BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SANDRA DIESEL,
*Petitioner*,

vs.

JACKSON COUNTY,
*Respondent*.

LUBA Nos. 2016-039/055

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Ross Day, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Day Law & Associates, P.C.

Joel C. Benton, County Counsel, Medford, filed the response brief and argued on behalf of respondent. With him on the brief were James Ryan Kirchoff and Kirchoff Law Offices LLC.

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

AFFIRMED 09/13/2016

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

Opinion by Ryan.

## NATURE OF THE DECISION

Petitioner appeals two county ordinances, Ordinance 2016-3 and Ordinance 2016-4, adopting amendments to the Jackson County Land Development Ordinance.

## MOTION TO DISMISS PETITIONER BRODKEY

David Brodkey, one of two petitioners in LUBA No. 2016-055, moves for permission to withdraw from the appeal. The motion is granted, and petitioner Brodkey is dismissed from LUBA No. 2016-055.[1]

## BACKGROUND

A brief explanation of the state's laws regulating the growing of marijuana is necessary in order to understand this appeal.[2] 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

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[1] Ordinance 2016-4, the decision that is appealed in LUBA No. 2016-039, is a temporary ordinance that expired on July 14, 2016. Both parties agree for purposes of these appeals that the ordinances are identical except for the expiration date of Ordinance 2016-4.

The county transmitted separate records for LUBA No. 2016-039 and LUBA No. 2016-055. As we understand it, the record in LUBA No. 2016-055 includes all of the materials that are included in the record for LUBA No. 2016-039, and additional materials. All citations to the record in this opinion are to the record in LUBA No. 2016-055.

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

ORS 475B.400 to 475B.525. The Oregon Health Authority (OHA) administers the state's medical marijuana program and has adopted rules regulating the growing of marijuana for medical purposes at OAR chapter 333, divisions 7 and 8.

In November 2014, Oregon voters approved Ballot Measure 91, which legalized recreational 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 and 2016 the legislature enacted changes to the OMMA and the state's recreational marijuana program. Measure 91, the OMMA, and the 2015 and 2016 changes are now codified at ORS 475B.005 *et seq*.

With respect to producing marijuana for recreational use, ORS 475B.340(1)(a) and (g), and (2) allow local governments to adopt "reasonable conditions on the manner in which a marijuana producer licensed under [the state's recreational marijuana program] may produce marijuana[,]" and "[r]easonable limitations on where a premises for which a license has been issued [to produce marijuana] may be located." For medical marijuana production, ORS 475B.500 allows the governing body of a city or county to adopt "reasonable regulations on the operation of marijuana grow sites" by holders of grow cards under the OMMA. ORS 475B.500(2). "Reasonable regulations" in that section are defined as including "reasonable limitations on where the marijuana grow site of a person designated to produce marijuana by

a registry identification cardholder * * * may be located." ORS 475B.500(1)(d).

In April 2016, the board of county commissioners adopted Ordinance 2016-3. *See* n 1. Ordinance 2016-3 adopted amendments to the Jackson County Land Development Ordinance (LDO) to regulate the production, processing, wholesaling, and retail sale of marijuana. This appeal followed.

**REPLY BRIEF**

Petitioner moves for permission to file a reply brief to respond to alleged new matters raised in the county's response brief. OAR 661-010-0039. Petitioner argues that the response brief raised a new matter, namely, the response brief's position that ORS 197.620(1) divests LUBA of jurisdiction over the appeals.

We agree with petitioner that a reply brief is warranted to respond to a jurisdictional challenge in the response brief. *See Sievers v. Hood River County*, 46 Or LUBA 635, 637 (2004) ("[A]lthough all petitions for review must state why the challenged decision is subject to LUBA's jurisdiction, jurisdiction does not become an issue in an appeal until respondents contend that LUBA lacks jurisdiction"). The reply brief is allowed.

**MOTION TO TAKE EVIDENCE**

Petitioner moves to take evidence not in the record under OAR 661-010-0045.[3] Petitioner must establish that the evidence concerns "unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 * * * or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision."

