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MEMO

TO: Planning Director

FROM: John Eisler; Asst. County Counsel

DATE: September 24, 2024

RE: Planning File # 217-24-000047-PLNG FHAA/ADA Accommodation Requests
Our File: Comm Dev 77

I was asked to provide an analysis of how Sunshine Behavioral Health Group, LLC's (the "applicant") requests for accommodations under federal law affect our typical land use decision-making process. My purpose in this memo is not to tell you how to apply Oregon Land Use Law; the purpose is instead to make you aware of some of the considerations and pitfalls present when trying to apply state and local land use law against possibly three sets of federal exemptions.

What is contained herein are my legal opinions, based upon my research and understanding of the law. Various reviewing courts could disagree with the conclusions I have drawn, but, as stated, what follows is my application of the law to the specific facts of this application.

I. Characterization of the Modification Request

At its core, this application is about converting the use on a tract of land comprised of various established structures. Some of those structures were originally built or approved for an agricultural use; others were built for its current use to enable the exercise of religion. The present application's invocation of federal law is to prevent discrimination against those with protected disabilities from living in dwellings or utilizing programs available to others. Both the current use and the proposed use fall under protections from Federal Acts that are supreme and controlling over both the State and County's land use laws under the Supremacy Clause in Article IV, Paragraph 2 of the United States Constitution.

The applicant proposes to accomplish this change of use for all of the structures, from one set of supreme laws to another, through two undefined terms in our County Code—"modification" and "community center"—which each come with their own standards and criteria that the County must apply. Application of those standards and criteria were altered by the County in its analysis, originally, to protect the exercise of religion. The present application now asks us to alter the analysis once more, to prevent discrimination against a protected class, with different requested departures from standard criteria and for different reasons.

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1. County Code Framework

The County's Code, at CCC 18.172.100(1), allows the modification of a conditional use permit when, *inter alia*, the use for which the permit was granted ceases to exist or "the proposed modification will result in a change to the original proposal" and the application meets the applicable standards of subsection (3). Subsection (3) states that the modification "is subject only to either the standards, criteria, and conditions that were applicable when the original permit was issued or in effect at the time of the revocation or modification, whichever is less restrictive." CCC 18.172.100(3).

The term "modification" is not defined in our code. I am not aware of the Board of Commissioners or Planning Commission ever giving an express definition to the word. Webster's defines "modification" as "the act or action of changing something without fundamentally altering it." *Webster's New Third New International Dictionary* 1452 (1986). There are no other substantive requirements or restrictions specific to a modification application in the EFU-3 Zone, though modifying a conditional use permit subjects it to various provisions of chapter 18.160.

2. The Present Application

The applicant describes the application as a request "to continue the use of the Property as a *community center* while amending the CUP, most particularly to replace the seven RV spots with cabins and to reduce the number of individuals using the facilities on the Property." *Applicants' Narrative Demonstrating Compliance with the Approval Criteria* (cited hereafter as "App.") at 2 (emphasis added). The applicant thereafter applies the original criteria of CCC 18.16.010 and ORS 215.283(2)(e) for a "community center" to all the structures on the Property. The Property is comprised of two storage sheds, a manse, a chapel, a retreat center, a bunkhouse building, five cabins, a bathhouse/restroom, seven RV pads, a multi-use playing field, pastureland, a campfire circle, and a hiking trail.

When asked how the structures were to be used pursuant to the application, the applicant responded that "the applicant proposes to continue to use the structures on the Subject Property as a community center as already approved." Applicant's Response to April 23, 2024 Incomplete Letter (cited hereafter as "IR") at 7. When asked specifically about the intended use of the chapel, the applicant responded that "the chapel should be considered as a facility approved as part of the broader community center. The present modification application seeks to continue the use of the Subject Property as a community center, and intends to continue to use the chapel as part of that community center use." *Id.* The applicant adds that "the use of the chapel will continue to be used by staff and clients to engage in religious and spiritual services as part of the community center, and will also be used by clients to engage in similar religious and spiritual activities such as yoga, meditation, and group discussions." *Id.*

3. The Original Approval

The original 2007 application's Burden of Proof (the "2007 BoP") described the project as the "Catholic Community Center," which was "intended as a retreat and gathering place for the Roman Catholic Diocese of Baker." App. Ex. D at 4. The 2007 BoP noted that there was then "no place for the Diocese to hold retreats and other events" for the Catholic community of central and eastern Oregon and that this "Community Center will offer the members of the Baker Diocese a place for retreats, educational programs, and church-related events such as

weddings, holiday observations, and services." *Id.* The overnight facilities were necessary to accommodate the large geographic area the facility would serve. App. Ex. D at 6. The 2007 BoP elsewhere described the project as a "campus-style retreat" with "a private park, campground, and community center." App. Ex. D at 7. The 2007 BoP addressed the separate code and statutory provisions for churches (ORS 215.283(1)(b)[1] and CCC 18.24.020(3)[2]); replacement dwellings (CCC 18.24.080); and CCC 18.24.020(7)'s provision for parks, playgrounds, hunting and fishing preserves and campgrounds, and community centers, with "private parks," "campgrounds," and "community centers" underlined. *Id*.

