

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

3  
4                                   WILLIAM FEETHAM,  
5   *Petitioner,*

04/16/18 AM 11:07 LUBA

6  
7   vs.

8  
9                                   JACKSON COUNTY,  
10   *Respondent.*

11  
12   LUBA No. 2017-130

13  
14   FINAL OPINION  
15   AND ORDER

16  
17                   Appeal from Jackson County.

18  
19                   Ross Day, Portland, filed a petition for review on behalf of petitioner.  
20                   With him on the brief was Day Law & Associates, P.C.

21  
22                   No appearance by Jackson County.

23  
24                   RYAN, Board Chair; BASSHAM, Board Member; HOLSTUN Board  
25                   Member, participated in the decision.

26  
27                                   AFFIRMED                                   04/16/2018

28  
29                   You are entitled to judicial review of this Order. Judicial review is  
30                   governed by the provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioner appeals a hearings officer’s decision verifying medical marijuana production on petitioner’s property as a nonconforming use.

**FACTS**

In 1998, Oregon voters approved the Oregon Medical Marijuana Act (OMMA), which allowed the production and use of medical marijuana.<sup>1</sup> The OMMA is now codified at ORS 475B.785(2017) to 475B.949(2017).<sup>2</sup> The Oregon Health Authority (OHA) administers the state’s medical marijuana program. Although a detailed discussion of the statutes and OHA regulations regarding medical marijuana is not necessary to resolve this appeal, a brief explanation of how the state’s medical marijuana program is administered is necessary.

ORS 475B.791 and 797 set out a system for a medical marijuana patient to apply for and receive a “registry identification card” that identifies the patient, any person whom the patient designates to grow marijuana on his or

---

<sup>1</sup> In November 2014, Oregon voters approved Ballot Measure 91, known as the Adult and Medical Use of Cannabis Act (the Act), which legalized recreational (non-medical) marijuana under state law. The Act placed administrative authority over the state’s recreational marijuana program with the Oregon Liquor Control Commission (OLCC). The Act is not at issue in this appeal.

<sup>2</sup> The Federal Controlled Substances Act, 21 USC § 801 *et seq.*, prohibits the manufacture, distribution, dispensation, and possession of marijuana.

1 her behalf, and the name and address of any “designated primary caregiver” if  
2 the patient designates one. OAR 333-008-0010(28) defines “grow site” as “a  
3 location registered under ORS 475B.420 where marijuana is produced for use  
4 by a patient or, with permission from a patient, for transfer to a registered  
5 processing site or dispensary.” An OMMA patient may possess up to six  
6 mature marijuana plants and twelve immature plants, and the plants must be  
7 grown at a registered grow site that is identified on the registry identification  
8 card.

9         Petitioner’s property is located in the county and is zoned RR-5 (Rural  
10 Residential). Petitioner has been growing marijuana on his property for medical  
11 purposes since 2008. Record 41. On March 16, 2016, the county adopted  
12 amendments to the Jackson County Land Development Ordinance (LDO) that  
13 prohibit the cultivation and growing of marijuana in the RR-5 zone. In August  
14 2016, petitioner applied to verify a nonconforming use right to grow marijuana  
15 for medical purposes on his property. The county planning staff issued a  
16 tentative decision denying his application, and petitioner appealed the decision  
17 to the county hearings officer. The hearings officer concluded that petitioner  
18 had established a nonconforming use right to grow marijuana for medical  
19 purposes on his property, and that the extent of petitioner’s nonconforming use  
20 right was a right to grow a total of eighteen mature marijuana plants. This  
21 appeal followed.

1    **ASSIGNMENT OF ERROR**

2           In a single assignment of error, petitioner argues that the evidence in the  
3 record establishes that the extent of petitioner’s nonconforming use right to  
4 grow marijuana for medical purposes is the right to grow 60 mature plants on  
5 the property. Petition for Review 7, 9. We understand petitioner to argue that  
6 the county’s decision is not supported by substantial evidence in the whole  
7 record. ORS 197.835(9)(a)(C).

