BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CATHERINE CAUDLE,
Petitioner,

vs.

CITY OF DUNES CITY,
Respondent,

and

VALERIE CAIN-MATHIS, DENNIS SMITH,
and PATRICIA CAIN-SMALLEY,
Intervenors-Respondents.

LUBA No. 2017-110

FINAL OPINION
AND ORDER

Appeal from City of Dunes City.

Sean T. Malone, Eugene, filed a petition for review on behalf of petitioner.

No appearance by the City of Dunes City.

Ross Day, Portland, filed a response brief on behalf of intervenors-respondents. With him on the brief was Day Law & Associates, PC.

RYAN, Board Chair; BASSHAM, Board Member; HOLSTUN Board Member, participated in the decision.

DISMISSED 03/05/2018

You are entitled to judicial review of this Order. Judicial review is

1 governed by the provisions of ORS 197.850.

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals Ordinance 245, a city ordinance that bans marijuana businesses in the city.

BACKGROUND

A brief explanation of the state's laws regulating the growing, processing, and sale of marijuana is necessary in order to understand this appeal.[1] In 1998, Oregon voters approved the Oregon Medical Marijuana Act (OMMA), which allowed the production and use of medical marijuana. The OMMA is now codified at ORS 475B.785(2017) to 475B.949(2017). ORS 475B.788(2017).

In November 2014, Oregon voters approved Ballot Measure 91, which legalized recreational (non-medical) marijuana under state law. Measure 91 placed administrative authority over the state's recreational marijuana program with the Oregon Liquor Control Commission (OLCC). After the passage of Measure 91, in 2015, 2016, and 2017, the legislature enacted changes to the OMMA and the state's recreational marijuana program. Measure 91, the OMMA, and the 2015, 2016, and 2017 changes are now codified at ORS

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[1] Growing, processing and sale of marijuana remains illegal under federal law. The Federal Controlled Substances Act, 21 USC § 801 *et seq.*, prohibits the manufacture, distribution, dispensation, and possession of marijuana.

475B.005 *et seq.* (2017). For purposes of this opinion, all references are to the 2017 version of ORS 475B.005 *et seq.* unless noted.

Although a majority of the state's voters enacted Measure 91, passage of Measure 91 was not without controversy, particularly in counties in which the majority of county voters did not approve Measure 91. Accordingly, one of the changes initially adopted in 2015 is the so-called "Local Option," which gives local governments the authority to adopt ordinances that "prohibit or allow the establishment of any one or more" marijuana businesses described in ORS 475B.968(1)(a) through (k) and refer those adopted ordinances to the electors of the city for approval at the next statewide general election.[2] ORS 475B.968(8) and (9) make ORS 475B.968(1) inapplicable to medical marijuana dispensaries and medical marijuana processing sites that are registered on or

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[2] The "Local Option" was introduced late in the legislative session, on June 15, 2015, as the "-31" amendments to House Bill 3400, and was eventually codified at ORS 475B.800(2015). ORS 475B.968(2017) was renumbered in 2017 from ORS 475B.800(2015).

Oregon Laws 2015, Chapter 614, Section 133 provided that the governing body of a county, or a city located in a county in which not less than 55 percent of votes cast in the county during the November 4, 2014 general election on Measure 91 were in opposition to Measure 91 could adopt ordinances that prohibit the establishment of one or more marijuana businesses in their jurisdiction, without referral of the ordinance to the electors. That authority to adopt an ordinance without subsequent referral to the voters expired 180 days after June 30, 2015, the effective date of Section 133. Oregon Laws 2015, ch 614, §§133(2)(a)-(b), *compiled as a note after* ORS 475B.800(2015).

before the date of the ordinance and that have successfully completed a city or county land use application process.[3]

Pursuant to the authority in ORS 475B.968(1), the city council adopted Ordinance 245 (the Ordinance) on September 13, 2017.[4] The city council also

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[3] ORS 475B.486 and 475B.928 give local governments the authority to adopt what the statutes refer to as "local time, place and manner regulations" on recreational and medical marijuana operations, as set forth in those statutes. Some local governments have amended their zoning ordinances to regulate marijuana activities pursuant to the authority in ORS 475B.486 and 475B.928. *See, e.g., Diesel v. Jackson County*, 74 Or LUBA 286, 297-98 (2016), *aff'd* 284 Or App 301, 391 P3d 973 (2017) (affirming the county's zoning ordinance amendments as not inconsistent with the county's comprehensive plan or with ORS 475B.340(2)(2015) and 475B.500(2)(2015)).