The Final Decision described the proposal as:

> An application for conditional use approval for a chapel (church), a Catholic Community Center with camping facilities (retreat and gathering center), and a chancery (business office); and for outright use approval for a Bishop's manse (replacement residence) in an Exclusive Farm Use Zone EFU-3.

App. Ex. B at 1. The Final Decision's description of the "approved facilities" included "a retreat and gathering place" used "for retreats, educational programs, and religious activities"; a "chapel (church)"; and "a manse." App. Ex. B at 9. The chapel was not to be a parish church (the parish church was planned for Phase II), but was instead to be "used for services for conference and retreat and summer camp participants, and for staff." App. Ex. B at 10. The proponent's written testimony quoted 215.441[3] and "made the case that all of the facilities applied for are in this category." *Id.* at 17. The proponent's attorney's written testimony stated that "denial of the proposed uses would impose a substantial burden on the religious practices of the diocese." *Id*.

The land use advocate group 1000 Friends of Oregon raised multiple issues with the application. It began by presenting the LUBA case, *Bechtold v. Jackson County*, 42 Or LUBA 204 (2002), for the proposition that ORS 215.283(1)(b)'s "church" should be "interpreted to exclude residences and other housing, and retreat facilities." *Id.* at 18. The Final Decision thereafter seemed to address 1000 Friends' comment, by stating that only the chapel would be approved as a church, with the "retreat and gathering center with camping facilities" to be approved as a "community center/private park" under CCC 18.160.050(5). *Id.* at 18.

The verbal testimony began with Crook County Attorney Dave Gordon, who advised that the "important question" was "whether adverse county action on the proposal would place an undue burden on religious practice" and noted that a church is an outright use in agricultural

[1] The statutory provision for the outright use of churches in EFU zones was subsequently renumbered to ORS 215.283(1)(a).
[2] Churches are no longer a conditional use in the EFU-3 Zone under the County Code but are instead subject to site plan review and any other listed criteria. CCC 18.16.010.
[3] At the time of the original application, ORS 215.441(1) read:
215.441 Use of real property for religious activities. (1) If a church, synagogue, temple, mosque, chapel, meeting house or other nonresidential place of worship *is allowed* on real property under state law and rules and local zoning ordinances and regulations, *a county shall allow* the reasonable use of the real property *for activities customarily associated with the practices of the religious activity*, including worship services, religion classes, weddings, funerals, child care and meal programs, but not including private or parochial school education for prekindergarten through grade 12 or higher education. (emphasis added)

zones under state statutes. *Id*. at 19. A representative of the applicant stated that they were not seeking approval for a parish church at that time, and the chapel in the application was "to mainly serve summer camp and retreat participants on the property." *Id.* The applicant's attorney discussed the *Bechtold* case, the Federal Freedom of Religious Act, and the Religious Land Use and Institutionalized Persons Act (RLUIPA). *Id.* at 20. Opponents mainly focused on the impacts on traffic and to agriculture. *Id*. at 20-21.

The Commission-Staff discussion included comments on safety, traffic impacts, the proposed chancery, and what constitutes a religious practice. For instance, Commissioner Wells said that there is no agreement on what constitutes a religious practice, and that definition should not be dictated by the Commission. *Id*. at 22. County Attorney Gordon reiterated that a church is an outright use, as well as "anything which is a part of religious practice," before repeating that a "key question" is whether denying the chancery would constitute a significant burden on religion. *Id*. Commissioner Payne considered a denial of the application to be a significant burden on religion. *Id*.

