

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

3  
4                   ROBERT P. KING,  
5                                   *Petitioner,*

6  
7                                   vs.

8  
9                   DESCHUTES COUNTY,  
10                                   *Respondent,*

05/03/18 PM 1:03 LUBA

11  
12                                   and

13  
14                   NORMA TEWALT and RICHARD TEWALT,  
15                                   *Intervenors-Respondents.*

16  
17                                   LUBA No. 2017-126

18  
19                                   FINAL OPINION  
20                                   AND ORDER

21  
22                   Appeal from Deschutes County.

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24                   Edward P. Fitch, Redmond, filed a petition for review and argued on  
25 behalf of petitioner. With him on the brief was Fitch law Group PC.

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27                   D. Adam Smith, Deschutes County Assistant Legal Counsel, Bend, filed  
28 a joint response brief. With him on the brief was Kristin Stankiewicz.

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30                   Kristin Stankiewicz, Portland, filed a joint response brief and argued on  
31 behalf of intervenors-respondents. With her on the brief was D. Adam Smith.

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

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36                                   AFFIRMED

05/03/2018

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

1 governed by the provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioner appeals a decision by the board of county commissioners approving an application to establish an indoor marijuana production facility on land zoned exclusive farm use.

**FACTS**

Intervenors-respondents (intervenors) own a 9.39-acre parcel zoned Exclusive Farm Use – EFUSC – Sisters Cloverdale Subzone. The property is developed with a residence, garage, and existing 36-foot by 36-foot agricultural building. The subject property has irrigation water rights from Sisters Irrigation District.

Intervenors applied for approval to construct and use a 3,500 square foot building for indoor marijuana production with three grow rooms and a 2,500 square foot canopy.<sup>1</sup> As part of the application and to address approval criteria in the Deschutes County Code (DCC) relating to odor and noise from marijuana production, intervenors submitted a “narrative report” from a licensed mechanical engineer that described the proposed HVAC system to be installed in the building. Record 1069-71. The engineer also submitted a revised “narrative report” dated September 6, 2017. Record 636. We refer to

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<sup>1</sup> Oregon law allows the production of marijuana for recreational and medicinal purposes. ORS 475B.005 *et seq.* The Federal Controlled Substances Act, 21 USC § 801 *et seq.* prohibits the manufacture, distribution, dispensation, and possession of marijuana.

1 those reports as the Engineer's Reports. The Engineer's Reports described the  
2 HVAC system's operation in "normal" mode and in "economizer" mode. In the  
3 "normal" mode, the HVAC system will recirculate air and exhaust no air from  
4 the building. In "economizer" mode, the HVAC system will only exhaust air  
5 from the building after the exhausted air is scrubbed through activated carbon  
6 filters on the exhaust system, with exhaust fans that are shaped and sized for  
7 the building's volume. Record 637-38.

8 The county planning staff approved the application, and petitioner  
9 appealed the decision. The board of county commissioners held a hearing on  
10 the appeal, and voted to approve the application with conditions. This appeal  
11 followed.

## 12 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

13 The county has adopted provisions into the DCC that regulate the  
14 production of marijuana in all zones in the county. *See* ORS 475B.486 and  
15 ORS 475B.928 (allowing local governments to adopt "reasonable regulations"  
16 on the operation of marijuana businesses for recreational purposes and on the  
17 operations of grow sites for medical purposes). DCC 18.116.330(B)(2)(c)  
18 prohibits marijuana production outdoors. DCC 18.116.330(B)(10) regulates  
19 odor from an indoor marijuana production operation. DCC  
20 18.116.330(B)(10)(a) requires the building in which marijuana is grown to be  
21 "equipped with an effective odor control system which must at all times

1 prevent unreasonable interference of neighbors' use and enjoyment of their  
2 property." DCC 18.116.330(B)(10)(b) provides:

3 "[a]n odor control system is deemed permitted only after the  
4 applicant submits a report by a mechanical engineer licensed in the  
5 state of Oregon demonstrating that the system will control odor so  
6 as not to unreasonably interfere with neighbors' use and  
7 enjoyment of their property."

