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

CENTRAL OREGON LANDWATCH,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent.

LUBA No. 2020-019

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Carol Macbeth filed the petition for review and reply brief and argued on behalf of petitioner.

D. Adam Smith filed the response brief and argued on behalf of respondent.

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

AFFIRMED 03/22/2021

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

Opinion by Zamudio.

NATURE OF THE DECISION

Petitioner appeals Ordinance 2020-001, which is a legislative decision by the board of county commissioners that amends the Deschutes County Code (DCC) and Deschutes County Comprehensive Plan (DCCP) to (1) replace references to "churches" with references to "religious institutions or assemblies," (2) remove churches from a list of prohibited uses in the Wildlife Area Combining (WA) overlay zone, (3) allow religious institutions or assemblies as outright permitted uses in several districts within the Urban Unincorporated Community – Sunriver Resort zone, and (4) remove churches as a conditional use and allow religious institutions or assemblies as outright permitted uses in several districts within the Rural Service Center – Unincorporated Community (RSC) zone.

STANDING

The challenged decision is a post-acknowledgment plan amendment (PAPA). Petitioner's statement of standing cites ORS 197.830(2), which requires that the petitioner have "[a]ppeared before the local government * * * orally or in writing."[1] Petitioner appeared orally at four public hearings before the planning

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[1] ORS 197.830(2) provides:

> "Except as provided in ORS 197.620, a person may petition the board for review of a land use decision or limited land use decision if the person:

commission and submitted approximately 120 pages of evidence and argument in opposition to the legislative amendments. Those materials were placed before and not rejected by the board of county commissioners and are therefore included in the record in this appeal. Petitioner did not further participate in the legislative proceedings before the board of county commissioners.

In the response brief, the county challenges petitioner's standing, arguing that petitioners' appearance before the planning commission is not sufficient to establish standing under ORS 197.830(2). The county acknowledges that we have held, in a quasi-judicial context, that a petitioner's appearance before the planning commission is adequate to constitute an appearance before the local government for purposes of ORS 197.830(2)(b), and that the petitioner need not have appeared before the governing body that rendered the final decision following a local appeal of the planning commission decision. *Thomas v. City of Veneta*, 44 Or LUBA 5, *aff'd*, 189 Or App 88, 74 P3d 114 (2003). The county posits that a legislative decision should have a higher standing requirement because local legislation is informed by public participation, and petitioner should not be allowed to challenge a final decision without having participated

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"(a) Filed a notice of intent to appeal the decision as provided in subsection (1) of this section; and

"(b) Appeared before the local government, special district or state agency orally or in writing."

in all stages of the legislative proceeding that resulted in the challenged legislation.

The county presents a novel issue: whether we should interpret the appearance requirement in ORS 197.830(2)(b) more stringently in an appeal of a legislative decision, as compared to an appeal of a quasi-judicial decision. The first problem with the county's position is that it is unsupported by the text of ORS 197.830(2)(b) and ORS 197.620, the latter of which provides additional bases for standing to appeal a PAPA that do not apply in this appeal. It would be unusual, and likely *ultra vires*, for LUBA to adopt divergent interpretations of the same statutory provision without any textual support within the relevant statute. Moreover, the purpose of the appearance requirement is the same in the legislative context as in the quasi-judicial context.

In *Warren v. Lane County*, the petitioners had testified before the planning commission, but they did not testify in subsequent proceedings before the board of county commissioners. 297 Or 290, 297, 686 P2d 316 (1984). The Supreme Court concluded that the petitioners had "appeared" for purposes of ORS 197.830. The court explained that the legislature prescribed the appearance requirement in order to prevent persons from doing nothing until after a land use decision has been made, and then appealing that decision. "The legislature required that in order to appeal, persons must first get involved and offer their views at the local level." *Id.* The court reasoned that appearing before whatever hearing body is delegated responsibility to gather evidence and make

recommendations to the governing body furthers the legislative policy of involving people and hearing their views at the local level.

The county argues that, under the DCC, the planning commission is authorized to review legislative decisions but not make recommendations to the board of county commissioners. DCC 22.12.010.[2] Whether that distinction—reviewing versus making recommendations—accurately reflects the planning commission's function under the DCC is immaterial to petitioner's standing, which is a matter of state law. The legislative purpose of the appearance requirement reflected in the court's decision in *Warren* is not based on the delegated decisional authority of the hearing body. Instead, where the hearing body creates a record that is presented to the final decision maker, an appearance before that hearing body is sufficient to confer standing to appeal to LUBA. The court explained:

> "[W]here the local governing body bases its land use decision, in whole or in part, on the record obtained in a prior proceeding before a planning commission, hearings officer, or other approval authority, whichever is delegated responsibility to gather evidence and make land use decisions or recommendations to the local governing body, then an appearance on the record before that authority is an appearance before the local governing body. The test is not, of course, whether the local governing body actually considers or is persuaded by the record made below, but only

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[2] DCC 22.12.010 provides, "No legislative change shall be adopted without review by the Planning Commission and a public hearing before the Board of County Commissioners."

> whether local ordinances require that a record in the prior stage of the local proceeding be made and forwarded to the local governing body for consideration." *Id.* at 297-98.

Similarly, in *Conte v. City of Eugene*, the Court of Appeals explained that the "appeared" standard requires "the kind of involvement necessary to facilitate full development of the record and fairness to the parties and the tribunal." 292 Or App 625, 637, 425 P3d 494 (2018).

The county does not dispute that the planning commission record is part of the record before the board of county commissioners. Petitioner's involvement before the planning commission facilitated the full development of the record and is sufficient to constitute an appearance under ORS 197.830(2)(b). Petitioner has standing in this appeal.

MOTION TO STRIKE

Petitioner attaches a copy of Ordinance 92-041 as an appendix to the petition for review. The county moves to strike Ordinance 92-041, and all references to it in petitioner's briefing, because Ordinance 92-041 is not in the record and petitioner did not request that we take official notice of it.