The Final Decision, by a vote of 4-3, was to approve everything other than the chancery, because the chancery's administration and business office did not qualify as a "religious institution" or an "activity customarily associated with the practices of religion" under ORS 215.441 and was not otherwise allowed under ORS 215.283. The motion read in relevant part:

> I move that we approve and deny in part C-CU-2337-07, the Roman Catholic Church application so that the chancery offices are denied and the remainder is approved for the following reasons:
>
> The Chapel is an outright permitted use in the EFU as a Church under ORS 215.283.1(b) [sic].
>
> That the retreat and community center and campground are conditional uses under ORS 215.283(2)(e) and the Crook County Code § 18.24.020(7).
>
> That the applicant has shown compliance with regard to State law and the Crook County Code for the retreat, community center and campground elements based on the testimony and substantial evidence in the record….
>
> The Community Center element, while not being primarily by and for local residents as required by ORS 215.283(2)(e), may serve local residents in some form and such a use would be allowed outright pursuant to ORS 215.441 as an "activity customarily associated with the practices of the religious activity."

Id. at 23.

Despite the multiple structures and occasionally ambiguous terminology, two things are clear from the original approval. First is the Planning Commission's primary concern that denying any part of the application might be construed as substantially burdening religion. Ultimately, relying on the *Bechtold* case, the Planning Commission decided that the chancery was not entitled to the same treatment as the other proposed facilities. And second, the approval of the remaining facilities in the application all flowed down from the existence of the chapel/church

(other than the manse/replacement residence) and the tie-in to ORS 215.441, which mandated the approval of the other facilities upon approval of the church/chapel. Though the entire proposal was framed as a Catholic Community Center and the "community center element" was central to the successful operation of the project, it cannot be said that the original approval was simply an approval of a "community center" as that term is used in state statute and local code, particularly for the chapel/church.

4. The Scope of the Modification

The requested modification would replace the exercise of religion as the focal point of the Subject Property with a substance use disorder (SUD) treatment center. The physical changes to the Subject Property will be minor—merely converting seven RV pads with a bunkhouse or cabins and making minor interior modifications to the chapel, residence, and community center. The impacts to the Subject Property from the change in use—though likely a substantial increase from its actual use—will be a slight decrease from the *approved* use in the valid, existing CUP.

II. Potential Deviations from Applicable Standards and Criteria

Modifying a CUP concerned with burdening religious exercise to one that seeks accommodations for those with disabilities requires certain considerations that may not be on your radar. This section addresses two aspects that warrant close examination: the relevance of the chapel building and the FHAA's limitation to "dwellings."

1. RLUIPA and the Church

RLUIPA was passed by Congress to protect the First Amendment's guarantee of the free exercise of religion, following the Supreme Court's decision that the Religious Freedom Restoration Act (RFRA) was unconstitutional as applied to state and local governments. *See Coles Valley Church v. Or. Land Use Bd. of Appeals*, 2021 U.S. Dist. LEXIS 92386, *3-6. RLUIPA prohibits local governments "from imposing 'substantial burdens' on 'religious exercise' unless there exists a compelling governmental interest and the burden is the least restrictive means of satisfying the governmental interest." *Guru Nanak Sikh Soc. of Yuba City v. Cnty. of Sutter*, 456 F.3d 978, 985-86 (9th Cir. 2006).

RLUIPA, at 42 U.S.C.A. 2000cc 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.

"Religious exercise" is defined as:

> (A) In general
>
> The term "religious exercise" includes any exercise of religion, *whether or not compelled by, or central to,* a system of religious belief.

> (B) Rule
> The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.

42 U.S.C.A. § 2000cc-5 (emphasis added). Moreover, "land use regulation" under RLUIPA is defined as:

> a zoning or landmarking law, or *the application of such a law*, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

42 U.S.C. § 2000cc-5 (emphasis added). Complicating things even more:

> Under RLUIPA, the religious entity bears the burden of persuasion on whether zoning laws, or the application of those zoning laws to a particular property, "substantially burdens" its "exercise of religion." However, Congress directed that RLUIPA "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C.A. § 2000cc.

Coles Valley Church v. Or. Land Use Bd. of Appeals, 2021 U.S. Dist. LEXIS 92386, *7-8 (internal citation omitted).

The application makes no claim under RLUIPA. The applicant makes no claim that the chapel should still qualify as a "church" under ORS 215.283(1)(a). Instead, the applicant states that "the use of the chapel will continue to be used … to engage in religious and spiritual services as part of the community center." IR at 7. Under RLUIPA's plain language—even though such use is not "compelled by" or "central to" a system of religious belief—the use described likely qualifies as religious exercise and any *application* of our land laws that imposes a substantial burden would be prohibited unless the County could show its actions were the least restrictive means of furthering a compelling government interest.

Leaning on our land use code and procedures or state law to justify burdening this exercise of religion would not suffice. The allowance of other, secular assemblies on EFU land has been established to be a violation of the Equal Terms provision. *Central Oregon Landwatch v. Deschutes County*, LUBA No. 2018-095, 16 (finding that the allowance of wineries and receptions and not religious assemblies violates the Equal Terms provision). The application of 215.283(1)(a) or our local code is irrelevant. *See id.* at 17 ("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.").

