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

TOMMY NEHMZOW,  
*Petitioner,*

vs.

DESCHUTES COUNTY,  
*Respondent,*

and

KEITH ADAMS and KRISTIN ADAMS,  
*Intervenors-Respondents.*

LUBA No. 2019-110

FINAL OPINION  
AND ORDER

Appeal from Deschutes County.

Michael R. Hughes, Bend, filed the petition for review and reply brief and argued on behalf of petitioner. With him on the brief was The Hughes Companies, LLC.

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

Elizabeth A. Dickson, Bend, filed a joint response brief and argued on behalf of intervenors-respondents. With her on the brief was Dickson Hatfield LLP.

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

REVERSED 08/10/2020

1           You are entitled to judicial review of this Order. Judicial review is  
2 governed by the provisions of ORS 197.850.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision by the board of county commissioners  
4 denying petitioner’s application for a marijuana production facility on property  
5 zoned for exclusive farm use (EFU).

6 **BACKGROUND**

7 The subject property is comprised of approximately 17.08 acres and is  
8 located adjacent to and generally southwest of property owned by Sundance  
9 Meadows Ranch (Sundance Meadows).<sup>1</sup> Record 727, 1494. Both the subject  
10 property and Sundance Meadows are zoned EFU. Record 1572–73. We describe  
11 the development and activities on the Sundance Meadows property in detail  
12 because this appeal is focused on the impact of activities at Sundance Meadows  
13 on petitioner’s proposed marijuana production on the subject property.

14 The subject property is a roughly horseshoe-shaped parcel that nearly  
15 surrounds a small portion of Sundance Meadows that contains an indoor  
16 swimming pool, ball court, and picnic area. Record 727, 1225–32. The remainder  
17 of Sundance Meadows is developed with, among other things, a lodge, meeting  
18 hall, horse stables, campground, RV parking sites and RV storage, small lake,  
19 miniature golf course, disc golf course, archery range, remote control car track,

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<sup>1</sup> Sundance Meadows is a “recreational community” that provides timeshares. Members and guests of Sundance Meadows are temporary residents of the recreational community. Record 1267.

1 and playground. Record 177–78, 727. We refer to these features collectively as  
2 recreational facilities. Some of the uses that occur on the Sundance Meadows  
3 property are legal nonconforming uses verified in 2018 that, absent such  
4 verification, would otherwise be prohibited in the EFU zone. Record 174–201.  
5 Oregon land use law generally preserves land for agricultural uses by restricting  
6 uses allowed in EFU zones to farm uses and certain non-farm uses that the  
7 legislature has determined are compatible with farming. *See* ORS 215.203(2)(a)  
8 (defining “farm use”); ORS 215.283 (providing non-farm uses permitted in EFU  
9 zones in nonmarginal lands counties); ORS 215.213 (providing nonfarm uses  
10 permitted in exclusive farm use zones in counties that adopted marginal lands  
11 system prior to 1993).

12         Petitioner applied to the county for approval to establish indoor marijuana  
13 production on the subject property. Petitioner’s proposed use would include an  
14 approximately 1,800-square-foot building used for indoor marijuana production.  
15 No outdoor production or greenhouses are proposed as part of the application.  
16 Record 1494. Marijuana is a crop for the purpose of “farm use” as defined in  
17 ORS 215.203. ORS 475B.526(1)(a). Marijuana production involves “the  
18 manufacture, planting, cultivation, growing or harvesting of marijuana.” ORS  
19 475B.015(32)(a).

1 A county may impose reasonable regulations on marijuana production  
2 facilities. ORS 475B.486.<sup>2</sup> As pertinent here, Deschutes County Code (DCC)  
3 18.116.330(B)(7)(a)(iv) provides that marijuana production and processing uses  
4 must be located a minimum of 1,000 feet from “[a] youth activity center,”  
5 “measured from the lot line of the affected properties listed in DCC  
6 18.116.330(B)(7)(a) to the closest point of the buildings and land area occupied  
7 by the marijuana producer or marijuana processor.”<sup>3</sup> We refer to that requirement

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<sup>2</sup> ORS 475B.486(2) provides, in part:

“Notwithstanding ORS 30.935, 215.253(1) or 633.738, the governing body of a city or county may adopt ordinances that impose reasonable regulations on the operation of businesses located at premises for which a license or certificate has been issued under ORS 475B.010 to 475B.545 if the premises are located in the area subject to the jurisdiction of the city or county[.]”