Ordinance 92-041 is the ordinance by which the county adopted its initial Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) inventories; conflicting use analyses; Economic, Social, Environmental and Energy (ESEE) analyses; and Goal 5 programs in 1992. DCCP section 2.4 provides:

> "Deschutes County completed Goal 5 inventories and the ESEE

> analysis during Periodic Review, a State process for updating comprehensive plans which lasted from 1988-2003. The County Goal 5 inventories and programs were acknowledged by the Department of Land Conservation and Development as being in compliance with Goal 5. Therefore, the acknowledged Goal 5 inventories, ESEEs and programs are retained in this Plan * * *."

Petitioner responds that Ordinance 92-041 is part of the DCCP and points out that, under ORS 40.090(7), LUBA may take official notice of an "ordinance, comprehensive plan or enactment of any county or incorporated city in this state, or a right derived therefrom."

LUBA routinely takes official notice of local government comprehensive plans and land use regulations. *McNamara v. Union County*, 28 Or LUBA 722 (1994). We take official notice of Ordinance 92-041 as part of the DCCP. However, we agree with the county that petitioner impermissibly relies on Ordinance 92-041 to establish geographic and scientific facts and legislative history. We do not have authority to take official notice of adjudicative facts or local legislative history. *Citizens for Renewables v. Coos County*, ___ Or LUBA ___, ___ (LUBA No 2020-003, Feb 11, 2021) (slip op at 52); *Martin v. City of Central Point*, 73 Or LUBA 422, 426 (2016). Accordingly, we will not consider Ordinance 92-041 for those purposes.

BACKGROUND

The challenged decision is an independent legislative decision. However, other appellate decisions provide helpful background and context for the challenged decision, so we describe them at the outset. In *Central Oregon*

Landwatch v. Deschutes County, 77 Or LUBA 395 (*COLW I*), *aff'd*, 294 Or App 317, 431 P3d 457 (*COLW II*) (2018), we remanded the county's amendments to the DCC and DCCP to allow churches in the WA overlay zone. We explained:

> "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 [DCCP] as a deer winter range, significant elk habitat, antelope range or deer migration corridor. [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 exceptions set out in DCC 18.88.040(B). * * * [I]n adopting the WA overlay zone and the 10 exceptions, the county determined that those 10 exceptions are 'conflicting uses' in the parlance of the Goal 5 rule, which conflict with the wildlife resources protected by the identified wildlife areas, and decided to prohibit those conflicting uses in the WA overlay zone. [*See* OAR 660-023-0010(1) (defining 'conflicting use').[3]]
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> "DCC 18.88.040(B) identifies 10 conditional uses that are not permitted 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.'[] * * *
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> "* * * * *

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[3] OAR 660-023-0010(1) provides: "'Conflicting use' is a land use, or other activity reasonably and customarily subject to land use regulations, that could adversely affect a significant Goal 5 resource (except as provided in OAR 660-023-0180(1)(b)). Local governments are not required to regard agricultural practices as conflicting uses."

"The plan and code amendments challenged in [*COLW I* arose] from a specific quasi-judicial dispute. * * *

"[After an unsuccessful attempt to have a church allowed on his property, which is in the WA overlay zone, *Central Oregon Landwatch v. Deschutes County*, 75 Or LUBA 284 (*Shepherd I*), *aff'd*, 287 Or App 239, 400 P3d 325 (*Shepherd II*) (2017)], John Shepherd wrote letters to the county threatening to file a lawsuit under the federal Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 USC §[§] 2000[cc to 2000cc-5], unless the county amended DCC 18.88.040(B) to eliminate the prohibition on churches. * * *

"Shortly thereafter, county staff initiated proposed amendments to the [DCC and DCCP] that would eliminate the prohibition in DCC 18.88.040(B)(3) on churches in [the WA overlay zone]. Because the proposed amendments would constitute an amendment of the county's acknowledged Goal 5 program to protect significant natural resources in order to allow a new conflicting use, staff provided an analysis under the requirements of the administrative rule implementing Goal 5, at OAR chapter 660, division 023.

"* * * OAR chapter 660, division 023, requires the county to conduct an analysis of the [ESEE] consequences of allowing, limiting or prohibiting uses that conflict with an inventoried significant natural resource. Based on that ESEE analysis, the county must then develop a program to achieve Goal 5 or, in this case, determine whether to modify its acknowledged 1992 program to achieve Goal 5 with respect to wildlife resources. Based on the standards in OAR 660-023-0040(5), the county may decide to (1) prohibit conflicting uses, (2) allow conflicting uses to a limited extent, or (3) allow conflicting uses without limit.

"* * * * *

"* * * The board of county commissioners ultimately decided to approve a version of the staff-initiated amendments that eliminates the prohibition on churches in the WA overlay zone * * *, in effect modifying the county's program to achieve Goal 5 to allow churches

without limits as a new conflicting use.

> "[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 [(LCDC)] 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." *COLW I*, 77 Or LUBA at 397-401 (footnote omitted).

In *COLW I*, we concluded that, because the county's 1992 legislative decision to prohibit churches in the WA overlay zone in order to achieve Goal 5 was based on extensive study and scientific analysis, subject to review and approval by LCDC, the mere *threat* of litigation against the county by a single landowner was an insufficient basis for the county to abandon that portion of its Goal 5 program. *COLW I*, 77 Or LUBA at 406. Instead, relying on the text and context of OAR 660-023-0040(4) and (5), we held that a county may modify its Goal 5 program based on threats of RLUIPA litigation only if its ESEE analysis evaluates whether the program may *actually* violate RLUIPA. In other words, we held that the county's ESEE analysis may not rest solely on the negative economic consequences of defending against such a claim, but must also consider the merits of such a claim. The Court of Appeals affirmed our conclusion. *COLW II*, 294 Or App at 326-27. We also concluded that remand was necessary because, in deciding to allow churches in the WA overlay zone without limits, the county

did not actually evaluate any limits that it could have adopted to protect wildlife resources, as required by OAR 660-023-0040(5)(c). *COLW I*, 77 Or LUBA at 410-11.

