

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

4
5 MJAI OREGON 5, LLC,
6 *Petitioner,*

11/13/18 AM 11:23 LUBA

7
8 vs.

9
10 LINN COUNTY,
11 *Respondent.*

12
13 LUBA No. 2018-096

14
15 FINAL OPINION
16 AND ORDER

17
18 Appeal from Linn County.

19
20 Zachary A. Kearns, Portland, filed the petition for review on behalf of
21 petitioner. With him on the brief was Julie R. Vacura and Larkins Vacura Kayser
22 LLP.

23
24 No appearance by Linn County.

25
26 ZAMUDIO, Board Member; RYAN, Board Chair; BASSHAM, Board
27 Member, participated in the decision.

28
29 REVERSED

11/13/2018

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

NATURE OF THE DECISION

Petitioner appeals a decision by the board of county commissioners that denied its application for site plan approval for indoor and outdoor marijuana production on land zoned for exclusive farm use (EFU).

FACTS

The subject property is comprised of 26.5 acres and is zoned EFU. The property is developed with a dwelling, barn, and detached garage. Record 166. Surrounding uses include agricultural and residential uses. Record 134.

A brief explanation of the laws regulating farm land and marijuana production is helpful. Production of medical and recreational marijuana is legal under Oregon law. ORS 475B.005 - 475B.968. Petitioner's land use application is for production of recreational marijuana, which is regulated by the Oregon Liquor Control Commission (OLCC). OAR Chapter 845, Division 25. "Marijuana production" means the manufacturing, planting, cultivation, growing, trimming, harvesting, or drying of marijuana, provided that the marijuana producer is licensed by the [OLCC] [.]” Linn County Code (LCC) 920.100(193) (boldface omitted); *see also* OAR 845-025-1015(67) (defining “produces” for purposes of recreational marijuana regulation).

Oregon land use law provides for the preservation of agricultural land for agricultural uses, with limited exceptions. While a local government's authority to regulate land use and development is generally broad under Oregon law, a

1 local government’s authority to regulate land use on EFU-zoned land is governed
2 by state law. Land that is planned and zoned for exclusive farm use must be used
3 exclusively for defined farm uses or limited listed exceptions provided by state
4 law. ORS 215.203(1).¹ Production of marijuana is an outright permitted farm use
5 on land zoned EFU. ORS 475B.526(1)(a) (providing that marijuana is a “crop for
6 purposes of ‘farm use’ as defined in ORS 215.203”); ORS 215.203(2)(a)
7 (defining “farm use”). While state law controls permitted uses on farm land and
8 the regulation of marijuana production, local governments may adopt reasonable
9 “time, place, and manner” regulations for marijuana production. ORS 475B.486;
10 ORS 475B.928.

11 LCC Chapter 928, sections 300 to 336, govern the county EFU zoning
12 district. Consistent with state law, LCC 928.310(B) provides that the production
13 of marijuana is an outright permitted use on EFU-zoned land, subject to
14 compliance with the county marijuana code and site plan review.² The purpose

¹ ORS 215.203(1) provides:

“Zoning ordinances may be adopted to zone designated areas of land within the county as exclusive farm use zones. Land within such zones shall be used exclusively for farm use except as otherwise provided in ORS 215.213, 215.283 or 215.284. Farm use zones shall be established only when such zoning is consistent with the comprehensive plan.”

² LCC 928.310(B)(1) provides:

“(B) *Uses allowed outright.*

1 of the county’s marijuana code is to provide “clear and objective standards for
2 marijuana businesses that minimize conflicts with other uses in underlying
3 zoning districts, as well as protect the public health, safety, and general welfare
4 of the citizens of Linn County.” LCC 940.200(B). To that end, LCC 940.400 sets
5 out marijuana production approval criteria related to zoning districts,
6 dimensional standards (including lot size, setbacks, and grow canopy size
7 limitations), access, lighting, odor control, noise, security cameras, water,
8 fencing, and encroachment prevention. Compliance with those criteria is assessed
9 through site plan application and review.

10 Petitioner applied for site plan approval for indoor and outdoor marijuana
11 production proposing to site two buildings for indoor marijuana production and
12 up to ten hoop houses for outdoor marijuana production.³ Petitioner’s application
13 noted that petitioner would file a separate conditional use permit application for
14 marijuana processing. Record 165–66. The site plan conforms to applicable

“(1) Farm use. Marijuana is subject to compliance with
LCC 940.400.” (Italics in original.)