<sup>3</sup> DCC 18.1 16.330(B)(7)(a) provides:

“7. Separation Distances. Minimum separation distances shall apply as follows:

“a. The use shall be located a minimum of 1000 feet from:

“i. A public elementary or secondary school for which attendance is compulsory under Oregon Revised Statutes 339.010, *et seq.*, including any parking lot appurtenant thereto and any property used by the school;

“ii. A private or parochial elementary or secondary school, teaching children as described in ORS 339.030(1)(a), including any parking lot

1 in this decision as the “separation distance” or the “separation buffer.” That  
2 limitation applies to marijuana production in the EFU.<sup>4</sup>

3 County planning staff approved petitioner’s application after finding that  
4 it could satisfy all applicable criteria with conditions. Record 1252–89.  
5 Intervenors appealed that decision the board of county commissioners (board),  
6 which denied the application based solely on its determination that Sundance  
7 Meadows is a “youth activity center” and the application did not comply with the

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appurtenant thereto and any property used by the  
school;

“iii. A licensed child care center or licensed  
preschool, including any parking lot appurtenant  
thereto and any property used by the child care  
center or preschool. This does not include  
licensed or unlicensed child care which occurs at  
or in residential structures;

“iv. A youth activity center; and

“v. National monuments and state parks.”

<sup>4</sup> In October 2018, the county adopted Ordinance No. 2018-012 amending DCC chapter 18. That decision was challenged in *Deschutes Farm Bureau v. Deschutes County*, \_\_\_ Or LUBA \_\_\_ (LUBA No 2018-036, Oct 9, 2019). The county later repealed Ordinance No. 2018-012. Those events do not affect the applicable criteria and analysis in this case, which remain the same as when the application was filed.

1 separation buffer.<sup>5</sup> The board expressly adopted all of the other findings of  
2 compliance and conditions in the staff report. Record 40.

3 On October 21, 2020, petitioner filed a notice of intent to appeal that  
4 decision to LUBA in this appeal. Meanwhile, on October 17, 2019, LUBA issued  
5 a final decision in *Waveseer of Oregon, LLC v. Deschutes County*, \_\_\_ Or LUBA  
6 \_\_\_ (LUBA No 2019-036, Oct 17, 2019) (*Waveseer I*), which, as described  
7 further below, remanded a different decision in which the board denied an  
8 application for marijuana production on land zoned EFU based on the youth  
9 activity center separation distance criterion. The county withdrew for  
10 reconsideration the decision that is challenged in this appeal, and issued a  
11 decision on reconsideration again denying the application based solely on its  
12 determination that Sundance Meadows is a “youth activity center” and the  
13 application did not comply with the youth activity center separation distance  
14 criterion.

15 The term “youth activity center” is undefined and not used elsewhere in  
16 the DCC. The board referred to the phrase “youth activity center,” generally, as  
17 “gathering places for children” and explained that “Deschutes County  
18 intentionally separated youths from marijuana production and processing,  
19 particularly concentrations of youths engaging in organized activities.” Record

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<sup>5</sup> Intervenors reside within the Sundance East Subdivision, which is adjacent to the west side of the subject property. Record 174, 178, 727.

1 41. The board observed that, while applicable state law allows marijuana  
2 production as an outright permitted use in EFU zones, state law also allows local  
3 governments to place reasonable time, place, and manner restrictions on  
4 marijuana production. *Id.* The board explained that the county “intentionally  
5 restricted the ‘place’ where marijuana could be grown in the EFU zone with the  
6 intent of protecting the County’s youths engaging in activities.” *Id.* The board  
7 reasoned that marijuana is a unique crop because it is an intoxicant that is “grown  
8 in a mostly consumable state” and requires “simply drying to be consumed.” *Id.*  
9 The board also reasoned that Deschutes County has a unique zoning pattern that  
10 mixes EFU-zoned property with lands developed with non-agricultural uses,  
11 which “creates a greater likelihood for conflicting uses, such as development  
12 featuring youth activities near EFU land suitable for marijuana production.” *Id.*  
13 The board explained that the county’s “checkerboard” zoning pattern resulted  
14 from development on agricultural lands prior to adoption of state land use law  
15 that preserves agricultural land for agricultural uses and protects agricultural uses  
16 from conflicting uses. *Id.*