In 2018, while *COLW I* was pending review, the Shepherds sought land use approval to conduct church services and associated activities on their property. The county approved the application after concluding that RLUIPA prohibited it from applying the WA overlay zone provisions that would result in denying the application. We affirmed the county's decision and the Court of Appeals affirmed our decision. *Central Oregon Landwatch v. Deschutes County*, 78 Or LUBA 516, 518 (2018) (*Shepherd III*), *aff'd*, 296 Or App 903, 439 P3d 1060 (2019) (*Shepherd IV*). We agreed with the county that DCC 18.88.040(B) violates RLUIPA's equal terms provision because it prohibits churches in the WA overlay zone, while DCC 18.88.040(A) conditionally allows in the WA overlay zone secular uses that are allowed in the underlying zones that have similar impacts on wildlife, including wineries, museums, outdoor mass gatherings, and other commercial activities and events. *Shepherd III*, 78 Or LUBA at 522-23.[4]

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[4] RLUIPA's equal terms provision provides: "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." 42 USC § 2000cc(b)(1).

After *Shepherd III*, the county adopted Ordinance 2020-001, which petitioner challenges in this appeal and which amends the DCC to remedy the RLUIPA violation identified in *Shepherd III* by removing the prohibition on churches the WA overlay zone.

In addition, the county decided to comprehensively review its code and amend any other provisions that might offend the RLUIPA equal terms provision by treating "a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 USC § 2000cc(b)(1). The county identified the following RLUIPA equal terms concerns. In the RSC zone, parks or playgrounds, community centers, and public or semipublic buildings or uses were all allowed as permitted uses subject to site plan review, but churches were allowed as conditional uses in that zone. In the Sunriver Town Center District, religious institutions and assemblies were not allowed, but parks, libraries, community centers, and visitor centers were allowed as outright permitted uses. In the Sunriver Resort Marina District, religious institutions and assemblies were not allowed, but parks, playgrounds, and picnic and barbecue areas were allowed as outright permitted uses. In the Sunriver Golf Course District, religious institutions and assemblies were not allowed, but golf courses were allowed as an outright permitted use. In the Sunriver Nature Center District, religious institutions and assemblies were not allowed, but nature centers were allowed as an outright permitted use.

The county amended the DCC and DCCP to replace the term "church" with "religious institution or assembly" in order to include all religious worship and places of worship.[5] The county concluded that religious institutions or assemblies should be equally allowed where similar secular uses are allowed. The amendments allow religious institutions or assemblies as outright permitted uses where other similar secular uses are allowed in the Sunriver Resort districts and as outright permitted uses, instead of conditional uses, in several districts within the RSC zone.

Because the WA overlay zone was adopted to protect deer, elk, and antelope habitat, and because the Sunriver Resort Marina, Golf Course, and Nature Center districts contain riparian resources and wildlife habitat—which are

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[5] Former DCC 18.04.030 defined "church" as "an institution that has nonprofit status as a church established with the Internal Revenue Service." Former DCC 19.04.040 defined "church" as "a permanently located building commonly used for religious worship, fully enclosed with walls (including windows and doors), having a roof (canvas or fabric excluded) and conforming to applicable legal requirements affecting design and construction."

Amended DCC 18.04.030 and 19.04.040 provide:

> "'Religious Institution or Assembly' means, so long as having public charity status as a religious assembly or institution established with the Internal Revenue Service, either (consistent with ORS 215.441(1)) a church, synagogue, temple, mosque, chapel, meeting house, or other nonresidential place of worship, or (consistent with 42 USCA § 2000cc-5(7)(B)), the use, building, or conversion of real property for the purpose of religious exercise." Record 23, 52.

Goal 5 resources—the county concluded that the amendments allowed new uses which "could" conflict with Goal 5 resources within the meaning of OAR 660-023-0250(3)(b). Record 87. In that circumstance, OAR 660-023-0250(3) directs the county to "apply Goal 5." OAR 660-023-0040 sets out the ESEE decision process, which results, ultimately, in the county deciding to (1) protect the Goal 5 resource by prohibiting conflicting uses; (2) protect the resource and the conflicting use by allowing the conflicting use on a limited basis; or (3) fully allow the conflicting use "notwithstanding the possible impacts on the resource site." OAR 660-023-0040(5)(a)-(c). We discuss OAR 660-023-0040 later in this decision.

The county therefore conducted a new ESEE analysis, after which it chose to allow religious institutions or assemblies fully in the WA overlay zone and the Sunriver Resort Marina, Golf Course, and Nature Center districts, notwithstanding their possible impacts on the Goal 5 resources. Record 90-114. The county amended the DCC and DCCP to reflect that choice in the new ESEE analysis.

This appeal followed.

PRESERVATION OF ERROR

Petitioner argues that it is not required to demonstrate that it preserved any of its arguments below because the challenged decision is a legislative decision. *See* OAR 661-010-0030(4)(d) ("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.").

ORS 197.835(3) provides that issues at LUBA "shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable." Under ORS 197.763(1), parties must raise issues during local proceedings in order to raise them in an appeal before LUBA. That so-called "raise or waive it" doctrine applies only to quasi-judicial proceedings. *Columbia Pacific v. City of Portland*, 76 Or LUBA 15, 24-25 (2017), *rev'd and rem'd on other grounds*, 289 Or App 739, 412 P3d 258, *rev den*, 363 Or 390 (2018); *DLCD v. Columbia County*, 24 Or LUBA 32, 36, *aff'd*, 117 Or App 207, 843 P2d 996 (1992); *Parmenter v. Wallowa County*, 21 Or LUBA 490, 492 (1991).

The county acknowledges that ORS 197.763(1) does not apply to legislative decisions and urges us to interpret ORS 197.805 to create a "legislative preservation rule." ORS 197.805 provides, in part: "It is the policy of the Legislative Assembly that time is of the essence in reaching final decisions in matters involving land use and that those decisions be made consistently with sound principles governing judicial review." The county argues that we should construe ORS 197.805 to impose a preservation requirement for review of legislative decisions because allowing parties to raise new issues on appeal to LUBA enables them to delay legislation.