³ LCC 920.100(B)(155) (“**Indoor marijuana production**’ means producing marijuana in any manner that utilizes artificial lighting on mature marijuana plants; or any other manner of producing other than outdoor production.” (Boldface in original.)); LCC 920.100(B)(222) (“**Outdoor marijuana production**’ means producing marijuana in an expanse of open or cleared ground or in a greenhouse, hoop house, or similar non-rigid structure that does not utilize any artificial lighting on mature marijuana plants, including but not limited to electrical lighting sources.” (Boldface in original.)).

1 dimensional standards. Petitioner submitted evidence that the proposed
2 marijuana production operation would comply with operational standards,
3 including odor control and waste management.

4 The planning director approved petitioner's application with conditions
5 after reviewing petitioner's application and supplemental materials and
6 comments from concerned surrounding property owners. Record 154, 189–225.
7 The director's decision was appealed to the planning commission, which
8 conducted a *de novo* public hearing. No evidence was submitted that contradicted
9 petitioner's assertion that it could and would meet the county's marijuana odor
10 control and waste management requirements. Nonetheless, during the planning
11 commission's deliberations, more than one commission member stated their
12 belief that marijuana should not be farmed in Linn County based on negative
13 personal experiences with marijuana production. Petition for Review, Appendix
14 B, Transcript of Linn County Site Plan Hearing (June 13, 2018) 41:7–42:15;
15 72:5–14; 75:20–78:20.

16 Ultimately, the planning commission denied petitioner's site plan review
17 application based upon its conclusion that the application does not comply with
18 the applicable odor control and waste management standards. Petitioner appealed
19 the planning commission's decision to the board of commissioners, which
20 affirmed the planning commission's decision without conducting any further
21 hearing. This appeal followed.

1 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

2 In its first and second assignments of error, petitioner argues that the
3 county erred by improperly construing the applicable law and acting outside its
4 range of discretion in deciding that petitioner’s proposal did not comply with
5 LCC 940.400(A)(5) and (A)(9). We discuss those assignments of error together
6 because they advance similar legal arguments.

7 LCC 940.400(A)(5) provides:

8 “Odor. As used in this section, building means the building,
9 or portion thereof, used for indoor production. This section
10 does not apply to a building approved as part of outdoor
11 production, as defined in LCC 920.100(B)(2[22]).

12 “(a) The building shall be equipped with an activated
13 carbon filtration system for odor control to ensure that
14 air leaving the building through an exhaust vent first
15 passes through an activated carbon filter.

16 “(b) The filtration system shall consist of one or more fans
17 and activated carbon filters. At a minimum, the fan(s)
18 shall be sized for cubic feet per minute (CFM)
19 equivalent to the volume of the building (length
20 multiplied by width multiplied by height) divided by
21 three. The filter(s) shall be rated for the applicable
22 CFM.

23 “(c) The filtration system shall be maintained in working
24 order and shall be in use. The filters shall be changed a
25 minimum of once every 365 days.

26 “(d) Negative air pressure shall be maintained inside the
27 building.

1 “(e) Doors and windows shall remain closed, except for the
2 minimum length of time needed to allow people to
3 ingress or egress the building.

4 “(f) The filtration system shall be designed by a mechanical
5 engineer licensed in the State of Oregon. The engineer
6 shall stamp the design and certify that it complies with
7 LCC 940.400(A)(5).

8 “(g) An alternative odor control system is permitted if the
9 applicant submits a report by a mechanical engineer
10 licensed in the State of Oregon demonstrating that the
11 alternative system will control odor as well or better
12 than the activated carbon filtration system otherwise
13 required.”

14 LCC 940.400(A)(9) provides:

15 “Waste Management. Marijuana waste shall be stored in a
16 secured waste receptacle in the possession of and under the
17 control of the OLCC licensee or [Oregon Health Authority]
18 OHA registrant. Outdoor storage of marijuana waste is
19 prohibited. Marijuana waste burning is prohibited.”

