APPENDIX 3: STATEMENT ON RELIGIOUS LAND USE RIGHTS

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SENT VIA EMAIL AND US MAIL

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Re: Oro Valley Church of the Nazarene Stars Center, Oro Valley, AZ

Dear Mr. Rothschild and Mr. Andrews,

I am following up with you regarding our prior discussions about OVCN's proposed sports ministry building project, specifically, OVCN's plan to develop a sports-ministry recreational field (the "Sports-Ministry Field") and a multi-use ministry building ("Multi-Use Ministry Building") at 440 West Calle Concordia, Oro Valley, AZ. For the reasons described in this letter, OVCN maintains that the religious nature of the proposed Sports-Ministry Field and Multi-Use Ministry Building is well-settled and therefore the Town Planning and Zoning Commission lacks discretion to consider this issue and must find these facilities part of a "religious institution" or an "accessory use" permitted as a matter-of-right under the Town Zoning Code.

As we have discussed in prior correspondence and conversation, OVCN intends to use the Sports-Ministry Field and Multi-Use Ministry Building for OVCN's youth and children's ministries and as an evangelical outreach to youth and children in the broader Oro Valley community. OVCN's vision for its youth and children Sports Ministry is central to its evangelical mission "to make disciples of the nations." Matthew 28:18-20. OVCN is passionate about sharing the love of Christ through athletics with members of the Oro Valley community and ministering to those children and youth who are already involved in OVCN's ministries. OVCN believes athletics are a unique vehicle for evangelical community outreach because it forges relationships between teammates and coaches and provides an opportunity for character development. OVCN's proposed use of the Sports-Ministry Field and Multi-Use Ministry Building is discussed in further detail below.

I. OVCN'S PROPOSED USES OF THE SPORTS-MINISTRY FIELD AND MULTI-USE MINISTRY BUILDING.

OVCN views the entirety of its campus as a sanctuary. OVCN seeks to point to a relationship with Jesus Christ everywhere on its campus with everyone who attends any and all events. Research

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suggests that it takes a person coming onto a church campus seven times before he or she feels comfortable enough to walk through the doors for service. This is why no event at OVCN is a "non-ministry" event and why all events to be hosted at the new Sports-Ministry Field and Multi-Use Ministry Building will be in accordance with OVCN's evangelical mission.

The primary use of the new Sports-Ministry Field and Multi-Use Ministry Building will be for OVCN's sports leagues. Currently, OVCN offers basketball, flag football, soccer and cheerleading programs and focuses its sports ministries on ages four through fifth grade. OVCN desires to expand its sports ministries into additional sports leagues and clubs and to develop athletic programming for older children, middle school through high school. The Sports-Ministry Field and Multi-Use Ministry Building will assist OVCN toward these goals. The Multi-Use Ministry Building will include three basketball courts, a turf court, a gathering space with snack bar, and a championship court that will double as a Wednesday night and Sunday Youth Center space, with stage and seating. The space will also be available for main Sunday worship services. The basketball court area provides OVCN the flexibility to offer additional activities, such as pickleball, volleyball, indoor dodgeball, and futsal.

Beyond OVCN's Sports Ministry, these new facilities will see substantial use for outreach events hosted by all of OVCN's other ministry programs, including Kids Ministry, Youth Ministry, College and Adult Ministry, Women's and Men's Ministries, Single Moms Ministry, Mom's Group Ministry, 55+ Ministry and other church-wide and community outreach events. Activities include exercise classes, walking groups, "mommy and me" classes and other activities that OVCN may offer to seek to draw people onto campus and into fellowship.

Finally, OVCN may allow limited third-party use of the Sports-Ministry Field and Multi-Use Ministry Building, but only for activities aligned with its religious mission and, more specifically, only if the third party agrees to and signs OVCN's Facility Use Agreement (attached as Exhibit A). This Facility Use Agreement, provides among other things, that OVCN may, at its discretion, open the event in prayer and have pastors, ministry leaders and/or other staff attend or participate in the event. Examples of third-party activities that may be acceptable if a Facility Use Agreement is signed include weddings, funerals, Town of Oro Valley events, Oro Valley Police Department events, Chamber of Commerce events and other similar community events. OVCN intends that third-party events will constitute only an incidental use of the Sports-Ministry Field and Multi-Use Ministry Building.