[4] ORS 475B.968(1) provides:

> "The governing body of a city or county may adopt ordinances to be referred to the electors of the city or county as described in subsection (2) of this section that prohibit or allow the establishment of any one or more of the following in the area subject to the jurisdiction of the city or in the unincorporated area subject to the jurisdiction of the county:
>
> "(a) Marijuana processing sites registered under ORS 475B.840;
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> "(b) Medical marijuana dispensaries registered under ORS 475B.858;
>
> "(c) Marijuana producers that hold a license issued under ORS 475B.070;
>
> "(d) Marijuana processors that hold a license issued under ORS 475B.090;
>
> "(e) Marijuana wholesalers that hold a license issued under ORS 475B.100;

adopted a resolution referring the Ordinance to the electors of the city for approval at the November 6, 2018 general election, pursuant to ORS 475B.968(2).

Section 1 of the Ordinance adopts new provisions into Title XI of the Dunes City Code (DCC), including Section 111.002. New DCC Section 111.002 "prohibits the establishment and operation of the following in the area subject to the jurisdiction of the City:

"A. Marijuana processing sites under ORS 475B.435[2015];

"B. Medical marijuana dispensaries;

"(f) Marijuana retailers that hold a license issued under ORS 475B.105;

"(g) Marijuana producers that hold a license issued under ORS 475B.070 and that the Oregon Liquor Control Commission has designated as an exclusively medical licensee under ORS 475B.122;

"(h) Marijuana processors that hold a license issued under ORS 475B.090 and that the commission has designated as an exclusively medical licensee under ORS 475B.127;

"(i) Marijuana wholesalers that hold a license issued under ORS 475B.100 and that the commission has designated as an exclusively medical licensee under ORS 475B.129;

"(j) Marijuana retailers that hold a license issued under ORS 475B.105 and that the commission has designated as an exclusively medical licensee under ORS 475B.131; or

"(k) Any combination of the entities described in this subsection."

"C. Marijuana producers licensed under ORS 475B.450[2015];

"D. Marijuana processors;

"E. Marijuana wholesalers;

"F. Marijuana retailers;

"G. Any combination of the entities described in this Section 110.002." Record 16.

New DCC Section 111.003 provides:

> "the prohibition * * * does not apply to a marijuana processing site or medical marijuana dispensary that meets the conditions set out in ORS 475B.800(6) and (7) [2015]. Further, the prohibitions set out in this Chapter 111 does not apply to any marijuana-related entity described in Section 111.002 that has, at the time of the adoption of this Chapter 111, obtained a Land Use Compatibility Statement pursuant to ORS 475B.063[2015]." Record 16.

Section 3 of the Ordinance declares an emergency and provides that "this ordinance shall be in full force and effect immediately and without delay." Record 17.

On November 17, 2017, approximately 65 days after the city council adopted the Ordinance, petitioner filed a Notice of Intent to Appeal (NITA) the Ordinance, and subsequently filed the petition for review. On February 1, 2018, intervenors-respondents (intervenors) filed a response brief that seeks dismissal of the appeal because, intervenors argue, petitioner failed to file her NITA within the time limits set in ORS 197.830(9) and/or ORS 197.830(3).