20 Petitioner submitted evidence that the project would comply with the odor
21 control standards in LCC 940.400(A)(5). Petitioner explained that the project will
22 be designed and implemented in compliance with the county’s odor control
23 standards for indoor production and stated that petitioner would work with
24 engineers with experience in designing and building air filtration systems that
25 comply with the county odor control standards. Record 39. Petitioner’s
26 submission demonstrated that a mechanical engineer would design the project to
27 comply with LCC 940.400(A)(5) and that the air filtration systems would be
28 installed, maintained, and used at all operative times. Record 55 (“All indoor

1 production buildings will be equipped with an activated carbon filtration system
2 for odor control to ensure that air leaving the building through an exhaust vent
3 first passes through an activated carbon filter. All fans will be sized by the
4 licensed engineer based on the volume of each building, and the filters will be
5 rated for the applicable CFM (Cubic Feet Per Minute) based on the engineer's
6 findings.”).

7 Petitioner submitted evidence that the project would comply with LCC
8 940.400(A)(9) regarding waste management. Petitioner explained that its
9 marijuana waste would be stored in secured waste receptacles in its possession
10 and control. Moreover, petitioner stated that it would comply with all other laws
11 regarding the storage, management, and disposal of solid and liquid waste,
12 including OLCC's rule that limits the manner of disposing of marijuana waste
13 and requires that a marijuana producer maintain comprehensive records for “all
14 waste activity related to the disposal of marijuana.” OAR 845-025-7750(3);
15 Record 43, 57.

16 The planning commission found that petitioner did not provide adequate
17 information to show how odor from the hoop houses would be mitigated and that
18 petitioner's evidence was insufficient to demonstrate that the proposed filtration
19 system would comply with the code and mitigate odor impacts on surrounding
20 properties. Record 7. With respect to waste management, the planning
21 commission explained that opponents had expressed concerned about the effects
22 of contaminated water runoff from marijuana production and its effect on

1 surrounding farm uses and a nearby creek. The planning commission found that
2 petitioner's waste management evidence was deficient in three respects: (1) it did
3 not describe the herbicides and pesticides that would be used for marijuana
4 production, (2) it did not provide adequate evidence to address concerns raised
5 about water runoff, and (3) it did not address how or where the marijuana waste
6 associated with production would be disposed. Record 8.

7 Petitioner argues that the factors and considerations upon which the county
8 relied in denying the application are not contained in the applicable approval
9 criteria. Petitioner asks us to reverse the county's decision and order the county
10 to approve its application for site plan approval for indoor and outdoor marijuana
11 production under ORS 197.835(10)(a), which provides, in part:

12 "The board shall reverse a local government decision and order the
13 local government to grant approval of an application for
14 development denied by the local government if the board finds:

15 "(A) Based on the evidence in the record, that the local government
16 decision is outside the range of discretion allowed the local
17 government under its comprehensive plan and implementing
18 ordinances."

19 ORS 197.835(10)(a) "requires reversal, and precludes remand, of a denial
20 decision when LUBA determines on the basis of the record that the local
21 government lacks the discretion to deny the development application." *Stewart*
22 *v. City of Salem*, 231 Or App 356, 375, 219 P3d 46 (2009), *rev den*, 348 Or 415
23 (2010) (affirming LUBA's decision that reversed the city's decision because the

1 applicable criteria did not provide a basis for denying the petitioner’s land use
2 application).

3 In *Parkview Terrace Dev. LLC v. City of Grants Pass*, 70 Or LUBA 37
4 (2014), which petitioner cites, we examined an appeal of a city council decision
5 denying an application for site plan approval for a housing project. *Id.* at 40.
6 There, we explained that where the city council applied approval standards that
7 did not actually exist under the city’s code, the city’s decision was “outside the
8 range of discretion allowed the local government under its comprehensive plan
9 and implementing ordinances.” *Id.* at 57–58. Accordingly, we reversed the city’s
10 decision and ordered the city to approve the petitioner’s application.

11 With that overview of the applicable law, we turn to petitioner’s challenges
12 to the bases for denial.

13 **A. LCC 940.400(A)(5) (odor control)**

14 The county found petitioner failed to demonstrate compliance with LCC
15 940.400(A)(5) odor control standards because petitioner “did not provide
16 adequate information to show how odor from the hoop houses would be
17 mitigated,” and because “there was not enough evidence in the record to
18 demonstrate that the proposed filtration system would comply with the odor
19 standards contained within [the] County Code in a manner to mitigate odor
20 impacts on surrounding properties.” Record 7.

21 Petitioner argues, and we agree, that the county erred in applying LCC
22 940.400(A)(5) to the hoop houses, because the proposed hoop houses are for

1 outdoor marijuana production and LCC 940.400(A)(5) applies only to indoor
2 marijuana production. LCC 940.400(A)(5) (“This section does not apply to a
3 building approved as part of outdoor production[.]”); LCC 920.100(B)(222); see
4 n 3.