We decline the county's invitation. ORS 197.805 applies equally to legislative and quasi-judicial proceedings. If the policy set forth in that statute were itself sufficient to support a "raise it or waive it" requirement in local land use proceedings, then the legislature's express adoption of such a requirement in ORS 197.835(3), and ORS 197.195 or 197.763, would be meaningless surplusage.[6] *See State v. Stamper*, 197 Or App 413, 418, 106 P3d 172, *rev den*, 339 Or 230 (2005) ("[W]e assume that the legislature did not intend any portion of its enactments to be meaningless surplusage."); *see also* ORS 174.010 ("[W]here there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.").

FIRST ASSIGNMENT OF ERROR

The county explained its reason for adopting the amendments: "Deschutes County is amending the [DCCP] and several chapters of the [DCC] to treat religious institutions and assemblies or assemblies (formally referred to as

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[6] The fact that ORS 197.805 does not independently impose a "raise it or waive it" requirement on legislative proceedings is further evidenced by the fact that, after adopting ORS 197.805 in 1979, the legislature briefly imposed a preservation requirement on appeals of PAPAs. Or Laws 1981, ch 748, § 5a(4)(a) ("[N]either the director nor a person appealing by filing an objection may appeal on grounds which that party did not raise in the local government proceedings leading to the final adoption."); Or Laws 1983, ch 827, § 8 (repealing the 1981 legislation); *Century Properties, LLC v. City of Corvallis*, 207 Or App 8, 15-16, 139 P3d 990 (2006). If the legislature intended the general policy set forth at ORS 197.805 to encompass a preservation requirement for challenges to legislative decisions, the legislature would not have separately adopted and repealed an express requirement to that effect.

churches) and similar secular uses equally, consistent with [RLUIPA]." Record 93. The county's findings reflect its reliance on *Shepherd III* and *IV* in concluding that the amendments are necessary to comply with RLUIPA:

> "Through [*Shepherd III* and *IV*], both LUBA and the Court of Appeals agreed with the County that prohibiting churches in the [WA overlay zone] while allowing other similar uses violates the equal terms clause of RLUIPA. As a result, the County determined the need to audit the remaining chapters of DCC to identify other areas of noncompliance with RLUIPA, while also analyzing the impact to Goal 5 acknowledged resources." Record 82.

The county's ESEE analysis also reflects this reliance on *Shepherd III*:

> "In [*Shepherd III*], LUBA found the County's WA [overlay zone] did not treat religious institutions and assemblies and similar secular uses equally. The zone conditionally allowed for certain uses such as wineries, living history museums, and agri-tourism and other commercial events and activities, but prohibited religious assemblies. This unequal treatment was found to be in violation of RLUIPA, likely as RLUIPA was adopted more than eight years after the adoption of the WA Combining Zone and other zoning sections. Based on this decision, Deschutes County is proposing to amend several sections of the DCC and [DCCP] to comply with RLUIPA and ensure equal treatment of religious institutions and assemblies and secular uses." Record 93.

We explained the applicable standard of review of legislative land use decisions in *Restore Oregon v. City of Portland*:

> "LUBA's standard of review of a decision that amends a comprehensive plan is set out at ORS 197.835(6). LUBA is required to reverse or remand the amendment if 'the amendment is not in compliance with the goals.' *Id.* LUBA is also required to reverse or remand a decision that amends a land use regulation if, as relevant here, '[t]he regulation is not in compliance with the comprehensive

plan.' ORS 197.835(7)(a).

> "Because the challenged decision is a legislative rather than a quasi-judicial decision, there is no generally applicable requirement that the decisions be supported by findings, although the decision and record must be sufficient to demonstrate that applicable criteria were applied and 'required considerations were indeed considered.' *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 16, n 6, 38 P3d 956 (2002). With respect to evidence, Statewide Planning Goal 2 (Land Use Planning) requires that a decision that amends a comprehensive plan or land use regulation must be supported by an adequate factual base. An 'adequate factual base' is equivalent to the requirement that a quasi-judicial decision be supported by substantial evidence in the whole record. *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372, 378, *aff'd*, 130 Or App 406, 882 P2d 1130 (1994). Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993); *Younger v. City of Portland*, 305 Or 346, 351-52, 752 P2d 262 (1988)." ___ Or LUBA ___, ___ (LUBA Nos 2018-072/073/086/087, Aug 6, 2019) (slip op at 6-7), *aff'd*, 301 Or App 769, 458 P3d 703 (2020).

Petitioner argues that the county's reliance on *Shepherd III* does not provide "an adequate factual base" for concluding that the amended DCC and DCCP provisions that implemented the county's Goal 5 program and previously prohibited (or did not allow) religious institutions or assemblies violate RLUIPA. Petitioner further argues that, because *Shepherd III* did not actually decide whether the Shepherds' use was a "church," that decision does not justify removing the prohibition on churches in the WA overlay zone.

As a threshold matter, petitioner's assignment of error relies on an incorrect standard of review. Petitioner couches the argument in terms of Goal 2

"adequate factual base." However, whether the county's Goal 5 program violates RLUIPA is a question of law. As we explain in more detail in our resolution of the second assignment of error, we expressly concluded in *Shepherd III* that the DCC prohibition on "churches" in the WA overlay zone violated RLUIPA. *See* 78 Or LUBA at 524 ("[T]he board of county commissioners correctly concluded that the express exclusion of churches * * * from the WA overlay zone, while allowing nonreligious assemblies and institutions * * * violates the Equal Terms provision."). We reasoned that it was not material whether the Shepherds' proposed use qualified as a "church" because RLUIPA applies to all religious institutions and assemblies. We concluded that churches "encompass elements of both a religious institution and a religious assembly." *Id.* at 523. Thus, we concluded that religious institutions and assemblies like the Shepherds' proposed use must be allowed in the WA overlay zone on equal terms with similar secular institutions and assemblies.