8 Finally, DCC 18.116.330(B)(10)(d) requires the odor control system to either  
9 (1) consist of one or more fans that are sized for the cubic feet per minute  
10 (CFM) equivalent to the volume of the building, and that include fan filters  
11 rated for the required CFM, or (2) use an alternative method to achieve equal or  
12 greater odor mitigation than the fan system. The board of county  
13 commissioners found that the Engineer's Reports satisfied DCC  
14 18.116.330(B)(10)(b) and that intervenors' application satisfies DCC  
15 18.116.330(B)(10)(a); *i.e.*, that the odor control system will "prevent  
16 unreasonable interference of neighbors' use and enjoyment of their property."  
17 The board of county commissioners imposed an ongoing condition of approval  
18 that mirrors the language of DCC 18.116.330(B)(10)(b).

19 In his first assignment of error, petitioner argues that the board of  
20 commissioners' conclusion is not supported by substantial evidence in the  
21 whole record. ORS 197.835(9)(a)(C). In his second assignment of error,  
22 petitioner argues that the board of commissioners' interpretation of DCC  
23 18.116.330(B)(10)(b) improperly construes that DCC section. The arguments

1 in the first and second assignments of error are inter-related and dependent and  
2 we address them together.

3 Petitioner argues that the Engineer's Reports do not satisfy the  
4 requirements in DCC 18.116.330(B)(10)(b) because they are not "reports"  
5 within the meaning of the code provision. That is so, according to petitioner,  
6 because the information contained in the Engineer's Reports does not  
7 "demonstrate[]" or describe a site specific system, designed specifically for the  
8 proposed 3,500 square foot building, that will control odor. According to  
9 petitioner:

10 "[t]his code requirement requires the applicant to submit a report  
11 from a licensed engineer that is site specific to the application.  
12 That report must demonstrate that the system for this particular  
13 application will prevent odor emissions that would otherwise  
14 unreasonably interfere with other adjoining properties and the  
15 owners' use and enjoyment of those properties." Petition for  
16 Review 8.

17 As we understand petitioner's argument, it is that DCC 18.116.330(B)(10)(b)  
18 requires a site-specific demonstration that intervenors' actual odor control  
19 system, as-built and in operation in its intended location, controls odor.  
20 According to petitioner, because the Engineer's Reports are not site specific  
21 and system specific, the decision is not supported by substantial evidence in the  
22 whole record.

23 Petitioner does not really point to any cognizable interpretation of DCC  
24 18.116.330(B)(10)(b) by the board of commissioners, and we do not think the  
25 board of commissioners expressly interpreted the provision. At best, the board

1 of commissioners implicitly rejected petitioner's proffered interpretation of the  
2 word "report" in DCC 18.116.330(B)(10)(b). We understand the board of  
3 commissioners to have concluded that the Engineers' Reports submitted by  
4 intervenors satisfied the DCC 18.116.330(B)(10)(b) requirement to submit "a  
5 report," and that the Engineers' Reports demonstrated that the odor control  
6 system described in the reports will "prevent unreasonable interference of  
7 neighbors' use and enjoyment of their property." Thus, the issue presented in  
8 the first and second assignments of error is more properly characterized as an  
9 evidentiary dispute regarding whether the board of commissioners' conclusion  
10 that DCC 18.116.330(B)(10) is satisfied is supported by substantial evidence in  
11 the whole record. ORS 197.835(9)(a)(C).

12 The county and intervenors (respondents) dispute that DCC  
13 18.116.330(B)(10)(b) requires more than what is included in the Engineer's  
14 Reports. According to respondents, in adopting DCC 18.116.330(B)(10)(b), the  
15 county chose to rely on the opinion of an expert licensed mechanical engineer  
16 that the *proposed* odor control system "will control" odor such that the odor  
17 does not unreasonably interfere with neighbors' use of their property.  
18 According to respondents, this approach is consistent with the reality that for  
19 the majority of applicants seeking approval for marijuana production or many  
20 other uses, the building will not be constructed when the application is  
21 submitted, and thus no "as built" or site-specific demonstration that the built  
22 system will control odor is possible. Rather, respondents rely on *Meyer v. City*

1 of *Portland*, 67 Or App 274, 280, 678 P2d 741 (1984), for the proposition that  
2 the Engineer's Reports provide substantial evidence to support the board of  
3 commissioners' finding that the odor control system described in the  
4 Engineer's Reports, when installed in the 3,500 square foot building, will  
5 control odor "so as not to unreasonably interfere with neighbors' use and  
6 enjoyment of their property," the ultimate standard to be satisfied. Respondents  
7 argue that the schematic diagram and description of the HVAC system,  
8 activated carbon charcoal filter on the exhaust system, and identification of the  
9 size and ratings of the exhaust fans, is sufficient evidence for the county to find  
10 that that standard is satisfied, and the exact design of the odor control system  
11 need not be known at the time of approval as long as the odor control system is  
12 "possible, likely, and reasonably certain to succeed." *Meyer*, 67 Or App at 280  
13 n 5 (internal citations omitted).