5 Petitioner further argues that the county’s conclusion that petitioner had
6 failed to demonstrate that petitioner’s filtration system would operate “in a
7 manner to mitigate odor impacts on surrounding properties” provides no basis for
8 denying the application because the conclusion is not tied to any applicable
9 criteria. Record 7. *See* LCC 921.160(E)(1) (providing that the county shall
10 approve the application and deny the appeal if the findings and conclusions
11 satisfy all the criteria or can be made to satisfy the criteria with conditions; or
12 deny the application and affirm the appeal, if the findings of fact do not satisfy
13 all the criteria). We agree with petitioner. LCC 940.400(A)(5) does not include
14 any express requirement that a marijuana producer “mitigate” odor impacts on
15 surrounding properties. With respect to odor control, the only basis for denial of
16 the application would be if the applicant failed to present sufficient evidence of
17 compliance with the technical odor containment and air filtration requirements
18 for indoor marijuana production in LCC 940.400(A)(5). The planning
19 commission did not find that petitioner failed to demonstrate compliance or
20 feasibility of compliance with the technical requirements of LCC 940.400(A)(5).

21 Petitioner submitted uncontroverted evidence that its project can and will
22 satisfy LCC 940.400(A)(5), the only LCC standards that govern odor. The

1 planning commission nonetheless denied the site plan review application, based
2 on requirements regarding odor that are not found in the code. That was error.

3 **B. LCC 940.400(A)(9) (waste management)**

4 The county found petitioner failed to demonstrate compliance with LCC
5 940.400(A)(9) waste management standards. The planning commission found
6 that petitioner's waste management evidence was deficient in three respects: (1)
7 it did not describe the herbicides and pesticides that would be used for marijuana
8 production, (2) it did not provide adequate evidence to address concerns raised
9 about water runoff, and (3) it did not address how or where the marijuana waste
10 associated with production would be disposed. Record 8. Petitioner argues that
11 those three concerns are not encompassed by the waste management standard in
12 LCC 940.400(A)(9), or any other identified applicable criteria. We agree with
13 petitioner.

14 LCC 940.400(A)(9) does not require petitioner to describe the herbicides
15 and pesticides it may use on the property for producing marijuana or address any
16 concerns regarding water runoff or how the marijuana waste is ultimately
17 disposed. LCC 940.400(A)(9) requires in relevant part only that a marijuana
18 producer securely store marijuana waste. Petitioner's uncontroverted evidence
19 established that it could or would satisfy LCC 940.400(A)(9), including storing
20 marijuana waste in a secured waste receptacle.

21 Petitioner's first and second assignments of error are sustained.

1 **THIRD ASSIGNMENT OF ERROR**

2 Under the third, alternative assignment of error, petitioner argues that the
3 planning commission committed procedural error by relying upon extra-record
4 evidence in denying petitioner’s application. Because we sustain petitioner’s first
5 and second assignments of error, and as explained below we must reverse the
6 county’s decision based on those errors, we need not determine whether the
7 county committed procedural error by improperly considering extra-record
8 evidence. We do not reach the third assignment of error.

9 **DISPOSITION**

10 As explained under the first and second assignments of error, the county
11 erred in denying petitioner’s application for site plan approval based solely on
12 considerations not found in any applicable approval criteria. Accordingly, we
13 agree with petitioner that the county’s decision was “outside the range of
14 discretion allowed the local government under its comprehensive plan and
15 implementing ordinances.” ORS 197.835(10)(a)(A). The proper disposition of
16 this appeal is therefore reversal and an order instructing the county to grant
17 approval of the application. *Stewart v. City of Salem*, 58 Or LUBA 605 (2009),
18 *aff’d*, 231 Or App 356, *rev den*, 348 Or 415 (2010); *Parkview Terrace*, 70 Or
19 LUBA 37.

1 The county's decision is reversed. The county is ordered to approve
2 petitioner's application.⁴

⁴ We note that the planning director imposed several conditions of approval in his decision approving petitioner's site plan. Record 154-63. Because petitioner agreed to those conditions of approval, the county board of commissioner's decision to approve the application may include those conditions of approval. *Parkview Terrace*, 70 Or LUBA 37; *Stewart*, 58 Or LUBA 605.