8           During the proceedings before the hearings officer, petitioner took the  
9 position that petitioner possesses a nonconforming use right to grow 72 mature  
10 marijuana plants, based on copies of 12 cards issued by OHA that petitioner  
11 submitted into the record and an allowance for six mature plants for each card.  
12 Record 42. At other times during the proceedings before the county, petitioner  
13 alternatively took the position that petitioner possessed the right to grow 90  
14 mature plants. Record 217. And as noted, petitioner now takes the position in  
15 the petition for review that the evidence in the record “establishes that at the  
16 time [petitioner’s] use because nonconforming he was growing (or could grow)  
17 at least sixty (60) mature marijuana plants on the [ ] property.” Petition for  
18 Review 7. In support of his argument, petitioner cites Record pages 99 and 101  
19 to 110. Record 99 and 101 to 110 are copies of registry identification cards that  
20 list the subject property as the “grow site.”

21           In determining the scope or extent of a nonconforming use right, the  
22 relevant legal question is the extent of the activity that is actually occurring on

1 the property on the date on which the use becomes nonconforming, with an  
2 allowance for changes in the volume or intensity of a use if the changes are  
3 attributable to growth or fluctuations in business conditions. *Polk County v.*  
4 *Martin*, 292 Or 69, 78, 636 P2d 952 (1981). To the extent petitioner argues that  
5 the number of OHA cards that identify the property as a grow site conclusively  
6 establishes the scope (or extent) of his nonconforming use right to be equal to  
7 the number of plants authorized by the cards, we reject that argument. The  
8 number of cards that identify the subject property as a grow site is not  
9 conclusive in determining the activity that was actually occurring on the  
10 subject property on the date the county amended the LDO to prohibit marijuana  
11 production in the RR-5 zone, March 16, 2016. Stated differently, if zero plants  
12 were growing on petitioner's property on March 16, 2016, and the lack of any  
13 plants was not otherwise attributable to the growing season, the existence of  
14 current OHA cards that listed the property as a registered grow site would not  
15 entitle petitioner to more than the number of plants actually growing on the  
16 property on the date the use became nonconforming.

17 We further disagree with petitioner that the evidence in the record  
18 conclusively establishes that the extent of petitioner's nonconforming use right  
19 is a right to grow 60 mature plants. The record pages that petitioner cites in  
20 support of his assignment of error are Record 99 and 101-110. Those record  
21 pages are copies of registry identification cards that identify the subject  
22 property as the grow site. However, the cards do not conclusively establish

1 anything. One of the cards includes an effective date that is after March 16,  
2 2016, and therefore is after the date the use became nonconforming. Record  
3 100. Other cards expired at least a year before March 16, 2016, or before the  
4 application was filed. Record 96. Still other cards appear to be duplicate cards.  
5 Record 96, 98, 106, 107. Finally, as we explain above, the relevant question in  
6 determining the extent of the nonconforming use is what activity was actually  
7 occurring on the property on the date the use became nonconforming (subject  
8 to fluctuations due to business or similar cyclical variations). The evidence that  
9 petitioner cites to is simply not conclusive on this point.

10 Finally, the hearings officer reviewed the evidence submitted by  
11 petitioner, including copies of the OHA cards submitted into the record that are  
12 located at Record 99 to 112, and adopted nearly eight pages of detailed  
13 findings that addressed that evidence and other evidence in the record. Record  
14 15-21. At the conclusion of those findings, the hearings officer determined that  
15 the extent of petitioner's nonconforming use was the right to grow 18 mature  
16 marijuana plants, based on three OHA cards in the record. Record 21.  
17 Petitioner neither acknowledges nor challenges those findings. If petitioner had  
18 attempted to challenge those findings, we might well agree with petitioner that  
19 the findings are inadequate to explain why the hearings officer concluded that  
20 only three OHA cards were relevant in determining the extent of petitioner's  
21 nonconforming use right to grow medical marijuana, because we have a  
22 difficult time following the findings. However, given that petitioner does not

1 acknowledge or challenge the hearings officer's findings, or otherwise explain  
2 and adequately defend his own position that the extent of his nonconforming  
3 use right is 60 mature plants, petitioner's assignment of error does not provide  
4 a basis for reversal or remand of the decision.

5 The assignment of error is denied.

6 The county's decision is affirmed.