Petitioner argues that the county's reliance on as-applied cases like *Shepherd III* is inappropriate in considering facial challenges to the DCC and DCCP, citing *Friends of Columbia Gorge v. Columbia River*, 218 Or App 232, 251, 179 P3d 706 (2008), *aff'd*, 346 Or 433, 213 P3d 1191 (2009) and *Calvary Chapel Bible Fellowship v. County of Riverside*, 948 F3d 1172, 1177 (9th Cir 2020). Petition for Review 19. The county responds, and we agree, that those cases are inapposite because they concern the judicial standard of review in resolving facial challenges to legislation. The county's decision to amend the

DCC and DCCP is not a facial challenge to legislative action. Rather, the county's decision is legislative action. Petitioner has cited no applicable law that prevents the county from considering its prior quasi-judicial decisions, or decisions on appeal thereof, in legislative proceedings, and we are aware of none. The county did not err in relying on *Shepherd III* in evaluating the merits of a potential RLUIPA claim.

The first assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

In the fourth assignment of error, petitioner challenges the adequacy of the county's ESEE analysis under various provisions of OAR chapter 660, division 23, which sets out procedures and requirements for complying with Goal 5.

A. The county did not misconstrue the term "conflicting use."

Petitioner argues that the county's ESEE analysis misconstrues OAR 660-023-0010(1), which defines the term "[c]onflicting use." See n 3.

1. Churches are not an independent "conflicting use" allowed by the DCC.

The county found that religious institutions or assemblies could be a conflicting use that impacts a Goal 5 resource site because religious institutions or assemblies "generally concentrate groups of people to a specific area for a shared activity" and can generate traffic, noise, light, and alter habitat by introducing invasive species, removing vegetation, and creating barriers such as roads and fences. Record 95, 99, 101.

Petitioner argues that, instead of analyzing the conflicting use introduced by removing "churches" from the list of prohibited uses in the WA overlay zone, the county improperly considered the conflicting use introduced by allowing "religious institutions and assemblies" in that zone.

The county did not err by failing to consider the removal of churches from the list of prohibited uses as a separate conflicting use. Removing a use from the list of uses prohibited in the WA overlay zone does not authorize that use on any particular property. The WA overlay zone is a combining zone; thus, "the underlying designation of each individual property will determine if religious institutions and assemblies * * * are allowed." Record 102.

Ordinance 2020-001 replaces all remaining references to "churches" in the DCC with the phrase "religious institutions and assemblies." "Churches" no longer appear in the DCC as an independent use. Thus, the only new conflicting uses that could be allowed in the WA overlay zone as a result of the challenged decision are religious institutions or assemblies. The county did not err by failing to consider "churches" as a conflicting use independent from religious institutions or assemblies. In considering religious institutions and assemblies as a conflicting use, the county also considered the impacts of churches. See n 5 ("religious institution or assembly," as defined in the DCC, includes churches); *see also Shepherd III*, 78 Or LUBA at 523 ("[C]hurches * * * encompass elements of both a religious institution and a religious assembly.").

2. The county did not analyze religious discrimination as a conflicting use.

The county's ESEE analysis concludes that prohibiting religious institutions and assemblies "would have negative [social] consequences because it could be viewed as discriminating against religious institutions and assemblies or other religious assemblies compared to similar secular uses." Record 109.

Petitioner argues that, in reaching this conclusion, the county improperly considered religious discrimination to be a conflicting use. Petitioner's argument misapprehends the county's decision. The county did not analyze religious discrimination as a conflicting use. Instead, it considered the public perception of religious discrimination within the county land use regulations and decisions to be a potential negative social consequence of prohibiting religious institutions and assemblies. To the extent that petitioner means to argue the county erred by considering the potential perception of religious discrimination as an ESEE consequence at all, we disagree.

The county correctly observes that an ESEE analysis does not focus exclusively on environmental impacts. Record 95. The prescribed ESEE analysis requires the county to consider social consequences. OAR 660-023-0040(4) ("Local governments shall analyze the ESEE consequences that could result from decisions to allow, limit, or prohibit a conflicting use."). "The ESEE analysis need not be lengthy or complex, but should enable reviewers to gain a clear understanding of the conflicts and the consequences to be expected." OAR 660-023-0040(1). Under Goal 5, the county is afforded fairly broad discretion in

considering potential impacts from allowing or prohibiting a particular use and determining whether, how, and to what extent a Goal 5 resource will be protected. OAR 660-023-0040(5)(c) ("A local government may decide that the conflicting use should be allowed fully, notwithstanding the possible impacts on the resource site.").

B. The county did not err conducting a single ESEE analysis for multiple resource sites.

OAR 660-023-0040(4) provides:

> "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."

The county conducted a single ESEE analysis for mule deer winter range, significant elk habitat, and antelope range in the WA overlay zone, as well as the riparian resources and habitat in the Sunriver Resort zone. The ESEE explains:

> "Deschutes County has adopted inventories for a variety of Goal 5 natural resources. Some of these resources have mapped geographic boundaries such as Deer Winter Range, whereas others are

> described as being located in general areas—such as furbearer habitat in riparian corridors. The inventories were produced at a countywide scale * * *. * * * [I]nventoried habitat * * * spatially overlaps with the zones impacted by the proposed text amendments." Record 97 (footnote omitted).

The ESEE further explains that, because "the proposed text amendments are legislative and do not impact any specific properties, staff did not review Goal 5 impacts on an individual parcel level basis. Instead staff identified * * * potential resources sites in which the allowance of a new religious institution could potentially intersect with Goal 5 resources:" the Sunriver Riparian Corridor and the WA overlay zone. Record 97-98. The county found that the impacts of religious institutions or assemblies in each area "are of such a similar nature that the impacts for the two areas may be reviewed together." Record 100.

Petitioner argues that the county's singular ESEE analysis violates OAR 660-023-0040(4) because the Goal 5 resources it addresses are not within the same area, similarly situated, or subject to the same zoning. Instead, petitioner argues that these resources are in different parts of the county, that they "inhabit different environments and face different risks to their continued existence," and that the Sunriver Resort zone has nothing to do with the WA overlay zone. Petition for Review 45-46 (citing Record 118).