After we received the petition for review and the response brief, we raised the issue of whether LUBA has jurisdiction to review the Ordinance on

our own motion. *Adams v. City of Ashland*, 33 Or LUBA 552, 554 (1997). We suspended the appeal and requested additional briefing from the parties regarding the basis for LUBA's jurisdiction over petitioner's appeal of the Ordinance. Petitioner and intervenors then submitted additional briefing regarding LUBA's jurisdiction to review the Ordinance. For the reasons explained below, we conclude that LUBA lacks jurisdiction over the appeal.

JURISDICTION

LUBA's jurisdiction is limited to review of "land use decisions" as defined at ORS 197.015(10)(a), *i.e.*, a final decision or determination made by a local government that concerns the adoption, amendment or application of the statewide planning goals, a comprehensive plan provision, a land use regulation or a new land use regulation.[5] A decision is a land use decision if it either applies or should have applied a land use regulation or a comprehensive plan provision. *Jaqua v. City of Springfield*, 46 Or LUBA 566, 574 (2004). A

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[5] ORS 197.015(10)(a)(A) defines "land use decision" to include:

> "A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:
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> "(i) The goals;
>
> "(ii) A comprehensive plan provision;
>
> "(iii) A land use regulation; or
>
> "(iv) A new land use regulation[.]"

decision may also be a land use decision if it falls within the "significant impacts" test articulated in *City of Pendleton v. Kerns*, 294 Or 126, 134, 653 P2d 992 (1982) and *Billington v. Polk County*, 299 Or 471, 480, 703 P2d 232 (1985).

In her first assignment of error in her petition for review, petitioner argues the Ordinance is a *de facto* amendment of DCC Section 155.2.1.110(5). That is so, petitioner argues, because DCC Section 155.2.1.110(A)(5) allows "agriculture" as a permitted use in the Residential (R-1) zoning district and the growing of marijuana qualifies as "agriculture." Petitioner argues that in adopting the Ordinance, the city should have applied six different policies from the city's comprehensive plan in adopting the Ordinance and adopted findings addressing those policies.[6]

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[6] The Dunes City Comprehensive Plan policies cited by petitioner, in the order in which they are set out in the petition for review, are:

> "[M. Agriculture, Agricultural and Livestock Policies] Policy M1. Dunes City shall permit agricultural usage of land that is consistent with water quality protection.
>
> "[M. Agriculture, Agricultural and Livestock Policies] Policy M2. Existing agricultural uses will be allowed to continue as conditional uses except where a nuisance situation or continuing air or water pollution is found to occur.
>
> "[B. Open Space, Scenic Areas, and Natural Resources, Lakes] Policy B6. Methods of conserving water resources must be considered in all land use and development proposals and decisions. In compliance with the Mid-Coast Basin Program

Finally, petitioner argues that even if the Ordinance is not a "land use decision" as defined in ORS 197.015(10)(a), the Ordinance will have "significant impact" on present and future land uses and therefore qualifies as a significant impacts land use decision under *City of Pendleton v. Kerns*, 294 Or 126.

A. ORS 197.015(10)(a) Land Use Decision

DCC 155.2.1.110(A) lists the uses allowed in the Residential (R-1) zoning district, including as relevant here "Agriculture: including the growing and raising of trees, vines, shrubs, berries, vegetables, nursery stock, hay, grains, and similar food and fiber products." DCC 155.2.1.110(A)(5).

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adopted on September 25, 1984, the City recognizes that Siltcoos and Woahink Lakes are classified only for utilization of water for domestic, livestock, and in-lake uses for recreation, wildlife, and fish life purposes.

"[E. Air, Land and Water Quality, General Policies] Policy E3. Waste discharges from future facilities shall not exceed the carrying capacity nor degrade the quality of the land, air, and water resources."

"[E. Air, Land and Water Quality, General Policies] Policy E4. Regulations involving land, air, and water resources of the city shall be based upon long-term capabilities of the available natural resources to both support economic activity and absorb the future, resulting man-made pollutants.

"[G. The Economy, Economic Policies] Policy G4. Minor economic activities, such as home occupations, will be permitted if they are not harmful to air, water, or land quality[, and if they are not potential nuisances to neighboring uses. Dunes City does not seek industries to locate in the city.]" Petition for Review 17.