Here, the structure that is the chapel is already built. It was approved as a "church" under ORS 215.283(1), even though it was not to be a parish church but was instead to be "used for

services for conference and retreat and summer camp participants, and for staff." App. Ex. B at 10. Though the central focus of the entire Subject Property was originally the exercise of religion, the actual use proposed by applicant for the chapel building is actually quite similar to its current approved use.

How this analysis applies to the application is another tricky matter. The only clear aspect is that the removal of religious exercise as the central theme should mean the non-chapel facilities approved in the original application under CCC 18.24.020(7) and the outright use of ORS 215.441 would lose the approval mandate of ORS 215.441 as structures "customarily associated with the practices of the religious activity." The result being that the non-chapel facilities would need to meet the applicable criteria of CCC 18.16.010 and ORS 215.283(2)(e) on their own, subject to the applicant's accommodation requests.

Applicant requests that "the chapel … be considered as a facility approved as part of the broader community center." IR at 7. As stated above, the chapel was approved as a *church*, separate and distinct from the portions of the Subject Property approved as a community center, campground, park, or replacement dwelling. The chapel's approved and proposed uses both involve some degree of religious exercise. The ability to exercise one's religion or spirituality would seem to be a critical central component to the recovery of substance use disorder for certain people. I believe the applicant is right that, should the rest of the application be approved, the chapel *should* be considered as a facility approved as part of the broader community center. Because if the rest of the application is approved, denying its clients and staff the ability to exercise their religion in the chapel building would violate RLUIPA.

The logistics of such a modification approval may benefit from alternate findings. For example, the chapel could be subject to the relevant approval criteria for a "church." The applicable criteria would be the criteria at the time of the current application, as the current criteria permit churches subject to standards, versus at the time of the application such use required a CUP. The criteria to which it would be applied would be the three-mile setback of CCC 18.16.015(24) and the expansion standards of CCC 18.16.015(26). Both sections permit an existing structure to be maintained or enhanced on the same tract, subject to other requirements of law. As a reminder, "church" is not defined under state law or our local code, and the chapel need not even qualify as a church under ORS 215.283(1) to receive RLUIPA's protections. *Central Oregon Landwatch v. Deschutes County*, LUBA No. 2018-095, 16-17.

Alternatively, Staff could consider the chapel as similar to the other facilities in the application and apply the "community center" tests of CCC 18.16.010 and ORS 215.283(2)(e), as requested by the applicant. The term "community center" is also undefined. The applicant has asked that the County apply the "implicit" interpretation offered by the original applicant and accepted by the Planning Commission as "locations where members of a group of people may gather for learning, activities, social support, and events." Should the portion of the facilities to be used as dwellings and/or originally approved as replacement dwellings be incorporated into the definition of "community center" by Staff in its decision, the inclusion of the chapel as another aspect of that community center should lead to little *additional* interpretive risk.

Finally, Staff could also lean on the approved and envisioned use for the chapel and conclude—based on prior County modification decisions—that the aspect of the original approval for the chapel is not being modified sufficiently to trigger a re-application of the original criteria. In other words, typically only the portions of a CUP that are actually changing undergo the modification criteria. Here, the minor interior modifications and alteration of use "for services for conference and retreat and summer camp participants, and for staff" from the original approval to clients and staff using the chapel "to engage in religious and spiritual services as part of the community center" in the present application could be seen as similar enough uses to not mandate review by the County at this time.

2. FHAA and the "Dwellings"

Both the FHAA and ADA supersede state and local laws to prevent discrimination against those with qualifying disabilities. In the housing and land use context, claims of discrimination often involve both the FHAA and ADA. However, the FHAA only protects the right for the disabled to choose the *dwelling* of their choice, whereas the ADA makes it unlawful to discriminate through the application of zoning laws. *See SoCal Recovery, LLC v. City of Costa Mesa*, 56 F.4th 802, 812 (2023).

This distinction can be important. Here in the Ninth Circuit, a district court was faced with accommodation requests from a disabled person under both the ADA and FHAA for a home occupation in a warehouse on a five-acre lot that included his residence in *Kulin v. Deschutes County*, 872 F. Supp. 2d 1093 (2012). The facts and procedural history are messy, but at the time of the request, the warehouse was already built. The court went through the accommodation request test under the ADA and found that approving the request (increasing the number of employees and increasing space designated for storage) would not fundamentally alter the County's zoning scheme. *Id.* at 1103-06. However, on the FHAA claim, the court applied the definition of "dwelling" under the FHAA and caselaw from 1975 to find that the warehouse was "not his temporary or permanent dwelling place, abode, or habitation" and dismissed the FHAA claim. *Id.* at 1106.