We agree with the county that its ESEE analysis complies with OAR 660-023-0040(4). An ESEE analysis must identify conflicting uses, determine the impact area, analyze the ESEE consequences, and develop a program to achieve Goal 5. OAR 660-023-0040(1). The county identified religious institutions and

assemblies as a conflicting use and concluded that the impacts of that use would be the concentration of public activity, noise, and light; habitat removal; introduction of invasive, nonnative plants; and habitat fragmentation. Record 99-101, 103-04. The county determined that the impact area consists of private properties in the relevant zones (or, in the WA overlay zone, those properties for which the underlying zoning allows churches) that also contain Goal 5 resources. Record 97-98, 102, 115-18. The county analyzed the ESEE consequences of the three scenarios allowing, prohibiting, and limiting religious institutions and assemblies in the relevant zones. Record 104-12. Based on that analysis, and the application of RLUIPA's equal terms provision, the county decided to allow religious institutions and assemblies without limitation, notwithstanding their impacts on the Goal 5 resources. Record 113.

"[A]n ESEE analysis needs to contain specific enough information so that the local government can conduct a meaningful analysis of the relative effects of the conflicting uses and the identified resource site on each other. The specificity that will be required is thus dependent upon what is being analyzed." *Restore Oregon*, 301 Or App at 792-93. Petitioner does not explain how the differences between mule deer, elk, antelope, riparian wildlife, and their associated habitats prevent the county's singular ESEE analysis from enabling it to meaningfully analyze the impacts that religious institutions and assemblies have on those resources. As a result, petitioner's argument provides no basis for reversal or remand.

Petitioner also argues that, in addition to misconstruing RLUIPA with respect to the WA overlay zone, discussed in the second assignment of error, the county also misconstrued RLUIPA in adopting the challenged amendments to the Sunriver Resort districts. As we explain in our resolution of the second assignment of error, the equal terms provision ensures that, if a secular use is allowed in a particular zone, similarly situated religious uses are also allowed. The county's ESEE analysis identifies specific secular uses that are conditionally allowed in the WA overlay zone and that are similarly situated to religious uses. Record 93. In *Shepherd III*, we affirmed the county's conclusion that those secular uses are similarly situated to religious uses because they have similar impacts on wildlife. 78 Or LUBA at 521-24.

The Sunriver Resort Marina district allows marina, park, playground, picnic and barbecue area, restaurant, and bar and cocktail lounge uses. DCC 18.108.070(A). The Sunriver Resort Golf Course district allows golf course and accessory uses. DCC 18.108.080(A). The Sunriver Resort Nature Center district allows nature centers, observatories, restaurant and food services, retail sales, and rental and repair services. DCC 18.108.100(A). The county concluded that those secular uses are similarly situated to religious institutions and assemblies with respect to their impacts on the riparian resources and habitat in the Sunriver Resort zone, and that the equal terms provision therefore requires that religious institutions and assemblies be allowed in those districts. We agree with that

conclusion. The county did not misconstrue RLUIPA in adopting the challenged amendments to the Sunriver Resort zone.

C. The county explained why it chose not to adopt limitations on religious institutions and assemblies to protect Goal 5 resources.

As explained above, the county completed an ESEE analysis and concluded that religious assemblies and institutions are "conflicting uses" in that those uses "could adversely affect a significant Goal 5 resource," including wildlife habitat and riparian areas. OAR 660-023-0010(1). Nevertheless, the county decided to allow religious assemblies and institutions without special limitations to reduce conflicts with Goal 5 resources.

Under OAR 660-023-0040(5)(c), where a local government decides to allow a conflicting use fully, it must explain why "measures to protect the resource to some extent should not be provided." In *COLW I*, we remanded, in part, because the county's ESEE analysis did not evaluate any limits that it could impose on churches to protect Goal 5 resources in the WA overlay zone and, therefore, did not adequately explain its decision to allow churches fully in that zone under OAR 660-023-0040(5)(c). 77 Or LUBA at 411.

The county's ESEE analysis explains:

> "The County considered allowing [religious institutions or assemblies] with limitations such as hours of operation, square footage maximums, or requiring restoration measures, but this practice could still be seen as discrimination or unequal treatment of religious institutions and assemblies when compared to other uses allowed in the zoning districts. Therefore the County is choosing [to] allow the use fully notwithstanding the possible impacts on the

resource sites." Record 113.

Petitioner argues that the county could have complied with RLUIPA by broadening the prohibition in the WA overlay zone from just churches to include all religious institutions and assemblies. Petitioner asserts that they proposed code language to that effect during the local proceeding, that the county ignored it, and that, in doing so, the county failed to comply with OAR 660-023-0040(5)(c) and our direction on remand in *COLW I*.

As explained above, the county correctly determined that, because some secular uses are allowed in the WA overlay zone, it must treat similar religious institutions and assemblies on equal terms and allow those uses in the in the WA overlay zone despite conflicts with Goal 5 resources. Because the county decided to allow conflicting uses without limitations, the county is required to explain why "measures to protect the resource to some extent should not be provided." OAR 660-023-0040(5)(c).

As we have explained, the county is afforded fairly broad discretion in conducting ESEE analyses. The ESEE rule requires the county to perform an analysis, but it does not compel any particular result. *COLW I*, 77 Or LUBA at 404-05. OAR 660-023-0040(5)(c) does not require the county to make specific findings analyzing all proposed limitations on a conflicting use. Even if it did, the county's decision at least implicitly reasons that petitioner's proposed expanded prohibition would violate RLUIPA's equal terms provision for the same reason that a less expansive prohibition of religious uses and assemblies in

the WA overlay zone violates RLUIPA. The county's decision does not violate OAR 660-023-0040(5)(c).

Petitioner also argues that the county's stated reason for not imposing limits on religious institutions and assemblies in its ESEE analysis is inadequate because the county failed to establish that imposing *any* limits on religious institutions and assemblies violates RLUIPA. In its ESEE analysis, the county determined that it would not impose "limitations such as hours of operation, square footage maximums, or requir[e] restoration measures" because those limitations could be perceived as "discrimination or unequal treatment of religious institutions and assemblies when compared to other uses allowed in the zoning districts." Record 113. The county determined that public perception is both a negative social consequence and could potentially expose the county to the negative economic consequences of defending additional, meritorious RLUIPA lawsuits.