17 The board explained that, to assist the county in determining whether a  
18 specific use is a “youth activity center,”

19 “this Board has compiled a list of ten factors that it collectively has  
20 found persuasive when previously called to interpret the otherwise  
21 undefined term. It should be noted that the Board’s intention in  
22 setting forth the aforementioned ten factors is simply to consolidate  
23 and clarify our previous interpretations. The Board intends that these  
24 ten factors are to be applied as a checklist of considerations, but not

1 all such consideration are required elements for a use to rise to the  
2 level of a ‘youth activity center.’ A use may satisfy only some of the  
3 factors, and still qualify as a ‘youth activity center.’” Record 34.

4 The board set out ten factors (the *Nehmzow* factors):

- 5 (1) Separate building, facility, or area for use
- 6 (2) Youth recreation activity accommodated regularly
- 7 (3) Adult supervision provided
- 8 (4) Specific toys, games, or equipment available for activity
- 9 (5) Permitted or licensed activities
- 10 (6) Organized group activities
- 11 (7) School related activities
- 12 (8) Usage (frequency/ regularity/ intensity/ number of participants)  
13 exceeds usual EFU use by 50% or more
- 14 (9) Use observable from neighboring properties
- 15 (10) Youth activities marketed to the public (e.g., website, social  
16 media, published or publicized). Record 34.

17 The board explained that whether a use is a “youth activity center” would  
18 be determined on a case-by-case basis. In addition to the above ten factors, the  
19 board interpreted our decision in *Waveseer I* as imposing an additional  
20 “foreseeability” constraint. That is, in considering whether a specific use is youth  
21 activity center, the decision maker should determine whether it is foreseeable that  
22 the county would consider that land use to qualify as a “youth activity center”  
23 that requires a separation buffer. *Id.* Finally, the board noted that a person who is

1 interested in purchasing property for marijuana production or processing “should  
2 perform the customary ‘due diligence’ on par with any other commercial property  
3 acquisition to verify that the intended use is reasonably likely to be permitted on  
4 the considered tract.” Record 43.

5 The board applied the *Nehmzow* factors and determined that the youth-  
6 oriented activities at Sundance Meadows constitute a “youth activity center.” The  
7 board found that the recreational facilities include “separate buildings, facilities,  
8 and areas [that] collectively rise to the level of a youth activity center, thus  
9 imposing a separation distance measured from the [Sundance Meadows] property  
10 line.” Record 43–44. The board determined that due diligence would have  
11 revealed the youth activities and that it was foreseeable that the county could  
12 conclude that those activities qualify Sundance Meadows as a youth activity  
13 center. The board denied the application for failure to satisfy the separation buffer  
14 requirement.

15 Petitioner filed an amended notice of intent to appeal. The only issue on  
16 appeal is whether the county properly interpreted and applied the youth activity  
17 center separation buffer criterion to deny the application.

18 **JURISDICTION**

19 The county and intervenors (respondents) argue that LUBA lacks  
20 jurisdiction to review this appeal because petitioner failed to demonstrate in the  
21 petition for review that the issues raised in the assignments of error were raised

1 during the local proceedings, as required by OAR 661-010-0030(4)(d).<sup>6</sup> Joint  
2 Response Brief 13.

3 To preserve an issue for LUBA's review, a party must raise the issue "not  
4 later than the close of the record at or following the final evidentiary hearing on  
5 the proposal before the local government." ORS 197.763(1). LUBA's scope of  
6 review is limited to those issues limited to those "raised by any participant before  
7 the local hearings body." ORS 197.835(3).