A federal district court in Connecticut later borrowed the reasoning from *Kulin* on an FHAA request by a nine-bedroom sober living facility for the use of a carriage house on the property. *Drazen v. Town of Stratford*, 2013 U.S. Dist. LEXIS 47908, *11. The district court concluded, leaning on *Kulin*, that the carriage house did not fit the definition of "dwelling" under the FHAA and denied the claim. *Id.*

That ruling was reversed on a motion for reconsideration. The reviewing court noted that the carriage house was to be used to "hold weekly twelve-step programs attended by residents, alumni, sponsors and members of the public." *Drazen v. Town of Stratford*, 2013 U.S. Dist. LEXIS 113870, *2. The reviewing court found the initial interpretation of "dwelling" too narrow, and that the carriage house represented a facility that residents used *in connection with* their residency at the sober living facility and thus it fell "within the statute's contemplation of provision of services or facilities in connection with a dwelling." *Id.* at *3.

Here, the applicant proposes to use multiple facilities as overnight accommodations, but most lack typical features of a dwelling like bathrooms and kitchens. Guests in the cabins must use the separate bathhouse/restroom. Meals will be served only in the separate community center

building. No one will sleep in the storage buildings, bathhouse, community center, or chapel. Should all of these structures qualify for and receive special treatment as a "dwelling" under the FHAA?

The FHAA defines dwelling as "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof." 42 U.S.C. § 3602. On its face, the first part of this definition is quite restrictive. However, "group homes," as the applicant's SUD facility is sometimes called, qualify as dwellings under the FHAA. *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1157 ("[G]roup homes such as the ones at issue here are "dwellings" under 42 U.S.C. § 3602(b)…."). And as the *Drazen* court noted, the administrative regulations define one type of prohibited discrimination as "[l]imiting the use of privileges, services or facilities *associated with a dwelling*…." 24 C.F.R. § 100.65(b)(4) (emphasis added).

The administrative regulations provide needed clarity. The bunkhouses, cabins, and other sleeping facilities obviously meet the definition of a dwelling. The bathhouse and community center are facilities associated with a dwelling (bathing and eating). And, like in *Drazen*, the community center and chapel will also provide services associated with the dwellings (counseling, therapy, religious and spiritual services, etc.). Therefore, despite the ruling in *Kulin*, the non-dwelling structures should qualify for the protections of the FHAA.

III. The Accommodation Request Process

The applicant has requested an accommodation under both the FHAA and ADA on three interpretive issues regarding our local code and ORS 215.283(2)(e), which reads:

> Community centers owned by a governmental agency or a nonprofit community organization and operated primarily by and for residents of the local rural community. A community center authorized under this paragraph may provide services to veterans, including but not limited to emergency and transitional shelter, preparation and service of meals, vocational and educational counseling and referral to local, state or federal agencies providing medical, mental health, disability income replacement and substance abuse services, only in a facility that is in existence on January 1, 2006. The services may not include direct delivery of medical, mental health, disability income replacement or substance abuse services.

The applicant requests interpretive accommodations for "owned by a governmental agency or a nonprofit community organization"; "operated primarily by and for residents of the local rural community"; and "services may not include direct delivery of medical, mental health, disability income replacement or substance abuse services."

Federal courts describe FHAA and ADA discriminatory protections as:

> Both the FHAA and the ADA prohibit governmental entities from implementing or enforcing housing policies in a discriminatory manner

> against persons with disabilities. Under the FHAA, it is unlawful to discriminate, or otherwise make unavailable, in the sale or rental of a dwelling because of the handicap of a person residing in or intending to reside in that dwelling after it is sold, rented, or made available. 42 U.S.C. § 3604(f)(1). Similarly, the ADA provides, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination by such entity. 42 U.S.C. § 12132….
>
> To establish discrimination under either the FHAA or the ADA, a plaintiff has three available theories: (1) intentional discrimination, also referred to as disparate treatment; (2) disparate impact; and (3) failure to make reasonable accommodations.

Rise, Inc. v. Malheur Cty., No. 2:10-cv-00686-SU, 2012 U.S. Dist. LEXIS 44994, at *28-29 (D. Or. Feb. 13, 2012) (quotations and internal citations omitted).