In *COLW I*, we concluded and the Court of Appeals agreed, that the mere threat of RLUIPA litigation is an insufficient basis for the county to abandon portions of its acknowledged Goal 5 program, and that the county's ESEE analysis must evaluate whether the program actually violates RLUIPA. In *Shepherd III*, LUBA and the Court of Appeals agreed with the county that its Goal 5 program actually violated RLUIPA.

The county modified its Goal 5 program based on its analysis of the ESEE consequences of allowing religious institutions and assemblies without certain

limitations. As we explain throughout this decision, the county's ESEE analysis satisfies the prescribed process. In the context of the county's decision, which is informed and motivated by *Shepherd III*, we conclude that the county was not required to demonstrate that certain limitations proposed by petitioner violate RLUIPA before deciding not to adopt such limitations.

The fourth assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In the second assignment of error, petitioner argues that the county's conclusion that portions of the DCC and DCCP violate RLUIPA misconstrues applicable law.

A. The county did not err in concluding that it may not apply any land use regulations that violate RLUIPA.

Ordinance 2020-001 adds the following language to DCC chapter 18.08 and DCC 19.08.020: "Compliance with [RLUIPA] supersedes all other aspects of [the DCC]." Record 24, 53. Petitioner argues that, in adopting the above-quoted language, the county misconstrued the law by inappropriately relying on the Supremacy Clause of the United States Constitution[7] and, instead, should

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[7] The Supremacy Clause provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be

have proceeded from the presumption that, because zoning is a traditional police power of the state, Congress did not intend RLUIPA to preempt the DCC and DCCP.

We agree with the county that it did not misconstrue the applicable law in concluding that it may not apply provisions of the DCC and DCCP that violate RLUIPA. First, as the county correctly points out, we have already so held. *See Shepherd III*, 78 Or LUBA at 524 ("Under the * * * the Supremacy Clause, the county would almost certainly lack authority to deny the [Shepherds'] applications, based on nonconformance with local or state regulations that the county had concluded cannot be applied to the proposed use consistently with RLUIPA."). Moreover, contrary to petitioner's argument, there is no question that Congress intended for RLUIPA to preempt conflicting local land use law. The text of RLUIPA supports this conclusion, as does its legislative history. 42 USC § 2000cc-3(e) (providing how a government may avoid "the preemptive force" of RLUIPA); 146 Cong Rec S7776 ("[RLUIPA] preempts certain laws and practices that discriminate against or substantially burden religious exercise[.]"). Indeed, RLUIPA could not effectively prohibit unequal treatment of religious institutions or assemblies if that federal law does not prohibit local governments from applying conflicting zoning laws.

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bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." US Const, Art VI, cl 2.

Petitioner also argues that the county's conclusion that RLUIPA preempts the relevant DCC and DCCP provisions is inconsistent with the text of RLUIPA itself, which provides: "Nothing in this chapter shall be construed to preempt State law, or repeal Federal law, that is equally as protective of religious exercise as, or more protective of religious exercise than, this chapter." 42 USC § 2000cc-3(h). Although, under this provision, RLUIPA does not preempt local law that is *equally* as or *more* protective of religious exercise, here the county specifically found that the DCC and DCCP violate the equal terms provision and are therefore *less* protective than RLUIPA. Record 82. The text of RLUIPA does not support petitioner's position.

The county did not misconstrue the law in concluding that RLUIPA preempts inconsistent provisions of the DCC and DCCP.

B. The county's decision is not based on the substantial burden prong of RLUIPA.

In the portion of its ESEE analysis considering the economic consequences of allowing and regulating religious institutions and assemblies in the subject zones, the county found:

> "[P]ermitting religious institutions and assemblies reduces the risk that the County will be required to expend resources defending RLUIPA lawsuits or paying damages resulting thereof. However, imposing additional limits on religious institutions and assemblies [for example, limiting square footage, limiting hours or operation, or by requiring habitat restoration measures] may nevertheless expose the County to similar federal lawsuit pursuant to the 'Substantial Burden' prong of RLUIPA." Record 110.

In the portion of its ESEE analysis considering the social consequences of allowing and regulating religious institutions and assemblies in the subject zones, the county explains:

> "The County considered allowing the [religious institutions and assemblies] with limitations such as hours of operation, square footage maximums, or requiring restoration measures, but this practice could still be seen as discrimination or unequal treatment of religious institutions and assemblies when compared to other uses allowed in the zoning districts. Therefore the County is choosing [to] allow the use fully notwithstanding the possible impacts on the resource sites." Record 113.

Petitioner argues that the county misconstrued RLUIPA's "substantial burden" provision.[8] Petitioner cites case law for the proposition that, in order to constitute a substantial burden, a land use regulation must be oppressive or restrictive to a "significantly great" extent. Petitioner argues that the county's former prohibition of churches in some zones is not a substantial burden because

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[8] RLUIPA's substantial burden provision provides:

> "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." 42 USC § 2000cc(a).

RLUIPA does not define the term "substantial burden."

the county allowed churches in other zones. Petitioner further argues that, because those restrictions have been in place since 1992, any burden experienced by persons or entities acquiring land in those zones in order to establish a religious use would be self-imposed and, therefore, not "substantial." Petition for Review 26-29. Petitioner also argues that the county failed to demonstrate that any of the limits it considered imposing on religious institutions and assemblies in its ESEE analysis would constitute a substantial burden.

We tend to agree with petitioner that the substantial burden hurdle is high. However, the county did not base the challenged amendments on the substantial burden prong of RLUIPA. The county's decision to allow religious institutions and assemblies in the relevant zones without special limitations is based on the RLUIPA equal terms provision. *See* Record 83-84 (summarizing the DCC and DCCP amendments "for greater consistency with equal terms provisions"); Record 93 (stating that the amendments are intended to treat religious institutions and assemblies and similar secular uses equally, consistent with RLUIPA). For that reason, any failure by the county to demonstrate that the limits it considered, but chose not to impose, would result in impermissible substantial burdens provides no basis for reversal or remand.