8 Under ORS 197.825(2)(a), LUBA's jurisdiction "[i]s limited to those cases  
9 in which the petitioner has exhausted all remedies available by right before  
10 petitioning the board for review." In the land use context, the exhaustion principle  
11 generally means that a party must seek review in an available local appeal before  
12 appealing a decision to LUBA. For example, a planning staff decision may be  
13 appealable to a hearings officer, and a hearings officer's decision may be  
14 appealable to the local governing body. A petitioner's failure to seek an available

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<sup>6</sup> OAR 661-010-0030(4)(d) provides, in part, that within the petition for review petitioner shall:

"Set forth each assignment of error under a separate heading. Each assignment of error must demonstrate that the issue raised in the assignment of error was preserved during the proceedings below. Where an assignment raises an issue that is not identified as preserved during the proceedings below, the petition shall state why preservation is not required."

1 local appeal would deprive LUBA of review jurisdiction under ORS  
2 197.825(2)(a).

3 In *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003), which  
4 respondents cite, the Court of Appeals explained that, to preserve an issue for  
5 LUBA review, the issue must be raised not only before the close of the record in  
6 the local proceeding, but also during a local appeal so that the final decision  
7 maker has an opportunity to rule on the issue. The court interpreted LUBA's  
8 scope of review, defined in ORS 197.835(3), and the preservation requirement of  
9 ORS 197.763(1) in context of the exhaustion requirement in ORS 197.825(2)(a).  
10 Respondents rely on *Miles* in arguing that LUBA lacks jurisdiction. Response  
11 Brief 13.

12 Respondents misapprehend the holding in *Miles* and conflate preservation  
13 and exhaustion principles. Preservation principles are prudential, while  
14 exhaustion is jurisdictional. Generally, the failure to preserve an issue for review  
15 does not deprive LUBA of jurisdiction to review a final land use decision.  
16 Instead, failure to preserve an issue would remove that issue from our scope of  
17 review. Differently, failure to seek review in an available local appeal, and thus  
18 exhaust "all remedies available by right," is a jurisdictional defect. Respondents  
19 do not assert that petitioner failed to exhaust "all remedies available by right."  
20 LUBA has jurisdiction.

1 **PRESERVATION**

2 As explained above, issues must be preserved for LUBA review. ORS  
3 197.835(3), 197.763(1). Petitioner is required to demonstrate in the petition for  
4 review that each issue was preserved, or explain why preservation is not required.  
5 OAR 661-010-0030(4)(d); n 6. Petitioner does not contend that preservation is  
6 not required for any issue raised in the petition for review. In the petition for  
7 review, petitioner references the same three documents, totaling 136 pages, to  
8 demonstrate that the issues raised in all three assignments of error were  
9 preserved: (1) all 18 pages of the challenged decision; (2) petitioner’s final  
10 argument and appendixes submitted to the county; and (3) petitioner’s entire open  
11 record submittal. Petition for Review 7, 12, 17. Petitioner cites an additional 222  
12 pages in his preservation statement for the second assignment of error. Petition  
13 for Review 12.

14 Respondents object to all three of petitioner’s preservation of error  
15 statements as overly broad, and argue that LUBA should therefore deny all three  
16 assignments of error. Respondents cite *H2D2 Properties, LLC v. Deschutes*  
17 *County*, \_\_\_ Or LUBA \_\_\_, \_\_\_ (LUBA No 2019-06, Dec 19, 2019) (slip op at  
18 7–9), a case where we denied six assignments of error for which the petitioner  
19 cited a total of 113 record pages to demonstrate preservation. Failure to cite the  
20 specific portion of record where an issue was raised can be prejudicial to the  
21 respondent where preservation is disputed. “Compliance with OAR 661-010-  
22 0030(4) helps eliminate waiver disputes or frame waiver disputes earlier in an

1 appeal, and in many cases will eliminate the need for a reply brief altogether with  
2 attendant efficiencies to LUBA’s appellate review.” *Wal-Mart Stores, Inc. v. City*  
3 *of Hood River*, 72 Or LUBA 1, 7, *aff’d*, 274 Or App 261, 363 P2d 522 (2015).  
4 Where preservation is disputed, LUBA will not search the record, or large page  
5 range citations, to determine whether an issue was raised below.

6         However, respondents do not dispute that the issues raised in the petition  
7 for review were raised in the local proceeding. Indeed, as petitioner points out, it  
8 would be difficult for respondents to take that position because the bulk of the  
9 challenged decision addresses the same central issue that petitioner challenges in  
10 his three assignments of error. The only basis for the board’s denial is the youth  
11 activity center separation distance criterion and the only issue on appeal is the  
12 board’s interpretation and application of the youth activity center separation  
13 distance criterion.