According to petitioner, marijuana production was allowed in the Rural Residential (RR) zone prior to the enactment of Ordinance 2016-3. Petitioner moves to take evidence in the form of two newspaper articles that petitioner alleges support petitioner's assertion in the motion to take evidence that marijuana production is now a nonconforming use in the RR zone, because prior to the enactment of Ordinance 2016-3 marijuana production was an allowed use in the RR zone, and Ordinance 2016-3 effectively prohibited marijuana production in the RR zone.

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[3] OAR 661-010-0045(1) provides in relevant part:

> "Grounds for Motion to Take Evidence Not in the Record: The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision."

In this appeal, petitioner challenges the county's enactment of Ordinance 2016-3, and argues that the amendments to the LDO are inconsistent with the county's comprehensive plan. Petitioner does not explain why, even if Ordinance 2016-3 amends the LDO to prohibit marijuana production in the RR zone, establishing whether marijuana production was formerly allowed in the RR zone and may now be allowed as a nonconforming use in the RR zone is relevant to the only issues raised in this appeal, which are (1) whether the LDO amendments enacted in Ordinance 2016-3 are consistent with the county's comprehensive plan, and (2) whether the LDO amendments are "reasonable regulations" within the meaning of ORS 475B.340 and 475B.500. Petitioner has not met her burden.

The motion to take evidence is denied.

**FIRST ASSIGNMENT OF ERROR**

**A. Ordinance 2016-3**

As relevant to this appeal, Ordinance 2016-3 adopts a definition of "marijuana production" at LDO 13.3(166), and lists the zones in which "marijuana production" is permitted and not allowed.[4] Marijuana production is

[4] LDO 13.3(166) defines "marijuana production" as "the manufacture, planting, cultivation, growing, trimming, harvesting or drying of marijuana, provided that the marijuana producer is licensed by the Oregon Liquor Control Commission, or registered with the Oregon Health Authority and a 'person designated to produce marijuana by a registry identification cardholder.'"

allowed in the exclusive farm use (EFU) zone, in forest zones, and in industrial zones. LDO Chapter 3.13.

LDO Chapter 6 contains "Use Regulations" for all use districts in the county other than resource districts, which are regulated in LDO Chapter 4. LDO 6.2, Table of Permitted Uses, explains that "Table 6.2-1 sets forth the uses permitted within all base zoning districts, except for the resource districts." LDO 6.2.1 includes an "Explanation of Table Abbreviations." As relevant here, LDO 6.2.1(F), "Uses Not Allowed," explains that "[a] dash (-) indicates that the use type is not allowed in the respective zoning district, unless it is otherwise expressly allowed by other regulations of this Ordinance."

Ordinance 2016-3 amended Table 6.2-1 to include "marijuana production" as a specific use in the general category of "Farm Use." Table 6.2-1 contains a "dash" for the specific use "marijuana production" in the column for the RR zone, and in all other zones except the Industrial zone, where the table indicates that marijuana production is a "Type 1/2" use in that zone.

Petitioner and the county disagree over what changes Ordinance 2016-3 actually made to the LDO.[5] According to petitioner, Ordinance 2016-3 amended the LDO to prohibit marijuana production in the RR zone, where

[5] We also understand petitioner to argue that marijuana production is allowed in the RR zone under the separate "farm use" category identified as "non-intensive agricultural use." Petitioner does not sufficiently develop the argument for review, and we do not consider it in this opinion.

according to petitioner it was previously allowed. Petition for Review 4. As we understand the county's position, it is that marijuana production was not allowed in the RR zone prior to the enactment of Ordinance 2016-3. From there, the county argues, Ordinance 2016-3 does not amend the LDO because the LDO still does not allow marijuana production in the RR zone. Response Brief 5. Therefore, the county argues, petitioner is challenging the county's decision to continue to *not* allow marijuana production as a permitted use in the RR zone. According to the county, ORS 197.620(1) divests LUBA of jurisdiction to review the county's decision because it is a decision to not amend the LDO.[6]

We reject the county's argument. It is undisputed that the county did in fact adopt legislative amendments to the LDO to, among other things, expressly prohibit marijuana production in the RR zone. While the parties disagree whether that amendment represents a change in the status quo in the RR zone as a matter of substance, there can be no question that the decision amends the LDO. Therefore, ORS 197.620(1) does not apply to this appeal. *ODOT v. Klamath County*, 25 Or LUBA 761 (1993). The county's argument relates to

[6] ORS 197.620(1) provides in relevant part that "a decision to not adopt a legislative amendment or a new land use regulation is not appealable unless the amendment is necessary to address the requirements of a new or amended goal, rule, or statute."

the substance or scope of petitioner's challenges to those legislative amendments.