The applicant is requesting an accommodation. To consider an accommodation, federal courts apply the following test for local governments:

> Under the FHAA and ADA, a municipality commits unlawful discrimination if it refuses to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford the disabled equal opportunity to use and enjoy a dwelling. 42 U.S.C. §3604(f)(3)(B); 28 C.F.R. § 35.130(b)(7). The FHAA and ADA apply identical standards whether the term used is reasonable accommodation or reasonable modification. The FHAA and the ADA impose an affirmative duty on municipalities to reasonably accommodate disabled residents. Whether a municipality must alter its policies to accommodate the disabled is a question where answers will vary depending on the facts of a given case. The reasonable accommodation inquiry is highly fact-specific, requiring case-by-case determination.
>
> To establish a claim of discrimination on a theory of failure to reasonably accommodate, a plaintiff must demonstrate that (1) plaintiff or his associate suffers from a disability; (2) defendants knew or reasonably should have known of the disability; (3) accommodation of the disability may be necessary to afford the disabled person an equal opportunity to use and enjoy the dwelling; (4) the accommodation is reasonable; and (5) defendants refused to make the requested accommodation.

Id., at *43-46 (quotations and internal citations omitted).

1. Does the applicant suffer from a disability?

Yes. "Alcoholism and drug addiction are 'impairments' under the FHAA, 24 C.F.R. § 100.201(a)(2), and the ADA, 28 C.F.R. § 35.108(b)(2)." *SoCal Recovery, LLC v. City of Costa*

Mesa, 56 F.4th 802, 813; *See also Pac. Shores Props.*, 730 F.3d at 1156 ("It is well established that persons recovering from drug and/or alcohol addiction are disabled under the FHA and therefore protected from housing discrimination."). Moreover, there is no issue that the application is on behalf of a business entity instead of the individual residents with disabilities, as "sober living home operators can satisfy the 'actual disability' prong on a collective basis by demonstrating that they serve or intend to serve individuals with actual disabilities." *Socal Recovery*, 56 F4th at 814. Thus, the applicant is able to step into the shoes of its current and future residents for the purpose of the FHAA and ADA.

2. Does the County know or should it reasonably know of the disability?

Yes. "In the context of zoning discrimination against a home that aims to serve people with disabilities, we hold that courts must look at the evidence showing that the home serves or intends to serve individuals with actual disabilities on a *collective basis*, including the home's policies and the standards the municipality uses to evaluate the residence." *SoCal Recovery*, 56 F.4th at 819 (emphasis in original). In *SoCal Recovery*, the court considered "admissions criteria and house rules, testimony by employees and current residents, and testimony by former residents" to satisfy this element. *Id.* at 815. Here, the applicant provided sufficient documentation of its policies and standards in its procedural accommodation request to establish, on a collective basis, that it intends to serve individuals with actual disabilities.

3. Are the accommodations necessary?

The test for whether an accommodation is "necessary" is described as:

> Whether the requested accommodation is necessary requires a showing that the desired accommodation will affirmatively enhance a disabled plaintiff's quality of life by ameliorating the effects of the disability. In other words, the plaintiffs must show that without the required accommodation they will be denied the equal opportunity to live in a *residential neighborhood*. This has been described by courts essentially as a causation inquiry.

Valencia v. City of Springfield, 883 F.3d 959, 968 (2018) (internal quotations and citations omitted) (emphasis added). The applicant should therefore demonstrate how living in the chosen location will affirmatively enhance the life of applicant's clients by ameliorating the effects of drug and/or alcohol addiction.

Also notable, is that most often, courts grapple with accommodation requests in *residential* zones. *See SoCal Recovery*, 56 F.4th at 809 (multi-family zone); *Pac. Shores Props.*, 730 F.3d at 1147 (residential zone); *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 777 (2002) (spacing requirement in municipal ordinance); *Drazen v. Town of Stratford*, 2013 U.S. Dist. LEXIS 47908, *2 (high-density, congested neighborhood).

Oregon's farm zones are not "residential neighborhoods." Instead, Oregon's farm zones, under Goal 3, are designed to "protect farmland for continued production of food and fiber." Many of the residential structures in Oregon's farm zones are single-family farm dwellings. There are, however, some land uses that involve the lodging of multiple individuals in farm zones (i.e.,

destination resorts). The court in *Oconomowoc*, briefly touched on a distinction when the accommodation request is on behalf of a group home:

> The FHAA prohibits local governments from applying land use regulations in a manner that will give disabled people less opportunity to live in certain neighborhoods than people without disabilities. Often, *a community-based residential facility* provides the only means by which disabled persons can live in a residential neighborhood, either because they need more supportive services, for financial reasons, or both. When a zoning authority refuses to reasonably accommodate these small group living facilities, it denies disabled persons an equal opportunity to live in the *community* of their choice.