Notably, OVCN's proposed uses of the Sports-Ministry Field and Multi-Use Ministry Building are consistent with what other relatively large (or smaller) churches offer through their sports ministry programs. For example, Christ's Church of the Valley offers the "CCV Stars" program, which is a premier youth sports program offering multiple sports (soccer, football, baseball, basketball) in many locations across the Valley. Additionally, OVCN is associated with Upward Sports, a ministry that partners with churches to help them develop sports ministry programs and promotes a relationship with Jesus Christ through sports. Upward Sports is actively partnering with over 1,500 churches nationwide, reaching over 300,000 children annually. **Upward Sports estimates that 90-95 percent of their affiliated churches provide sports programs in the churches' own gym and/or on the churches' own athletic field.**

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Moreover, as discussed below, OVCN's proposed uses for the Sports-Ministry Field and Multi-Use Ministry Building are within traditional and reasonably customary *religious* uses for a church or other religious institution as established by law. Because recreational activities have long been accepted and acknowledged as an integral part of worship and religious life, the Town lacks discretion to engage in any further inquiry as to the religious and/or nonreligious use of the facilities and must find that they are permitted as of right in the R1-144 zoning district.

II. THE SPORTS-MINISTRY FIELD AND MULTI-USE MINISTRY BUILDING ARE "RELIGIOUS INSTITUTIONS" AND/OR "ACCESSORY USES" UNDER THE ZONING CODE AND ARE THEREFORE "PERMITTED AS A MATTER-OF-RIGHT" IN THE R1-144 ZONING DISTRICT.

As noted above, the Sports-Ministry Field and Multi-Use Ministry Building will be located at 440 West Calle Concordia. This location is in the R1-144 zoning district. Under Section 23.1(A) of the Oro Valley Zoning Code (the "Code"), R1-144 is a single-family residential district, corresponding to lot sizes of 144,000 sq. ft. As shown on Table 23-1 "Permitted Uses," found at Chapter 23.2 of the Code, "Religious Institutions" are "permitted as a matter-of-right" in all zoning districts, including R1-144. Chapter 31 of the Code defines a "Religious Institution" as "[a] place of gathering or assembly with the primary purpose of religious worship. Typical religious uses include, but are not limited to, churches, synagogues, mosques and temples." (Emphasis added.) According to Table 23-1, "Accessory Uses" are also "permitted as a matter-of-right" in all zoning districts including R1-144. Chapter 31 of the Code defines "Accessory Use" as "[a] use customarily subordinate to the main use of the lot or building."

A. *The Meaning of "Religious Institution" is Much Broader Than a Church Building.*

As the Code recognizes, the definition of "religious institution" is not limited to a building dedicated exclusively to public or corporate worship services. This is consistent with the long-established understanding in zoning law that the meaning of "church" (or, in more modern usage, "religious institution") includes more than just the sanctuary facility. Indeed, a long line of courts has refused to adopt such a limited interpretation, in light of the favored status of churches under zoning law (*see, e.g., O'Brien v. Chicago*, 105 N.E.2d 917, 920 (Ill. App. Ct. 1952) ("[W]herever the souls of men are found, there the house of God belongs."); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Ashton*, 446 P.2d 185, 188 (Idaho 1968) (noting the "almost universal rule that churches and their attendant uses are permitted in residential areas and that a loss of tax revenue, a decrease in property values, increased noise, or traffic are not sufficient grounds" of exclusion (emphasis added)).

The Ohio Court of Appeals surveyed the judicial interpretation of the term "church" in the zoning context across many states. *See Solid Rock Min. Int'l v. Monroe Bd. of Zoning Appeals*, 740 N.E.2d 320 (Ohio Ct. App. 2000). Based on this review, the court concluded that established precedent "clearly shows that a church is more than a mere building used solely for worship." *Id.* at 325. Rather, "**religious use has been defined to mean conduct with a religious purpose**." *Id* (**emphasis added**). The court recognized that this interpretation is not intended to grant a church "completely unfettered use of its property" and reasoned that the "activities or the use to which the property is put must be reasonably related, in substance and in space to the church's purpose, the

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most, but not sole, prominent purpose of which is the public worship of God." *Id.* Thus, the court held that a church-run home for unwed teen mothers was within the "church" use for purposes of the local zoning code. *Id.* at 327-28; *see also Slevin v. Long Island Jewish Med. Ctr.*, 319 N.Y.S.2d 937, 946 (N.Y. Sup. Ct. 1971) (rejecting the argument that "religious uses must be conducted by the church itself for the benefit of its own members" and holding church-run drug rehab center to be "religious use").

