat reduction, fragmentation, and disturbance on winter range. But there was testimony of other factors as well. ODFW estimates that hunting and wildlife viewing contributed more than \$50 million to the Deschutes County economy annually, but no breakout was made to deer viewing or hunting.

Social Consequences: Many residents testified during the Planning Commission and Board of County Commissioner public hearings that permitting churches, consistent with RLUIPA, would have positive consequences by preventing discrimination on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation. It is also recognized that churches of all forms have long been recognized as central institutions within American life, helping provide a sense of community and moral foundation. Explaining why churches deserve special attention in the land use context, Daniel Dalton’s October 5th written comments quote RLUIPA’s co-sponsors, Senators Orrin Hatch and Edward Kennedy: “[t]he right to assemble for worship is at the very core of the free exercise of religion. Churches and synagogues cannot function without a physical space adequate to their needs and consistent with their theological requirements. The right to build, buy, or rent such a [space] is an indispensable adjunct of the core First Amendment

1 lines, it is reasonably clear that the board of commissioners regards churches to
2 be relatively more important than wildlife resources, or perhaps that the
3 positive consequences of allowing churches in wildlife areas are more
4 significant than the negative consequences. It is difficult to tell, however, how

right to assemble for religious purposes.’ Those foundational values have been codified in numerous areas of both federal and state law, including the [First] Amendment of the U.S. Constitution (U.S. Const amend. I), [RLUIPA], ORS 215.441, and ORS 215.283 (as interpreted by *Brentmar v. Jackson*, 321 Or 481, 900 P2d 1030 (1995) and *Lane County v. Land Conservation and Dev. Comm’n*, 325 Or 569, 942 P2d 278 (1997), ‘subsection 1’ uses—including ‘churches’—are generally allowed ‘as of right’ even in an Exclusive Farm Use zone).

“It could also have negative consequences based on testimony from ODFW due to the potential loss of wildlife habitat stemming from the possible removal of habitat areas and potentially the construction of structures and their associated human presence. Many residents testified during the Planning Commission and Board of County Commissioner public hearings expressing their appreciation for wildlife habitat and the importance of protecting it as a defining feature contributing to Deschutes County’s quality of life.

“Environmental consequences: People testified that the actual impact on deer populations from new churches would be minimal. Permitting churches could result in further negative impacts to designated habitat for deer winter range, elk habitat and antelope range. Based on testimony from ODFW, mule deer populations have declined up to 70 [percent] since 2000. Their testimony identified other elements contributing to reductions in mule deer populations tied to human caused habitat reduction, fragmentation, and disturbance on winter range.

“Energy consequences: Energy consumption is unlikely to be affected by this scenario.” Record 42-43.

1 much that judgment is influenced by the county's findings, rejected above, that
2 the mere threat of litigation under RLUIPA, in itself, is a consideration that can
3 support a decision to allow churches without limit as a new conflicting use in
4 the WA overlay zone. Moreover, the findings appear to presume, without
5 establishing a basis for the presumption, that the existing prohibition on
6 churches in the WA overlay zone is inconsistent with the "Equal Terms"
7 element of RLUIPA, 42 USC § 2000cc(b)(1). *See* n 4.

8 Under these assignments of error, we understand petitioner to argue that
9 the county erred in presuming that RLUIPA compels the county to allow
10 churches without limit in the WA overlay zone. According to petitioner, even
11 if it were demonstrated that the existing prohibition on churches in the WA
12 overlay zone is inconsistent with the Equal Terms provisions of RLUIPA, it
13 does not follow that the county has no choice but to allow churches without
14 limit in wildlife areas. Under the second assignment of error, petitioner argues
15 that if the county can ensure that the WA overlay zone is consistent with both
16 (1) its Goal 5 obligation to protect wildlife resources, *and* (2) the requirements
17 of RLUIPA (or whatever consideration in favor of the conflicting use is cited),
18 then OAR 660-023-0040(5)(c) requires the county to choose that course, and it
19 cannot instead adopt amendments that fail its Goal 5 obligations to protect
20 wildlife resources from identified conflicting uses. For example, petitioner
21 argues under the second assignment of error that the county could ensure
22 consistency with Goal 5, while avoiding any possible issue of consistency with

1 the Equal Terms provision of RLUIPA, by simply amending DCC 18.88.040 to
2 clarify that *all* assemblies in wildlife areas are prohibited, including religious
3 assemblies such as churches.