14 We agree with respondents. DCC 18.116.330(B)(10)(a) and (b) require  
15 the county to find that the proposed marijuana production will not  
16 unreasonably interfere with neighbors' use of their property. That finding must  
17 be supported by a report from a licensed engineer that demonstrates the odor  
18 control system will meet the standard. As explained above, the Engineer's  
19 Reports describe in detail the proposed odor control system. The board of  
20 commissioners could reasonably rely on the Engineer's Reports to conclude  
21 that the "not to unreasonably interfere" standard is met. *Dodd v. Hood River*  
22 *County*, 317 Or 172, 179-80, 855 P2d 608 (1993) (substantial evidence is



1 evidence a reasonable person would rely on in making a decision). That the  
2 board of commissioners imposed an ongoing condition of approval that mirrors  
3 the language of the standard does not mean that the board of commissioners'  
4 conclusion is not supported by substantial evidence in the whole record.

5 The first and second assignments of error are denied.

### 6 **THIRD AND FOURTH ASSIGNMENTS OF ERROR**

7 DCC 18.116.330(B)(11) requires noise produced by marijuana  
8 production to comply with the following standard:

9 "Sustained noise from mechanical equipment used for heating,  
10 ventilation, air condition, odor control, fans and similar functions  
11 shall not exceed 30 dB(A) measured at any property line between  
12 10:00 p.m. and 7:00 a.m. the following day."

13 The board of commissioners relied on the Engineer's Reports to conclude that  
14 sustained noise produced by the proposed operation will not exceed 30 dB(A)  
15 measured at any property line during night time hours.

16 In his third and fourth assignments of error, petitioner challenges the  
17 board of commissioners' conclusion that the proposed operation will comply  
18 with DCC 18.116.330(B)(11). Petitioner first argues that the Engineer's  
19 Reports do not describe the specific system that will be used in the building  
20 and did not consider site specific characteristics such as topography and  
21 temperature variations. Petitioner points to evidence that he submitted that  
22 pointed out that the Engineer's Reports did not evaluate the noise from three  
23 odor control systems, given the testimony that each grow room would be  
24 equipped with an odor control system. Petitioner opined that if all three odor

1 control systems operated simultaneously, the noise generated would be 210  
2 dB(A) at the source and 90 dB(A) at the property line.

3 Respondents respond that the Engineer's Reports are evidence that a  
4 reasonable decision maker would rely on to conclude that the noise standard  
5 can be met. First, respondents note, the applicable standard requires that  
6 "sustained" noise from mechanical equipment not exceed 30 dB(A) from 10:00  
7 p.m. to 7:00 a.m., and the Engineer's Reports explain that HVAC systems  
8 operate "intermittently" and therefore any noise produced by the HVAC system  
9 will not be "sustained." Second, respondents point out that the Engineer's  
10 Reports include calculations demonstrating that any noise at the property lines  
11 will not exceed 30 dB(A) at all times.

12 At the outset, we note that DCC 18.116.330(B)(11) is more of a  
13 performance standard that is applied to an ongoing operation after it is  
14 approved, than a pre-approval criterion that is required to be met prior to  
15 approval of the use. We agree with respondents that the board of  
16 commissioners' decision that the ongoing operation can comply with DCC  
17 18.116.330(B)(11) is supported by substantial evidence in the whole record.  
18 While petitioner's argument that the Engineer's Reports do not account for  
19 three odor control systems (one in each grow room) is not refuted by anything  
20 that respondents point to in the record, petitioner does not point to any  
21 evidence in the record that calls into question the Engineer's Reports'  
22 statement that the operation will not produce "sustained" noise that exceeds

1 permissible levels at any time because the system operates “intermittently.”  
2 That is so even if the operation uses three odor control systems.

3 The third and fourth assignments of error are denied.

4 **FIFTH ASSIGNMENT OF ERROR**

5 DCC 18.116.330(B)(13) requires an applicant for marijuana production  
6 to provide proof that water is available to the property in one of three ways.