Accordingly, we reject the county's argument that ORS 197.620(1) makes the county's decision to adopt Ordinance 2016-3 "not appealable" within the meaning of the statute.

**B. Assignment of Error**

ORS 197.835(7)(a) provides in relevant part that LUBA shall reverse or remand an amendment to a land use regulation "[if] the regulation is not in compliance with the comprehensive plan[.]" In her first assignment of error, we understand petitioner to argue that Ordinance 2016-3 does not comply with the Jackson County Comprehensive Plan (JCCP). In support, petitioner cites the Agricultural Lands Element of the JCCP, which provides in relevant part:

> "Predominant Farm Uses in Jackson County: Full-time agricultural production and employment are limited in the county. The major farm crops and farm uses are described below and compared in Table II. Hobby farming and small scale agriculture provide opportunities for agricultural diversity and are particularly appropriate for specialty crops and specialty or exotic livestock.
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> "The median size range for farms that annually gross more than $10,000 dollars is from 100 to 139 acres, and the median gross sales income is $25,000 to $40,000. These farms include about 48 per cent of the land in farms in Jackson County (Tables 2 and 16, 1987 Census of Agriculture), leaving about 52% of land in farms either in small scale agriculture or unmanaged. Farms with gross incomes less than $10,000 only account for 8 percent of the county's gross annual farm receipts. These figures strongly support the need to preserve farm land in large blocks in order to preserve and maintain those farms that contribute in a substantial way to the area's existing agricultural economy. *However, in areas*

> *where parcelization and/or residential development has already occurred, small scale agriculture is often the only way to keep land in productive farm use. Encouraging a variety of types of agriculture in the county provides a greater possibility of innovation and resiliency in the agricultural economy*." JCCP Agricultural Lands Element, 8-2 (underlining in original, italics added).

According to petitioner, the emphasized language above requires the county to allow Marijuana Production as a permitted use on RR lands. In support, petitioner also points to statements in the record by the county's planning staff that interpreted the emphasized language as requiring the county to allow marijuana production on RR zoned lands.

The county responds, and we agree, that petitioner has not demonstrated that amending the LDO to prohibit marijuana production on RR-zoned lands is inconsistent with the JCCP. The provision of the JCCP that petitioner relies on merely describes the predominant farm uses in the county and describes small scale agriculture on parcelized lands as one of those farm uses. The language does not *require* the county to allow marijuana production on RR-zoned land and the county's decision to prohibit it on those lands is not inconsistent with anything in the JCCP cited by petitioner.

Finally, we understand petitioner to challenge findings adopted by the board of county commissioners. The findings appear to take the position that the county's decision to prohibit marijuana production in the RR zone is consistent with a 2016 amendment to the state's recreational and medical

marijuana programs, Senate Bill 1598 (SB 1598).[7] As we understand it, the county takes the position that the legislature's decision to classify marijuana as a crop for purposes of the definition of "farm use" at ORS 215.203 supports the county's decision to prohibit marijuana production in the RR zone. As we understand petitioner's argument, it is that the county erred to the extent it found that SB 1598 requires the county to prohibit marijuana production in the RR zone. Petition for Review 15-16.

We are not sure we understand the county's findings to say what petitioner alleges that they say.[8] However, the county's findings appear to simply provide additional support for the board of commissioners' decision to prohibit marijuana production in the RR zone. Even if the county misunderstood SB 1598, and in fact that legislation does not provide support for the decision to prohibit marijuana production in the RR zone, petitioner does not explain why any faulty interpretation of SB 1598 compels the conclusion that the amendments to the LDO are not in compliance with the

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[7] Senate Bill 1598 provides that "marijuana is * * * [a] crop for the purpose of 'farm use' as defined in ORS 215.203[]" and applies the definition to producers of medical marijuana. Or Laws 2016, ch 23, §3 (SB 1598).