Oconomowoc Residential Programs, Inc. v. City of Milwaukee, 300 F.3d 775, 784 (internal quotations and citations omitted) (emphasis added).

The applicant addressed this element as follows:

> Granting exceptions from the zoning code to allow the existing community center to be used as an SUD treatment center is necessary to provide approximately 100 to 130 individuals suffering from SUD with a treatment center in Central Oregon. Without the accommodation, the Applicant will be unable to provide these necessary services at the existing and approved community center to disabled individuals seeking SUD treatment in a location of their choosing.

The applicant is correct that without the accommodation, an SUD treatment center of the size proposed could not be located in the County's EFU-3 zone. There are no provisions for SUD treatment centers in Oregon farm zones. And by its plain terms, ORS 215.283(2)(e), under which the applicant seeks approval, cannot be met. But applicant's response in that paragraph does not specifically address if the accommodation "will affirmatively enhance a disabled plaintiff's quality of life by ameliorating the effects of the disability" as described in *Valencia*. Elsewhere, though, applicant describes SUD treatment facilities as centers that "provide relapse management, engaging outdoor activities, and individualized programs for each patient." As the FHAA and ADA are to be construed broadly, and applicant has arguably met its burden on this element.

4. Is the accommodation request reasonable?

In the land use context, an accommodation request is reasonable "when it imposes no fundamental alterations in the nature of the program or undue financial or administrative burdens." *Myers v. Highlands at Vista Ridge Homeowners Ass'n, Inc.*, 6:20-CV-00562-MK, 2022 WL 4452414, at *23 (D Or Sept. 8, 2022). The court in *Valencia* expanded on the FHAA test for reasonableness as follows:

> The FHAA requires public entities to reasonably accommodate a disabled person by making changes in rules, policies, practices or services as is necessary to provide that person with access to housing that is equal to that of those who are not disabled. Although the plain language of the FHAA provides little

> guidance concerning the reach of its accommodation requirement, the contours of the obligation have been given substantial elaboration by this court and other courts of appeals. The basic elements of an FHAA accommodation claim are well-settled. The FHAA requires accommodation if such accommodation (1) is reasonable, and (2) necessary, (3) to afford a handicapped person the equal opportunity to use and enjoy a dwelling.
>
> Whether a requested accommodation is reasonable or not is a highly fact-specific inquiry and requires balancing the needs of the parties. An accommodation is reasonable if it is both efficacious and proportional to the costs to implement it. On the other hand, an accommodation is unreasonable if it imposes undue financial or administrative burdens or requires a fundamental alteration in the nature of the program.
>
> Some costs related to reasonableness may be objective and easily ascertainable. For example, some governmental costs associated with the specific program at issue may be a matter of simply looking at a balance sheet. Other costs may be more subjective and require that the court demonstrate a good deal of wisdom in appreciating the intangible but very real human costs associated with the disability in question. This refers to those intangible values of community life that are very important if that community is to thrive and is to address the needs of its citizenry. Of particular relevance here, a zoning waiver is unreasonable if it is so at odds with the purposes behind the rule that it would be a fundamental and unreasonable change.

Valencia v. City of Springfield, 883 F.3d 959, 967-968 (internal quotations and citations omitted). Courts in the Ninth Circuit apply the same test for reasonableness under the ADA and FHAA. *See, e.g., Rise, Inc. v. Malheur Cty*., No. 2:10-cv-00686-SU, 2012 U.S. Dist. LEXIS 44994, at *43 (D. Or. Feb. 13, 2012). There are no readily apparent undue financial or administrative burdens associated with this accommodation request, as the County frequently processes land use applications and the structures are, for the most part, all constructed. The more important consideration is whether the request would fundamentally alter the County's EFU-3 zoning scheme.

As discussed earlier, each accommodation request requires a highly fact-specific case-by-case inquiry. The purpose of farm zones in Oregon is the preservation of farmland. Were this an application to construct a new facility on open farm ground, this analysis would be quite different. But this modification request does not involve a reduction in available farmland as the Subject Property was developed pursuant to the original application. How, then, should the County consider the request's impact on the nature of our land use scheme?

The *Kulin* decision, and an earlier decision relied upon by *Kulin*, *Cam v. Marion County*, 987 F. Supp. 854 (1997), are both instructive to this unique accommodation request. As discussed above, *Kulin* involved an accommodation request regarding the number of employees and space designated to storage as a Home Occupation. Kulin's warehouse was already constructed and functional at the time of the accommodation request. *Kulin v. Deschutes County*, 872 F. Supp. 2d 1093, 1105 (2012).