C. The county did not misconstrue the RLUIPA equal terms provision.

As noted, the county adopted the challenged decision to address the RLUIPA equal terms violation identified in *Shepherd III* with respect to DCC

18.88.040(B) and to identify and address similar RLUIPA violations in other portions of the DCC and DCCP. Record 82. Petitioner argues that, in removing the prohibition on churches in the WA overlay zone at DCC 18.88.040(B), the county misconstrued the RLUIPA equal terms provision. Petitioner cites various federal cases for the propositions that an ordinance which treats secular and religious uses the same does not violate the equal terms provision, and that merely classifying land to achieve different regulatory goals (*i.e.*, agriculture preservation, wildlife preservation, outdoor recreation) does not discriminate against churches. Petition for Review 30-32. Petitioner argues that it does not matter what uses are allowed in the WA overlay zone under DCC 18.88.040(A) because the equal terms provision applies to "a land use regulation" and not the "zoning scheme" as a whole. Reply Brief 4. Because the list of prohibited uses at DCC 18.88.040(B) includes both secular and religious uses, petitioner argues that that provision treats secular uses and religious uses equally and therefore does not violate the equal terms provision.

We agree with the county that we resolved this issue in *Shepherd III*. There, petitioner similarly argued that "[a]ll uses similarly situated to churches are equally prohibited in the [WA overlay zone]." *Shepherd III*, 78 Or LUBA at 521. As we explained in that decision, petitioner's argument misapprehends the application of the equal terms provision. That provision does not ensure that, if a religious use is excluded from a particular zone, some similarly situated secular uses are also excluded from that zone. Rather, it ensures that, if a secular use is

allowed in a particular zone, similarly situated religious uses are also allowed in that zone. *See, e.g*, *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F3d 1163, 1174 (9th Cir 2011) (concluding that an ordinance violated RLUIPA by excluding religious organizations, even though secular schools were also excluded).

In *Shepherd III*, we affirmed the county's conclusion that, because secular uses such as wineries, museums, outdoor mass gatherings, and other commercial activities and events are conditionally allowed in the WA overlay zone under DCC 18.88.040(A), and because the impacts of those secular uses on wildlife are similar to the impacts of churches, the equal terms provision requires the county to allow churches in the WA overlay zone. 78 Or LUBA at 521-24. Here, the county relied on the same interpretation of the equal terms provision, as well as our and the Court of Appeals' opinions affirming it, to conclude that it should remove the prohibition at DCC 18.88.040(B)(3). Record 82, 93. The county did not misconstrue the RLUIPA equal terms provision.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

The Establishment Clause of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion." US Const,

Amend I, cl 1.[9] Petitioner argues that the county's decision unconstitutionally favors religion over irreligion by not prohibiting religious institution and assembly uses in the WA overlay zone while continuing to prohibit "equally noisy and disruptive secular land uses," including, for example, playgrounds. DCC 18.88.040(B).[10] Under the three-part test set out by the United States Supreme Court in *Lemon v. Kurtzman*, a law violates the Establishment Clause if (1) it has a religious purpose, (2) its primary effect either advances or inhibits religion, or (3) it fosters excessive government entanglement with religion. 403 US 602, 612-13, 91 S Ct 2105, 29 L Ed 2d 745 (1971).

In *Corporation Presiding Bishop v. City of West Linn*, we determined that RLUIPA itself does not violate the Establishment Clause under the *Lemon* test. 45 Or LUBA 77, 112-14 (2003), *rev'd on other grounds*, 192 Or App 567, 86 P2d 1140 (2004), *aff'd*, 338 Or 453, 111 P3d 1123 (2005). We observed that "[t]he line between permissible accommodation and impermissible advancement

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[9] Petitioner cites Article 1, sections 2, 3, and 20, of the Oregon Constitution and *Eugene Sand & Gravel v. City of Eugene*, 276 Or 1007, 1012-13, 558 P2d 338 (1976), but does not develop any specific argument under the Oregon Constitution. Any argument that the county's decision violates the Oregon Constitution is undeveloped for our review.

[10] Those nine prohibited secular uses are golf courses not included in a destination resort, commercial dog kennels, public or private schools, bed and breakfast inns, dude ranches, playgrounds, recreation facilities or community centers owned and operated by a government agency or a nonprofit community organization, timeshare units, veterinary clinics, and fishing lodges.

of religious practices is far from clear." *Id.* at 112. In *1000 Friends of Oregon v. Clackamas County*, we observed that RLUIPA is more likely to run afoul of the Establishment Clause where it is interpreted to mandate preferential treatment for religious uses. 46 Or LUBA 375, 409, *appeal dismissed*, 194 Or App 212, 94 P3d 160 (2004). Those two cases are not particularly helpful to our analysis because, in those cases, we assessed the constitutionality of RLUIPA in the context of its substantial burden provision, not the equal terms provision which is at issue here.

Turning to the first *Lemon* prong, we conclude that the county's decision does not have a religious purpose. The county's stated purpose is "to treat religious institutions and assemblies or assemblies (formally referred to as churches) and similar secular uses equally, consistent with [RLUIPA]." Record 93. Compliance with applicable federal law is a secular purpose. Petitioner does not argue that the challenged decision was not adopted for that secular purpose. Instead, petitioner argues that the effect of the challenged decision favors religious uses over secular uses, which we understand as an argument under the second prong of the *Lemon* test.

In *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, the United States Supreme Court explained that a law does not impermissibly advance religion merely because it allows religion to advance itself. Instead, for a law to have forbidden effects, it must be fair to say that the government itself has advanced religion. 483 US 327, 335-36, 107 S Ct 2862, 97

L Ed 2d 273 (1987). The county has not itself advanced religion by removing churches from the list of uses prohibited in the WA overlay zone.[11]

Finally, with respect to the third and final *Lemon* prong, petitioner does not argue that the county's decision excessively entangles the county with religion, and we do not believe that it does. The challenged decision does not violate the Establishment Clause.

The third assignment of error is denied.

The county's decision is affirmed.

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[11] The county compares its decision with the state legislature's decision to allow churches as nonfarm uses in exclusive farm use zones. ORS 215.283(1)(a).