[8] The county found:

> "Based upon the passage of Senate Bill 1598, recreational and medical marijuana production are both now determined to be a 'farm use.' The Board of Commissioners finds the [LDO] does not allow a 'farm use' to occur within the Rural Residential and Rural Use zoning districts." Record A0005.

JCCP. Petitioner's arguments provide no basis for reversal or remand of the decision.

The first assignment of error is denied.

**SECOND ASSIGNMENT OF ERROR**

In her second assignment of error, petitioner argues that the county's prohibition on production of marijuana in the RR zone is not a "reasonable regulation[]" under ORS 475B.340(2) and 475B.500(2). ORS 475B.340, as amended by SB 1598 (2016), provides in relevant part:

> "(1) For purposes of this section, 'reasonable regulations' includes:
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> "(a) Reasonable conditions on the manner in which a marijuana producer licensed under ORS 475B.070 may produce marijuana or in which a person who holds a certificate issued under ORS 475B.235 may produce marijuana or propagate immature marijuana plants;
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> "(b) Reasonable conditions on the manner in which a marijuana processor licensed under ORS 475B.090 may process marijuana or in which a person who holds a certificate issued under ORS 475B.235 may process marijuana;
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> "(c) Reasonable conditions on the manner in which a marijuana wholesaler licensed under ORS 475B.100 may sell marijuana at wholesale;
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> "(d) Reasonable limitations on the hours during which a marijuana retailer licensed under ORS 475B.110 may operate;

"(e) Reasonable conditions on the manner in which a marijuana retailer licensed under ORS 475B.110 may sell marijuana items;

"(f) Reasonable requirements related to the public's access to a premises for which a license or certificate has been issued under ORS 475B.070, 475B.090, 475B.100, 475B.110 or 475B.235; and

"(g) Reasonable limitations on where a premises for which a license or certificate may be issued under ORS 475B.070, 475B.090, 475B.100, 475B.110 or 475B.235 may be located."

"(2) Notwithstanding ORS 30.935, 215.253 (1) or 633.738, the governing body of a city or county may adopt ordinances that impose reasonable regulations on the operation of businesses located at premises for which a license has been issued under ORS 475B.070, 475B.090, 475B.100 or 475B.110, or for which a certificate has been issued under ORS 475B.235, if the premises are located in the area subject to the jurisdiction of the city or county, except that the governing body of a city or county may not:

"(a) Adopt an ordinance that prohibits a premises for which a license has been issued under ORS 475B.110 from being located within a distance that is greater than 1,000 feet of another premises for which a license has been issued under ORS 475B.110.

"(b) Adopt an ordinance after January 1, 2015, that imposes a setback requirement for an agricultural building used to produce marijuana located on a premises for which a license has been issued under ORS 475B.070 if the agricultural building:

"(A) Was constructed on or before July 1, 2015, in compliance with all applicable land use and building code requirements at the time of construction;

"(B) Is located at an address where a marijuana grow site first registered with the Oregon Health Authority under ORS 475B.420 on or before January 1, 2015;

"(C) Was used to produce marijuana pursuant to the provisions of ORS 475B.400 to 475B.525 on or before January 1, 2015; and

"(D) Has four opaque walls and a roof."

ORS 475B.500, as amended by SB 1598 (2016), provides in relevant part:

"(1) For purposes of this section, 'reasonable regulations' includes:

"(a) Reasonable limitations on the hours during which the marijuana grow site of a person designated to produce marijuana by a registry identification cardholder, a marijuana processing site or a medical marijuana dispensary may operate;

"(b) Reasonable conditions on the manner in which the marijuana grow site of a person designated to produce marijuana by a registry identification cardholder, a marijuana processing site or a medical marijuana dispensary may transfer usable marijuana, medical cannabinoid products, cannabinoid concentrates, cannabinoid extracts, immature marijuana plants and seeds;

(c) Reasonable requirements related to the public's access to the marijuana grow site of a person designated to produce marijuana by a registry identification cardholder, a marijuana processing site or a medical marijuana dispensary; and

"(d) Reasonable limitations on where the marijuana grow site of a person designated to produce marijuana by a registry identification cardholder, a marijuana

processing site or a medical marijuana dispensary may be located.

