

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

1625 SHERMAN AVE. LLC,
Petitioner,

vs.

CITY OF NORTH BEND,
Respondent.

LUBA No. 2022-047

FINAL OPINION
AND ORDER

Appeal from City of North Bend.

Richard Billin represented petitioner.

Rebekah Dohrman represented respondent.

RUDD, Board Member; RYAN, Board Chair; ZAMUDIO, Board
Member, participated in the decision.

DISMISSED 09/30/2022

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

NATURE OF THE DECISION

Petitioner appeals the city council’s decision affirming staff’s denial of applications for (1) an Annual Marijuana Retailer Permit, and (2) a Use Occupancy Permit.

FACTS

The subject property is located at 1625 Sherman Avenue and zoned General Commercial (C-G). Retail uses are an outright permitted use in the C-G zone. North Bend City Code (NBCC) 18.32.010.

Petitioner sought to operate a retail marijuana business on the subject property. Operating a retail marijuana business in the city requires several approvals. First, it requires a license from the Oregon Liquor Control Commission (OLCC). Prior to issuing a license, the OLCC requires that an applicant submit a land use compatibility statement (LUCS) from the local government indicating whether the proposed use is consistent with local land use provisions. In September 2020, the city provided petitioner with a LUCS indicating that retail marijuana sales was a permitted use at the subject property (2020 LUCS).

Operating a retail marijuana business in the city also requires an Annual Marijuana Retailer’s Permit pursuant to NBCC 5.31.030-60, which is part of the

1 city's business regulations.¹ Finally, operating a retail marijuana business, or any
2 retail business in the C-G zone, requires an Occupancy Permit pursuant to NBCC
3 18.04.040(2), which is part of the city's zoning ordinance.

4 On August 31, 2021, petitioner applied for a building permit for work
5 related to the marijuana dispensary at the subject property. Record 25. As we
6 explain in more detail below, no building permit was issued or finalized. On
7 February 2, 2022, petitioner applied for an Annual Marijuana Retailer's Permit
8 pursuant to NBCC 5.31.060, and on February 22, 2022, petitioner applied for an
9 Occupancy Permit for the proposed use, pursuant to NBCC 18.04.040. Record
10 14-16. On March 2, 2022, city staff issued a single decision denying the Annual
11 Marijuana Retailer's Permit and Occupancy Permit. Record 187.

12 Petitioner appealed the staff denial to the city council. On April 26, 2022,
13 the city council held a public hearing on the appeal and denied the appeal for
14 reasons stated in its findings.

15 **A. Basis for City Council's Denial of Petitioner's Applications**

16 **1. Annual Marijuana Retailer's Permit**

17 NBCC Title 5 contains the city's business regulations. An Annual
18 Marijuana Retailer's Permit must comply with NBCC 5.31.060. The city council
19 found that petitioner's applications violated NBCC 5.31.060(3), (6), and (15).

¹ In February 2021, the city adopted amendments to NBCC 5.31 that included NBCC 5.31.060(15), set out and discussed below.

1 NBCC 5.31.060(3) requires that a marijuana retailer meet applicable
2 building, land use, and fire codes. The city found that petitioner did not meet the
3 building code because it failed to receive a building permit. Record 21. Petitioner
4 applied for a building permit in August 2021 but at the time of the city’s decision,
5 the building permit had not been issued because additional information was
6 needed.² The city council also found that petitioner failed to meet the land use
7 code because petitioner did not possess an Occupancy Permit that was required
8 pursuant to NBCC 18.04.040. Record 10.

9 NBCC 5.31.060(6) provides that retail marijuana facilities may operate
10 between 9 a.m. and 8 p.m. The city concluded that petitioner’s proposal did not
11 meet NBCC 5.31.060(6) because the proposed operating hours were 8 a.m. to 10
12 p.m. Record 11.

13 NBCC 5.31.060(15) provides:

14 “No retailer or dispensary shall be located within 1,000 feet of
15 another retailer or dispensary. For purposes of determining the
16 distance between retailers or dispensaries, ‘within 1,000 feet’ means
17 a straight-line measurement in a radius extending for 1,000 feet or
18 less in any direction from the closest point anywhere on the
19 boundary line of the real property comprising a licensed retailer or

² The findings state

“In September of 2021, La Mota applied for a building permit to conduct work on the subject building located at 1625 Sherman Avenue. This work has not yet been authorized by the Building Official, additional information is required to process this application.” Record 10; *see also* 212-213 (detailing the additional information needed).