Petitioner presumes that growing marijuana constitutes "agriculture" for purposes of DCC 155.2.1.110(A), and for purposes of this opinion we also presume, without deciding, that that is the case.

Petitioner first argues that the Ordinance is a *de facto* amendment of DCC 155.2.1.110(A)(5) because it prohibits a particular plant, marijuana, from being grown in the R-1 zone. We disagree with petitioner.

Pursuant to ORS 475B.968(1) the legislature granted to the city specific authority to prohibit marijuana operations, and it would be inconsistent with that express grant of authority to subject a decision made by the city pursuant to that authority to local land use criteria and procedures. Measure 91, and the amendments to it that are now codified at ORS 475B.005 *et seq.* occupy the field of marijuana regulation, and preempt any local ordinances that are inconsistent with the provisions of ORS 475B.010 to ORS 475B.545. ORS 475B.454.[7] Therefore, the only standards that apply to the city's decision to adopt the Ordinance are the standards set out in the statute, which are not land use standards.[8] Neither do we think that the exception in the Ordinance for

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[7] The short title of ORS 474B.010 to ORS 475B.545 is the Adult and Medical Use of Cannabis Act. ORS 475B.010.

[8] While there could be circumstances in which the local zoning regulations include a broad use category, e.g. "Clinics," and a local government adopts an ordinance that prohibits the use of land in that category for a subset of uses, e.g. "methadone clinics," that ordinance could qualify as a de facto amendment of the local government's land use regulations and be subject to all procedures and standards in state law and the local zoning regulations governing

existing businesses is a *de facto* amendment of the city's zoning code.[9] After adoption of the Ordinance, "[a]griculture" remains a permitted use in the R-1 zoning district, but pursuant to the Ordinance, the production of marijuana for commercial and medical purposes is prohibited. The city's prohibition on marijuana businesses operating anywhere in the city is not an exercise of the city's planning and zoning responsibilities, and is therefore not a *de facto* amendment of DCC 155.2.1.110(A). Rather, it is a valid exercise of the authority given the city by the legislature in ORS 475B.968(1).

We similarly do not think that the city was required to apply any of the provisions of its comprehensive plan cited by petitioner. First, petitioner has not established that the cited comprehensive plan provisions establish standards for decision making in this context. More importantly, ORS 475B.968 allows the city to enact a prohibition on marijuana businesses and refer that prohibition to the electors of the city for approval. It would be inconsistent with the broad grant of authority in ORS 475B.968 to require the city to consider and apply the provisions of its comprehensive plan to a decision to adopt an

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amendments to the zoning ordinance. However, that is not the circumstance here, where ORS 475B.968 provides the only "standards" that apply to the city's decision to prohibit marijuana businesses in the city.

[9] We note that ORS 475B.461 sets out the procedure for submitting the question of "whether the operation of premises for which a license has been issued under ORS 475B.010 to 475B.545 should be prohibited in the city or county" to the electors of the city or county, pursuant to the initiative petition process.

Ordinance pursuant to the statutory authority, provisions which might preclude such a prohibition or referral to the electors. Stated differently, there is nothing in the broad grant of authority in ORS 475B.968 that suggests the legislature meant to subject that grant of authority to compliance with local governments' comprehensive plans.

For the reasons explained above, we conclude that the Ordinance is not a statutory "land use decision" as defined in ORS 197.015(10)(a).[10]

B. Significant Impacts Land Use Decision

A significant impacts land use decision is one where the challenged decision "effects a significant change in the land use *status quo* of the area and is not simply [a] *de minimis* [] improvement project." *City of Pendleton v. Kerns*, 294 Or at 135 (italics in original). A land use decision satisfies the "significant impact" test if the decision creates an "actual, qualitatively or quantitatively significant impact on present or future land uses." *Carlson v. City of Dunes City*, 28 Or LUBA 411, 414 (1994); *Keating v. Heceta Water District*, 24 Or LUBA 175, 181-82 (1992).