"(2) Notwithstanding ORS 30.935, 215.253 (1) or 633.738, the governing body of a city or county may adopt ordinances that impose reasonable regulations on the operation of marijuana grow sites of persons designated to produce marijuana by registry identification cardholders, marijuana processing sites and medical marijuana dispensaries that are located in the area subject to the jurisdiction of the city or county."

In support of her argument, petitioner cites and relies on cases that have addressed the reasonableness of restrictions on speech, conduct or expression that is protected by the First Amendment of the US Constitution.[9] Government restrictions on protected speech, conduct or expression are subject to a higher level of scrutiny, and will generally be upheld if the restrictions are content neutral and narrowly tailored to serve a substantial government interest. *Ladue v. Gilleo*, 512 US 43 (1994). According to petitioner, the amendments to the LDO to prohibit marijuana production on RR zoned land must serve a significant government interest, and the county has not identified any significant government interest those LDO amendments serve.

The county responds, and we agree, that petitioner has not established that marijuana production is a protected interest under the First Amendment.

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[9] The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Absent any argument that establishes such a protected interest in marijuana production, the cases petitioner cites are inapposite. That ORS 475B.340 and ORS 475B.500 use the similar phrase "reasonable regulation" in listing the kind of regulations a county or city can impose on the sale or production of recreational and medicinal marijuana does not mean that the legislature intended to import into review of local zoning codes the doctrines and standards of review that courts have applied to First Amendment speech cases.

We also understand petitioner to argue that the LDO's prohibition of marijuana production on RR zoned lands is not a "reasonable regulation" within the meaning of ORS 475B.340 and ORS 475B.500 because the county did not choose to prohibit other crops that the county may perceive also to have negative effects on neighboring properties from being grown on RR zoned land. The county responds that the choice to not allow marijuana production on RR-zoned lands is reasonable, given that the county chose to allow marijuana production in several base zoning districts, including on EFU and farm and forest zoned land, which the county approximates to include more than one million acres in the county.

The term "reasonable regulations" is not defined in the statutes regulating marijuana production and use. Accordingly, we first look to the ordinary meaning of the word "reasonable." "Reasonable" is defined as relevant here to mean "[1] b: being or remaining within the bounds of reason: not extreme: not excessive * * *; c: MODERATE : as (1) not demanding too

much[.]" *Webster's Third New Int'l Dictionary* 1892 (unabridged ed. 2002). We agree with the county that allowing marijuana production in zones that constitute over a million acres in the county, while not allowing it in a residential zone that would presumably present more potential for conflicts with residential uses, does not seem "extreme" or "excessive," and could accurately be described as "moderate."

We may also look to legislative history. ORS 174.020(3). In support of her claim that the county's prohibition of marijuana production in the RR zone is not a "reasonable regulation," petitioner cites statements made by a legislator on the floor of the House of Representatives in connection with 2015 amendments to Measure 91. However, that legislative history tends to defeat petitioner's argument. The cited legislator stated his belief about what is meant by "reasonable regulation," and expressed that an unreasonable regulation would be present when a local government attempts to:

> "* * * use their local zoning code to effectively eliminate marijuana businesses or grow sites in their communities by, for example, finding zones in which it is very difficult to site these businesses, or putting them on the edge of town where nobody wants to go or in some other way making it so difficult for these businesses to be sited that the businesses won't site in their communities." Audio Recording, House of Representatives, HB 3400, June 24, 2015, 1:45:30-1:46:03 (statement of Representative Ken Helm).

Given that the county allows marijuana production in the EFU zone and on lands zoned farm and forest, which together comprise more than a million acres in the county, and on industrial zoned land, the concerns stated by that

legislator about the reasonableness of zoning regulations do not appear to be present in this case. Accordingly, petitioner has not established that the amendments to the LDO to prohibit marijuana production in the RR zone are not "reasonable regulations" within the meaning of ORS 475B.340 and 475B.500, or that the county acted unreasonably when it decided to allow marijuana production in some, but not all, county zones.

The second assignment of error is denied.

The county's decision is affirmed.