4 We disagree with petitioner that OAR 660-023-0040(5)(c) prohibits the
5 county from allowing a conflicting use without limit, if there is another option
6 that would both fully protect the resource at issue, and satisfy whatever
7 motivations prompt the county to decide in favor of the conflicting use.¹⁰ As
8 the county notes, OAR 660-023-0040(5) states that a “decision to allow some
9 or all conflicting uses for a particular site may also be consistent with Goal 5,
10 provided it is supported by the ESEE analysis.” *See* n 6. Under OAR 660-023-
11 0040(5)(c), a county is authorized to allow the conflicting use without limit
12 notwithstanding the impacts on the resource, as long as (1) the ESEE analysis
13 supports that decision, (2) the county finds that the conflicting use is
14 sufficiently important “relative to the resource site,” and (3) the county
15 demonstrates why measures to protect the resource “to some extent” should not
16 be provided. OAR 660-023-0040(5)(c) requires the county to justify its choice
17 to allow a conflicting use without limit, and that justification must include a

¹⁰ The case cited to support that proposition, *White v. Lane County*, 68 Or LUBA 423 (2013), says nothing of the kind. In *White*, LUBA held that if the provisions of a county’s acknowledged Goal 5 program are ambiguous, and can be interpreted either in a way that would bring the program into conflict with Goal 5 or in a way that is consistent with Goal 5, the county cannot choose the interpretation that would bring the program into conflict with Goal 5. *Id.* at 435.

1 demonstration that alternatives, such as imposing limits or measures to provide
2 some protection for the resource consistent with OAR 660-023-0040(5)(b),
3 should not be provided. Assuming that demonstration is made, we agree with
4 the county that OAR 660-023-0040(5) and Goal 5 in general do not *compel* the
5 county to choose alternatives that fully or partially protect the resource.

6 The county argues in its response brief that there are no measures the
7 county could adopt to protect wildlife habitat from the negative impacts of
8 churches without running afoul of a separate RLUIPA requirement, that
9 governments not impose a “substantial burden” on religious exercise. 42 USC
10 § 2000cc(a)(1); *see* n 4. However, the county’s ESEE analysis includes no
11 evaluation of any measures or any findings on this point, and without actually
12 evaluating any measures that would provide some protection to wildlife
13 resources, it is difficult to understand how the county could reach a conclusion
14 that no measures could be adopted to protect wildlife resources without also
15 imposing a “substantial burden” on religious exercise. As discussed above,
16 remand is necessary for the county to adopt an ESEE analysis that either does
17 not rely on the mere threat of RLUIPA litigation, or that actually evaluates
18 whether the existing Goal 5 program is inconsistent with the RLUIPA Equal
19 Terms or Substantial Burden requirements. On remand the county must
20 consider whether there are measures it can adopt pursuant to OAR 660-023-
21 0040(5)(b) and (c) to reduce impacts on wildlife resources and include those
22 evaluations in the revised ESEE analysis. As part that analysis, the county may

1 consider, if necessary, whether identified measures would impose a “substantial
2 burden” on the free exercise of religion.

3 The first, second and third assignments of error are sustained, in part.

4 **FOURTH ASSIGNMENT OF ERROR**

5 In addition to citing threats of litigation under RLUIPA and generally-
6 stated concerns regarding compliance with RLUIPA, the county’s ESEE
7 analysis identifies several positive consequences of allowing churches in the
8 WA overlay zone, including “valuable contributions to communities in the
9 areas of direct economic contributions, social services and community
10 volunteering, education and civic skills training,” as well as “reduced levels of
11 deviance.” Record 44. The findings take the position that religion provides
12 “the moral foundation of self-reliance and community awareness necessary for
13 the success of republican self-government.” *Id.* The findings also note that
14 churches are protected by federal statute and allowed under the state’s
15 exclusive farm use zone.

16 Under the fourth assignment of error, petitioner argues that the county’s
17 decision to allow churches in the WA overlay zone as a new conflicting use
18 goes beyond protecting the free exercise of religion, and instead violates the
19 Establishment Clause of the First Amendment to the U.S. Constitution, by
20 expressing governmental preference for religious land uses over secular land

1 uses.¹¹ Petitioner argues that churches have the same negative impacts on
2 wildlife resources as the nine listed secular uses still prohibited by DCC
3 18.88.040(B), and the county’s clear preference for religious over secular uses
4 with similar negative impacts is inconsistent with the Establishment Clause,
5 which petitioner argues requires governments to remain neutral toward
6 religion, favoring neither one religion over another, nor religious land uses
7 over non-religious land uses. Petition for Review 32 (citing *Westchester Day*
8 *Sch. v. Village of Mamaroneck*, 386 F3d 183, 189 (2d Cir 2004)).