The county's hearings officer denied the accommodation request on the grounds that it would fundamentally alter the county's land use regulations in that approval would "be inconsistent with the purpose of the home occupation standards and the comprehensive goals, objectives, and policies to preserve and protect EFU-zoned land for agricultural uses," as well as "open the door for the establishment of non-farm related businesses on EFU-zoned parcels in contravention of those policies." *Id.*

The hearing officer's position reminded the *Kulin* judge of the *Cam* case, in which an existing barn, approved in an EFU zone for agricultural purposes, was converted into a church by local residents. *Id.* at 1104. Following a code compliance action, Cam applied for a land use permit to convert the use of the barn to a church, which was denied on the grounds that it was a "new" church as opposed to the expansion of an existing church. *Id. Kulin* quoted the *Cam* court on the impact of an existing structure to Oregon's goal of preserving farmland:

> As far as the state is concerned, whatever impact the building had on high value farmland occurred when it was first built. Whether the plaintiffs store pallets, tractors, or Bibles and sacred relics inside the building no longer matters in terms of the impact the building has on the land it occupies. The Hearings Officer expressly found that the use of the building as a church would not present any significant impact on farm use or farming practices in the area.

Kulin, 872 F. Supp. 2d at 1104 (quoting *Cam*, 987 F. Supp. at 860). The court in *Kulin* reiterated, "simply because a requested accommodation would alter a substantive rule or regulation does not render it unreasonable or unduly burdensome." *Id.*

In its fact-specific inquiry, ultimately approving the request under the ADA, the *Kulin* court found "perhaps the most important factor" was that the "requested accommodation has an inconsequential impact on the surrounding agricultural land use" as the structure was already constructed, the tangible impacts on surrounding uses were negligible, and the difference in impacts between personal and commercial storage was inconsequential. *Id.* at 1105-06. The *Kulin* court's decision finished by noting that there was "little danger" in the accommodation request "opening the floodgates" for others to circumvent the land use code, as each accommodation request required such a fact-specific, case-by-case analysis. *Id.* at 1106.

Thus, as Staff considers whether the present accommodation request fundamentally alters the County's land use scheme, the consideration should be limited. The preservation of farmland concerns no longer apply as those were addressed in the original application before the existing facilities were constructed. Moreover, the question of the impact on subsequent attempts to circumvent the County's EFU-3 rules should also be minimized in acknowledgement of the required fact-specific inquiry and truly unique nature of the Subject Property. The analysis should instead focus on considerations such as impacts to surrounding farm uses and traffic.

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IV. Consideration of Public Comment

One last note: It is important as Staff, and possibly the Board, consider this application that prejudiced comments of the public not be considered. Doing so could violate the FHAA,[4] as described in the following excerpt from the *Joint Statement of the Department of Housing and Urban Development and the Department of Justice: State and Local Land Use Laws and Practices and the Application of the Fair Housing Act* (2016):

> **5. Does a state or local government violate the Fair Housing Act if it considers the fears or prejudices of community members when enacting or applying its zoning or land use laws respecting housing?**
>
> When enacting or applying zoning or land use laws, state and local governments may not act because of the fears, prejudices, stereotypes, or unsubstantiated assumptions that community members may have about current or prospective residents because of the residents' protected characteristics. Doing so violates the Act, even if the officials themselves do not personally share such bias. For example, a city may not deny zoning approval for a low-income housing development that meets all zoning and land use requirements because the development may house residents of a particular protected class or classes whose presence, the community fears, will increase crime and lower property values in the surrounding neighborhood. Similarly, a local government may not block a group home or deny a requested reasonable accommodation in response to neighbors' stereotypical fears or prejudices about persons with disabilities or a particular type of disability. Of course, a city council or zoning board is not bound by everything that is said by every person who speaks at a public hearing. It is the record as a whole that will be determinative.

As always, let me know if you have any questions.

[4] For example, in the *SoCal* case: "Here, the City may have been influenced by the way others wrote and spoke about those with disabilities at public hearings… The oral testimony given at public hearings and written statements submitted to the City by residents opposing the permit applications for Appellants' sober living homes reflect stereotypes about the homes' residents. Some described the residents of sober living homes as 'capable of mayhem and violence,' and as the cause of '[c]rime and homelessness.' One person shared that single women are 'uncomfortable' with residents of a sober living home residing so close to their homes. The City referenced some of these stereotypes in its decisions denying Appellants' permit applications." *SoCal Recovery, LLC v. City of Costa Mesa*, 56 F.4th 802, 819 (2023).