7 The applicant can provide:

8 “a. A copy of a water right permit, certificate, or other water  
9 use authorization from the Oregon Water Resource  
10 Department; or

11 “b. A statement that water is supplied from a public or private  
12 water provider, along with the name and contact  
13 information of the water provider; or

14 “c. Proof from the Oregon Water Resources Department that  
15 the water to be used is from a source that does not require a  
16 water right.”

17 The property has irrigation rights to water that is available part of the year.  
18 Record 1056. Intervenors provided a letter from Bend Water Hauling, LLC that  
19 includes the name and contact information for a representative of the company,  
20 stating that it would supply water to the property during months when  
21 irrigation water is not available. Record 913. Based on that letter, the board of  
22 commissioners concluded that intervenors had satisfied DCC  
23 18.116.330(B)(13)(b). The board of county commissioners added as a  
24 condition of approval that “use of water from any source for marijuana

1 production shall comply with all applicable state statutes and regulations  
2 including ORS 537.545 and OAR 690-340-0010.” Record 16.

3 In his fifth assignment of error, petitioner argues that the board of  
4 commissioner’s conclusion is not supported by substantial evidence in the  
5 whole record. According to petitioner, Bend Water Hauling, LLC is not a  
6 “private water provider” within the meaning of DCC 18.116.330(B)(13)(b)  
7 because the company does not hold a water right.

8 Respondents respond that DCC 18.116.330(B)(13) does not require a  
9 statement from the holder of a water right, but only requires a statement from  
10 the private water provider who is providing water for the operation. We agree  
11 with respondents. The plain language of DCC 18.116.330(B)(13) requires “a  
12 statement that water is supplied from a \* \* \* private water provider, along with  
13 the name and contact information of the water provider[.]” The letter at Record  
14 913 includes all that is required by the code section, and the board of  
15 commissioners could rely on it to conclude that DCC 18.116.330(B)(13) was  
16 met.

17 The fifth assignment of error is denied.

## 18 **SIXTH ASSIGNMENT OF ERROR**

19 As explained above in our resolution of the fifth assignment of error, the  
20 board of commissioners found that intervenors satisfied the requirement in  
21 DCC 18.116.330(B)(13)(b). The board of commissioners imposed a condition  
22 of approval that requires that “the use of water from any source for marijuana

1 production shall comply with all applicable state statutes and regulations  
2 including ORS 537.545 and OAR 690-340-0010.” Record 16.

3 Petitioner’s sixth assignment of error is difficult to follow. Petitioner  
4 argues that the board of county commissioners’ decision improperly construes  
5 DCC 18.116.330(B)(13)(b), because in order to be a “provider of water” within  
6 the meaning of that section, the provider must have “an authorized source of  
7 water under Oregon Water Law.” Petition for Review 23. According to  
8 petitioner, Bend Water Hauling, LLC does not hold a water right. According to  
9 petitioner, there is evidence in the record that a company named “Avion Water”  
10 holds a water right permit to supply water only for “quasi-municipal water use”  
11 to Bend Water Hauling, LLC, and use of that water for marijuana production is  
12 not “quasi-municipal water use” as defined in OAR 690-300-010. Accordingly,  
13 petitioner argues, the board of commissioners erred in “fail[ing] to determine  
14 whether it was feasible under Oregon law to conduct a year-round marijuana  
15 operation, using quasi-municipal water.” Petition for Review 25.

16 Respondents respond that the board of commissioners was not required  
17 to determine whether intervenors’ proposed water source is a legal use of water  
18 consistent with the laws and administrative rules governing use of water.  
19 Respondents argue that the condition of approval that the board of  
20 commissioners imposed is sufficient to ensure that the approved use may  
21 operate only if it is consistent with state laws governing water use.

1           We agree with respondents. As we explain above, the board of  
2 commissioners correctly concluded that intervenors satisfied DCC  
3 18.116.330(B)(13)(b). Petitioner has not established that the county was  
4 required to apply any provision of the generically-described “Oregon Water  
5 Law” to intervenors’ application for an administrative decision from the county  
6 and determine whether intervenors’ application is consistent with state laws  
7 governing water use. Accordingly, petitioner’s arguments provide no basis for  
8 reversal or remand of the decision.

9           The sixth assignment of error is denied.

10          The county’s decision is affirmed.