14         In the reply brief, petitioner provides more focused record citations within  
15 the original citations to establish that the issues raised in the three assignments of  
16 error were raised below. In addition, petitioner argues, and we agree, that it is  
17 evident from the challenged decision itself that the issues raised on appeal were  
18 central to the local proceedings and the county’s decision responds to those  
19 issues. *See Boldt v. Clackamas County*, 107 Or App 619, 623, 813 P2d 1078  
20 (1991) (explaining that the objective of ORS 197.763(1) is to “afford the  
21 decisionmaker and the parties ‘an adequate opportunity to respond to each issue.’  
22 The plain thrust of that language is that the statute requires no more than fair

1 notice to adjudicators and opponents[.]”). In these circumstances, we conclude  
2 that petitioner’s failure to adequately specify where issues were preserved in the  
3 petition for review, or explain why preservation is not required, is a technical  
4 violation that does not prejudice respondents’ substantial rights. *See* OAR 660-  
5 010-0005 (“Technical violations not affecting the substantial rights of parties  
6 shall not interfere with the review of a land use decision or limited land use  
7 decision.”). Petitioner has established that the issues raised in three assignments  
8 of error are preserved for our review.

9 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

10 The first and second assignments of error present essentially the same legal  
11 questions, and we address them together. Petitioner argues that the county’s  
12 decision is unreasonable and violates ORS 475B.486, which allows the county to  
13 impose only “reasonable” regulations on marijuana production facilities.  
14 Petitioner argues that the board’s interpretation of the youth activity center  
15 separation distance criterion creates an impermissibly indefinite standard in  
16 violation of ORS 215.416(8)(a), which requires that permit approval standards  
17 and criteria set out in local regulations inform interested parties of the basis on  
18 which an application will be approved or denied.<sup>7</sup>

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<sup>7</sup> ORS 215.416(8)(a) provides:

“Approval or denial of a permit application shall be based on standards and criteria which shall be set forth in the zoning ordinance or other appropriate ordinance or regulation of the county

1           Petitioner first argues that the county’s decision is contrary to *Waveseer I*,  
2 where we remanded the county’s decision denying an application for marijuana  
3 production based, in part, on the youth activity center separation distance  
4 criterion. The petitioner argued, and we agreed, that the county’s interpretation  
5 of the youth activity center separation buffer—that farm uses and residential uses  
6 that “center around youth on a regular basis” constitute “youth activity  
7 center(s)”—was unreasonable under ORS 475B.486. In so concluding, we relied  
8 on ORS 215.416(8)(a). We reasoned:

9           “We agree with petitioner that the county’s broad interpretation of  
10 ‘youth activity center’ is unreasonable because there is no way for  
11 an applicant to determine if a particular EFU-zoned property could  
12 be used for marijuana production. Instead, the county interpretation  
13 would allow the county to deny a marijuana production application  
14 when any neighboring property owner testified that youth-oriented  
15 activities regularly occur on a neighboring property within the  
16 separation buffer. Those youth-oriented activities may occur  
17 outdoors, or in a farm structure, as part of an existing farm use, or  
18 may occur in and around a residence as accessory to a residential  
19 use. In any event, a property owner or applicant would not have any  
20 practical way of identifying whether those youth-oriented activities  
21 are occurring within the separation buffer surrounding any particular  
22 EFU-zoned property. As applied in this case, the county’s  
23 interpretation of youth activity center is so amorphous and uncertain  
24 that we conclude it is unreasonable.

25           “In so concluding, we emphasize the fact that the term ‘youth

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and which shall relate approval or denial of a permit application to the zoning ordinance and comprehensive plan for the area in which the proposed use of land would occur and to the zoning ordinance and comprehensive plan for the county as a whole.”