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[10] Intervenors argue that the Ordinance is not a "final" decision for purposes of ORS 197.015(10)(a) because the city council has referred the Ordinance to the voters. According to intervenors, the Ordinance is not effective. Because we conclude that the challenged decision does not concern the application of a land use regulation or the comprehensive plan, we need not and do not consider that argument.

The significant impacts test was announced by the Oregon Supreme Court at a time where many local governments did not have acknowledged comprehensive plans or land use regulations, and ORS 197.175(1)(1979) required (and requires today) cities to "exercise their planning and zoning responsibilities * * *" in accordance with the Statewide Planning Goals, until the comprehensive plans were acknowledged. *Kerns*, 294 Or at 133-35. Today, all local governments have acknowledged comprehensive plans and land use regulations and are required to exercise their planning and zoning responsibilities in accordance with those plans and land use regulations. Whatever the remaining role of the significant impacts test today, we do not believe the Ordinance qualifies as a significant impacts land use decision. In *Northwest Trails Alliance v. City of Portland*, 71 Or LUBA 339 (2015), we explained our view of the circumstances under which LUBA should exercise review jurisdiction under the judicially-created significant impacts test:

> "In the very rare cases when the significant impacts test is deemed met, LUBA's review is typically conducted under statutes or other laws, such as road vacation statutes, that provide standards for the decision, and that have some direct bearing on the use of land. *Billington* [*v. Polk County*, 299 Or 471, 480, 703 P2d 232 (1985)] for example, involved a road vacation decision under the then-applicable statutes, which included standards requiring the county to consider the impacts on access for nearby property owners, and whether the vacation is in the 'public interest.' *See also Mekkers v. Yamhill County*, 38 Or LUBA 928, 931 (2000) (road vacation that would set 'the stage for further development that will alter the character of the surrounding land uses'); *Harding v. Clackamas County*, 16 Or LUBA 224, 228 (1987), *aff'd* 89 Or App 385, 750

P2d 167 (1988) (vacation of road that would alter traffic pattern of nearby properties).

> "In our view, LUBA should exercise review jurisdiction over a decision under the significant impacts test only if the petitioner identifies the non-land-use standards that the petitioner believes apply to the decision and would govern LUBA's review. Further, we believe that those identified non-land-use standards must have *some* bearing or relationship to the use of land." *Id.* at 346 (emphasis in original).

ORS 475B.968 does not contain any standards that apply to the city council's decision to adopt the Ordinance and refer it to the voters.[11] And any provisions of that statute that arguably could contain what would qualify as standards have no bearing on or relationship to the use of land or to the city's *planning and zoning responsibilities*. For those reasons, we conclude that when a local government acts pursuant to the authority given it by the legislature in ORS 475B.968 to prohibit some or all marijuana businesses within its jurisdictional

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[11] Petitioner's first assignment of error alleges that the city failed to adopt findings regarding compliance with the comprehensive plan provisions cited in the petition for review.

Petitioner's second and third assignments of error allege that the city committed procedural errors in (a) failing to process the Ordinance according to the procedures in ORS 197.610 for a post-acknowledgement plan amendment, and (b) failing to process the Ordinance according to the procedures in ORS 227.186 for providing individualized notice "of a land use change." ORS 227.186(4).

Petitioner's fourth assignment of error alleges that the Ordinance is inconsistent with ORS 475B.968(8) and (9) because the Ordinance exempts all existing marijuana businesses from the ban instead of the marijuana businesses identified in those subsections.

boundaries, review of such a decision by a specialized land use decision review body like LUBA is not appropriate under the significant impacts test.

Petitioner has not filed a motion to transfer this appeal to circuit court, in the event LUBA concludes it lacks jurisdiction over the appeal. Accordingly, the appeal is dismissed. *Miller v. City of Dayton*, 22 Or LUBA 661, 666, *aff'd* 113 Or App 300, 833 P2d 299, *rev den* 314 Or 573 (1992).