Likewise, in the oft-cited case *In re Community Synagogue v. Bates*, 154 N.Y.S.2d 15 (1956), the Court of Appeals of New York held that "[a] church is more than merely an edifice affording people the opportunity to worship God." *Id.* at 453. The court opined that "[c]hurches have always developed social groups for adults and youth where the fellowship of the congregation is strengthened" and "[t]o limit a church to being merely a house of prayer and sacrifice would, in a large degree, be depriving the church of the opportunity of enlarging, perpetuating and strengthening itself and the congregation." *Id.* (holding synagogue's facilities for "fellowship" and "indoor and outdoor activities for youth" within "church" use). More recently, the Michigan Court of Appeals recognized that zoning authorities must be "flexible and accommodating" in defining what constitutes a "church" activity or use, noting that churches today are "used during the entire week, nights as well as days for various parochial and community functions." *Great Lakes Soc. v. Georgetown Charter Twp.*, 761 N.W.2d 371, 376, 382 (Mich. Ct. App. 2008) (holding that "church" use included large "tape/publication ministry area, including a recording studio," "exercise room" and "health ministry area" as well as sanctuary); *cf. World Outreach Conf. Ctr. v. City of Chicago*, 591 F.3d 531, 535 (7th Cir. 2009) (extending protections of federal Religious Land Use and Institutionalized Persons Act to Christian outreach center consisting mainly of recreational and living facilities) ("The building is not a church as such . . . [But] there is no doubt that even the recreational and other nonreligious services provided at the community center are integral to the World Outreach's religious mission . . . . Souls aren't saved just in church buildings.").

B. *Athletic and Recreational Facilities Are Well Within the Meaning of "Religious Institution" or an "Accessory Use" Thereto.*

Longstanding case law further establishes that ownership and use of athletic fields and related recreational facilities is a reasonably customary and traditional use falling within the meaning of a "church" or "religious institution" under the relevant zoning law or an "accessory use" thereto. In *Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Ashton*, 446 P.2d 185 (Idaho 1968), the Idaho Supreme Court ruled that a recreational complex, including two lighted softball fields, was an accessory use to an LDS church. Acknowledging that "a church is something more than merely a building in which the actual religious services are held," the court reasoned that the recreational and sports activities were intended to be a central part of the church's "program of worship" and were "sufficiently connected with the church itself that use of [the] property for recreation purposes [was] permissible" as an accessory use. *Id.* at 188-89; *see also Diocese of Rochester v. Planning Bd. of Town of Brighton*, 136 N.E.2d 827, 830, 836-37 (N.Y. 1956) (holding that parochial school, along with "open field and hard-top play areas" were accessory uses to Catholic church).

Similarly, in *Cash v. Brookshire United Methodist Church*, 573 N.E.2d 692 (Ohio Ct. App. 1988), the Ohio Court of Appeals, drawing on the line of case law discussed above, held that a baseball

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field owned by a church, and the church's sponsorship of a Little League team to play there, was within meaning of a "church use" under the local zoning code. The court recognized that "[i]t is the fundamental tenet of the Methodist Church that worship involves not only religious services, but reaching out into the community through sponsorship of activities such as scouting, Little League and Head Start programs." *Id.* at 693; *see also id.* at 696 (sponsorship of baseball team was "part of public worship program" of church). Thus, the court ruled that the church's recreational activities were "permitted under the city zoning ordinances as a church use" and could also be upheld as an "accessory use" to the church. *Id.* at 696-97.

As the above discussion illustrates, courts across the country recognize the time-honored tradition of religious institutions of various stripes using athletic and recreational facilities as part of their religious mission. This case law interprets the term "church" or other similar term in the relevant zoning law to incorporate these recreational facilities, either as part of the "church" use itself or as an "accessory use" thereto. The Town cannot interpret the term "religious institution" as used in its own Code in a vacuum; it must do so informed by this longstanding precedent and the constitutional protections of religious expression and free exercise. Accordingly, the term "religious institution" under the Code must be understood to encompass the athletic and recreational facilities proposed by OVCN, i.e., the Sports-Ministry Field and Multi-Use Ministry Building, making them permitted **as of right** in all zoning districts. Alternatively, the law with equal force unequivocally views the facilities as "accessory" uses to a religious institution, permitted as a matter-of-right. Importantly, OVCN's argument here is not that it can do whatever it wants at its property simply by virtue of being a church, but is instead grounded on the fact that athletic and recreational facilities are a long-established and reasonably customary use of houses of worship no matter the faith tradition.

