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.[1] 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 "[c]hurch."[2]

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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

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

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

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[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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> > "* * * * *
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> "(b) Discrimination and exclusion.
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> > "(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

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> "(3) Exclusions and limits. No government shall impose or implement a land use regulation that—
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> "(A) totally excludes religious assemblies from a jurisdiction; or
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> "(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction."

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.[4] ORS 197.835(9)(a)(D). Petitioner argues that "[a]ll uses similarly situated to churches are equally prohibited in the [WA overlay zone]."[5] Petition for Review 38. 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. Petition 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 290, 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).

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[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.[7] 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

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[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.[8] 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.[9]

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."[10]

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."[11] 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.

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[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."

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.[12] 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

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[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 *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 (*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.

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.[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.

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[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[.]"