9 The county responds that to the extent the amendments are authorized or
10 compelled by RLUIPA, the amendments do not violate the Establishment
11 Clause. *See Corporation Presiding Bishop v. City of West Linn*, 45 Or LUBA
12 77, 113, *rev’d on other grounds* 192 Or App 567, 86 P2d 1140, *rev allowed*
13 337 Or 282, 96 P3d 347 (2004), *aff’d* 338 Or 453, 111 P3d 1123 (2005)
14 (opining that RLUIPA does not offend the Establishment Clause as long as its
15 purpose and primary effect are directed at alleviating significant governmental
16 interference with religious exercise). That may be correct, as far as it goes, but
17 as noted above the county’s ESEE analysis does not address whether the
18 county’s existing Goal 5 program is inconsistent with RLUIPA. If the county
19 wishes to rely on RLUIPA in order to support the amendments to its Goal 5

¹¹ 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[.]”

1 program, and to defend its decision against a challenge under the Establishment
2 Clause, the ESEE analysis must actually address whether the county's existing
3 Goal 5 program is consistent with RLUIPA.

4 The county next argues that the county's primary motivation for
5 adopting the amendments was not RLUIPA, but rather to ensure that its Goal 5
6 program mirrors "the cultural values underpinning numerous religious
7 protections codified in federal and state law," as implemented in statutes such
8 as ORS 215.283(1)(a). Response Brief 54 (quoting Record 46). ORS
9 215.283(1)(a) authorizes in the exclusive farm use zone "[c]hurches and
10 cemeteries in conjunction with churches." The county notes that uses listed in
11 subsection (1) of ORS 215.283 are generally allowed in exclusive farm use
12 zones free of county regulation, although they remain subject to regulations
13 adopted by the Land Conservation and Development Commission. *Brentmar*,
14 321 Or 481; *Lane County v. Land Conservation & Dev. Comm'n*, 325 Or 569.
15 We understand the county to argue that removing the local prohibition on
16 churches in the WA overlay zone brings the county's regulations governing
17 churches closer to ORS 215.283(1)(a), and therefore the amendments could
18 violate the Establishment Clause only if ORS 215.283(1)(a) *also* violated the
19 Establishment Clause, which petitioner does not contend.

20 If the county's land use regulations treat churches on land zoned
21 exclusive farm use that are also located in the WA zone no more favorably
22 compared to secular uses with similar impacts than is provided for under ORS

1 215.283 and related statutes and administrative rules, we agree with the county
2 that that would constitute a very strong argument that the county's regulations
3 do not violate the Establishment Clause. However, we note that under the
4 amendments, churches on land zoned exclusive farm use that is also located in
5 the WA overlay zone are now treated more favorably than other uses with
6 arguably similar impacts on wildlife, including a "community center owned and
7 operated by a governmental agency or nonprofit community organizer," which
8 remains a prohibited use in the WA overlay zone. Presumably, a community
9 center prohibited under DCC 18.88.040(B) would, as much as churches, also
10 provide "valuable contributions to communities in areas of direct economic
11 contributions, social services and community volunteering, education and civic
12 skills training, and reduced levels of deviance." Record 44. We do not mean
13 to suggest that all forms and degrees of favoritism toward religion necessarily
14 run afoul of the Establishment Clause, but if the county amends its Goal 5
15 program in order to favor religious land uses over secular land uses with
16 apparently similar positive and negative impacts, then the county cannot be
17 surprised if that amendment draws a challenge under the Establishment Clause.

18 Nonetheless, we do not further address the parties' arguments regarding
19 the Establishment Clause. As explained under the first, second and third
20 assignments of error, remand is necessary for the county to revise its ESEE
21 analysis and adopt a new decision whether to allow, limit or prohibit new
22 conflicting uses, consistent with our disposition of those assignments of error.

1 The revised ESEE analysis and new decision may be considerably different
2 from the present analysis and decision. Under these circumstances, no purpose
3 would be served by resolving the parties' arguments regarding whether the
4 analysis and decision before us violates the Establishment Clause.

5 We do not reach the fourth assignment of error.

6 The county's decision is remanded.