In addition to the historical precedents discussed above, at least two other general principles must inform the Town's interpretation of "Religious Institution" under the Code. The first is the widely recognized maxim, affirmed by the Supreme Court of Arizona, that "[z]oning ordinances, being in derogation of common law property rights, will be strictly construed and any ambiguity or uncertainty decided in favor of property owners." *Hart v. Bayless Inv. & Trading Co.*, 346 P.2d 1101, 1109 (Ariz. 1969). Thus, while it is clear from the cases discussed above that athletic fields and related recreational facilities are part of the "religious institution" use or an "accessory" thereto, to the extent that the Town feels that there is any ambiguity or confusion as to the interpretation of the Code, **it must be resolved in favor of OVCN**. Second is the doctrine of ecclesiastical abstention, derived from the First Amendment, which prevents the government from "inquiring into ecclesiastical matters[.]" *Ad Hoc Comm. of Parishioners of Our Lady of the Sun Catholic Church v. Reiss*, 223 Ariz. 505, 510, ¶ 12, 224 P.3d 1002, 1007 (App. 2010) (citations omitted). Courts (and by extension, governmental entities) are not in the business of deciding what is and what is not religious exercise and will defer to the good faith religious proclamations of adherents. *United States v. Ballard*, 322 U.S. 78, 86-87 (1944). This admonition against governmental entities second-guessing what does or does not constitute worship and religious practice logically extends to zoning officials and the Town.

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III. UNDER RLUIPA, ZONING SCHEMES CANNOT PLACE A SUBSTANTIAL BURDEN ON RELIGIOUS EXERCISE.

OVCN is a religious group and is thereby afforded protection as such under the Religious Land Use and Institutionalized Persons Act (RLUIPA) in matters concerning the application of zoning regulations. RLUIPA is relevant to OVCN's desire to proceed with developing these facilities because the issue pertains to zoning regulations and the desired use of the land is religious.

We are concerned that the Town's shifting positions with regard to the Sports-Ministry Field may violate OVCN's civil rights under RLUIPA. Initially, the Town objected to the facilities on the basis that it would be used for a commercial purpose rather than a religious purpose. The Town appeared to be under the misimpression that the facilities would be used primarily as a rental for third parties. As established above, this is not the case. The Sports-Ministry Field and Multi-Use Ministry Building will almost exclusively be used for OVCN's youth and children's sports programs. OVCN is excited to ramp up this ministry and hopes to do so as soon as possible. Additional uses for these facilities include outdoor worship services and other OVCN special religious events and ceremonies. As discussed above, any third-party rentals would merely be an incidental use and no different than OVCN's current incidental renting of its sanctuary or other buildings through facility use agreements (very similar to the Town of Oro Valley utilizing the OVCN campus for community events). Moreover, even when the facilities may be rented to third parties, OVCN intends to use this rare occurrence as an opportunity for evangelical outreach by including in facility use agreements terms which allow pastors or other staff members to be present and to pray and/or offer other religious support. Therefore, even when the facilities are being used by third parties, the use will be tied to OVCN's central religious mission – the making of disciples of Jesus Christ.

RLUIPA standards supersede local zoning codes. RLUIPA is to be construed in favor of a broad protection of religious exercise – to the maximum extent permitted under RLUIPA and the Constitution. 42 U.S.C. § 2000cc-3(g). RLUIPA prohibits a land use regulation that "totally excludes religious assemblies from a jurisdiction" or that "unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." §§ 2000cc(b)(3)(A), (B). Zoning officials must determine whether the use in question constitutes religious exercise. RLUIPA defines "religious exercise" to "include[] any exercise of religion, whether or not compelled by, or central to, a system of religious belief." § 2000cc-5(7)(A). RLUIPA also provides that religious exercise applies to "[t]he use, building, or conversion of real property for the purpose of religious exercise." § 2000cc-5(7)(B).