1 activity center’ is undefined and not used elsewhere in the DCC. In  
2 addition, while we doubt whether a youth-oriented farm use or  
3 residential use could limit a farm use on property that is zoned EFU,  
4 it may be that, under different facts and circumstances, the county  
5 could interpret the undefined phrase ‘youth activity center’ in a  
6 manner that would not violate ORS 215.416(8)(a) or ORS  
7 475B.486. However, as applied in this case, the county’s  
8 interpretation of ‘youth activity center’ is contrary to ORS  
9 215.416(8)(a) and ORS 475B.486.” *Waveseer I*, \_\_\_ Or LUBA at  
10 \_\_\_ (slip op at 18–19).

11 Petitioner argues that the board’s interpretation in this case is even more  
12 expansive than the interpretation that LUBA remanded in *Waveseer I*. Sundance  
13 Meadows is a ranch with recreational facilities that sells timeshares to adults.  
14 Record 161–72, 1268–69. Petitioner argues the fact that children may stay on the  
15 property and engage in activities or use some of the recreational facilities does  
16 not transform the entire property into a youth activity center. Petition for Review  
17 9. As petitioner notes, the board’s interpretation of youth activity center could  
18 encompass any swimming pool or basketball court where children play. We agree  
19 that the board’s interpretation in this case is inconsistent with the holding in  
20 *Waveseer I* and is unreasonable under ORS 475B.486.

21 More importantly, and as we conclude in *Waveseer of Oregon, LLC v.*  
22 *Deschutes County*, \_\_\_ Or LUBA \_\_\_ (LUBA No 2020-038, August 10, 2020)  
23 (*Waveseer II*), issued this date, the undefined phrase “youth activity center” is  
24 too indefinite to constitute a criterion and, thus, violates ORS 215.416(8)(a) and  
25 cannot be applied. Petitioner makes that same argument in this case. Petition for  
26 Review 10–12, 17. As explained at greater length in *Waveseer II*, we agree with

1 petitioner that the county’s interpretation of “youth activity center,” relying on a  
2 list of factors derived from quasi-judicial decisions that are not contained in the  
3 DCC, does not save the youth activity center separation distance criterion from  
4 being impermissibly indefinite. Thus, the county erred in denying the application  
5 based on that criterion. We also conclude that the county erred in applying the  
6 *Nehmzow* factors, because those factors constitute uncodified criteria in violation  
7 of ORS 215.416(8)(a). *Waveseer II*, \_\_\_ Or LUBA at \_\_\_ (slip op at 25).

8 The first and second assignments of error are sustained.

9 **THIRD ASSIGNMENT OF ERROR**

10 In the third assignment of error, petitioner argues that the board interpreted  
11 the term “youth activity center” in a manner that is inconsistent with the express  
12 language and purpose of that provision. ORS 197.829(1); *Siporen v. City of*  
13 *Medford*, 349 Or 247, 243 P3d 776 (2010) (applying ORS 197.829(1)).<sup>8</sup> We have

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<sup>8</sup> ORS 197.829(1) provides:

“[LUBA] shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

“(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;

“(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;

“(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or

1 concluded that the county cannot apply the youth activity center separation  
2 distance criterion because it is too indefinite. Accordingly, we need not reach or  
3 decide the third assignment of error.

4 **DISPOSITION**

5 Petitioner requests as relief an order reversing the decision or remanding  
6 the decision. Petition for Review 1, 20. Petitioner argues that the facts are  
7 undisputed, nothing can be changed by a remand, and petitioner's application  
8 must be approved under the correct interpretation of the ordinance. Petition for  
9 Review 7–8, 18 (citing *McKay Creek Valley Ass'n v. Washington County*, 114  
10 Or App 95, 98–99; 834 P2d 482, *adh'd to as modified on recons*, 116 Or App  
11 229, 841 P2d 651 (1992)). County planning staff concluded that, with conditions  
12 of approval, the application satisfies all applicable criteria. Record 1252–89. The  
13 board of county commissioners expressly adopted those findings of compliance  
14 and conditions in the staff report, except that the board denied the application  
15 based solely on its application of the youth activity center separation distance  
16 requirement. Record 40. We conclude that the board erred in applying that  
17 criterion. Accordingly, there is no basis for the county to deny the application.

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“(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.”

- 1 We agree that nothing can be changed by a remand and the application must be
- 2 approved. Thus, the correct disposition is reversal.
- 3       The county's decision is reversed.