The Town's current position would place a substantial burden on OVCN's religious exercise as it would completely prohibit significant aspects of its ministry to its youth and children and to the unsaved youth and children of the greater Oro Valley community. The burden placed on OVCN's civil rights is further exemplified in the Town's apparent disregard to the obvious religious use and accessory use relative to the proposed facilities. Even if the Town disagrees with the interpretation of religious use and accessory use outlined above, the use need not qualify under local definitions to be subject to RLUIPA protections. Any such burden must be justified by compelling interests imposed in the least restrictive means to justify the substantial burden.

Substantial burdens can arise from delay, uncertainty, and expense resulting from zoning schemes and the conduct of municipal officials. *See Grace Church of N. County v. City of San Diego,*

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555 F. Supp. 2d 1126, 1137-39 (S.D. Cal. 2008). "When [a] town's actions are arbitrary, capricious, unlawful, or taken in bad faith, a substantial burden may be imposed because it appears that the [religious institution] may have been discriminated against on the basis of its status as a religious institution." *Fortress Bible Church v. Feiner*, 694 F.3d 208, 219 (2d Cir. 2012). Here, what should have been an expedient determination as to the religious character of the use of the proposed facilities, has instead been dragged out for more than a year, depriving OVCN and its members of the use and enjoyment of its property. Last year after OVCN clarified that the facilities were to be used for a clearly religious purpose, the Town's objection seemed to shift, with the Town asserting that no recreational facilities would be acceptable in that location as a religious institution (despite no less than six fields being in the immediate area). The shifting rationale gives rise to the inference that that the Town's actions are arbitrary and capricious, causing delay, fostering uncertainty, and forcing OVCN to incur unnecessary expense –threatening to substantially burden OVCN's religious exercise and expression.

IV. UNDER RLUIPA, DISCRIMINATION AGAINST, AND EXCLUSION OF, RELIGIOUS ASSEMBLIES ARE PROHIBITED.

RLUIPA requires that religious uses be treated as well as any comparable secular assembly use. § 2000cc(b)(1). Imposing different, more onerous zoning requirements on a religious institution can violate RLUIPA's nondiscrimination provisions. A religious institution does not need to show it suffered a burden to prove a RLUIPA violation under these proscriptions, nor is the articulation of a "compelling interest furthered through the least restrictive means" a stated defense for a "discrimination and exclusion" claim.

In *Corp. of Catholic Archbishop of Seattle v. City of Seattle*, a federal district court ruled that public schools located in residential, single-family zones with athletic fields are suitable comparators to religious institutions for the purpose of determining discrimination/exclusion under RLUIPA. 28 F. Supp. 3d 1163, 1169 (W.D. Wash. 2014). Where treatment is deemed unequal by comparators, a violation of RLUIPA has occurred. *Id.* (the court found that the city violated RLUIPA's "equal terms" provision by requiring a Catholic high school to apply for a variance to put up 70-foot-high light poles for its athletic field in a residential single-family zone, while allowing public schools to do the same by special exception).

OVCN is similarly concerned it is being discriminated against in the development of its facilities, particularly given the fact that under the Code the facilities undoubtedly qualify as a "religious institution" and an "accessory use," yet the Town has taken the position that OVCN cannot proceed with development absent an extended SUP or PAD process.

Significantly, development of the facilities will in no way alter or diminish the character of the zoning district. There are recreational fields all over this area, including at the adjacent James Kriegh Park, Canyon Del Oro High School, and Pusch Ridge Church/Christian Academy; with no discernable difference between OVCN's planned facilities and the other recreational facilities in the area.

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V. CONCLUSION

For the reasons stated herein, OVCN is entitled to pursue development of the Sports-Ministry Field and Multi-Use Ministry Building in the R1-144 zoning district. Because the religious nature of these facilities is well-settled under zoning case law, the Town Planning and Zoning Commission lacks discretion to consider this issue and must find these facilities to be permitted as a matter-of-right as part of a "religious institution" and/or as an "accessory use." Additionally, the Free Exercise Clause of the First Amendment and the civil rights protections afforded to OVCN by RLUIPA weigh strongly in favor of OVCN in this matter.

I look forward to continuing to work with you on this matter.

Sincerely,

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By
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cc: Jerry Steele (jerry@azbarristers.com)