1 dispensary to the closest point of the premises of a retailer or
2 dispensary applying for licensing. If any portion of the subject
3 premises is within 1,000 feet of a licensed retailer or dispensary a
4 license will not be issued.”

5 See n 1. The city found that the subject property is less than 1000 feet from the
6 marijuana retailer located at 1845 Sherman Avenue.³ Record 12.

7 **2. NBCC 18.04.040**

8 NBCC Title 18 contains the city’s zoning ordinance. NBCC 18.04.010.
9 NBCC 18.04.040 contains the city’s Use and Occupancy Permit Requirements
10 and provides in part:

11 “(1) No structure or premises may be used or occupied, and no
12 structure or part of a structure may be erected, moved, reconstructed,
13 extended, enlarged, or otherwise altered, except as permitted by this
14 title.

15 “(2) No premises shall be used or occupied in the commercial or
16 industrial zones unless and until an occupancy permit has been
17 issued by the building official *for the particular uses and activities*
18 *to be carried on at such premises*. No change in any use or
19 occupancy shall be made at any such premises unless and until an
20 occupancy permit has been issued by the building official permitting
21 such change.” (Emphasis added.)

22 As discussed above, NBCC 5.31.060(3) requires compliance with land use
23 codes. The Occupancy Permit requirement is part of the city’s zoning ordinance
24 and is required in order to operate a retail business, which again, is a permitted
25 use in the C-G zone. Because petitioner had not submitted the material identified

³ The city included in its decision a map depicting a distance of 1000 feet from the edge of 1845 SW Sherman to the most distant edge of the subject property. Record 13.

1 by the city as missing from its building permit application, and because petitioner
2 did not meet the NBCC 5.31.060(6) and (15) requirements for a marijuana
3 retailer’s license, the city’s planning staff and the city council denied the
4 Occupancy Permit.⁴ Record 10.

5 The city council also adopted findings that responded to petitioner’s
6 argument to the city council that the LUCS issued to petitioner in 2020 should
7 have required the city to issue the marijuana retailer’s license required under
8 NCBB 5.31.060.⁵ Record 10-11. The city council found that the marijuana
9 retailer license application

10 “cannot be [issued based on the 2020 LUCS], as requested by the
11 appellant, or can a variance be granted as was discussed by the
12 council because there are no provisions in Chapter 5.31 NBCC that

⁴ Missing information for the building permit application included way-finding signage required by NBCC 18.50, and a parking lot permit per NBCC 18.68. Record 21, 23, 25; 212-213.

⁵ Petitioner testified at the appeal hearing and

“spoke about the business being the largest privately owned cannabis business and [holder of] over 60 licenses. They did submit for a LUCS. Their process is to acquire real estate, once they receive the LUCS, close on the property, bring the buildings up to code, file with OLCC, submit for building permit, do necessary major upgrades. They have invested almost a half million dollars into the property and once the pandemic hit, it stopped any construction in rural areas.

“The Appellant is asking to be grandfathered in, since there was no timeframe on the LUCS and can’t get an OLCC license until the property closes or have a lease for the building.” Record 38.

1 would allow for such action.” Record 2.

2 This appeal followed.

3 **MOTION TO DISMISS**

4 LUBA has exclusive jurisdiction to review land use decisions. ORS
5 197.825(1).⁶ ORS 197.015(10)(a)(A)(iii) defines “[l]and use decision” to include
6 “[a] final decision or determination made by a local government or special district
7 that concerns the adoption, amendment or application of * * * [a] land use
8 regulation[.]” ORS 197.015(11) defines “[l]and use regulation” to mean “any
9 local government zoning ordinance, land division ordinance, * * * or similar
10 general ordinance establishing standards for implementing a comprehensive
11 plan.”

12 ORS 197.015(10)(b) also lists nearly a dozen types of decisions that over
13 the years the legislature has provided are *not* “land use decisions” as described in
14 ORS 197.015(10)(a), and thus are excluded from LUBA’s jurisdiction, even if
15 those decisions might otherwise qualify as “land use decisions.” As relevant here,
16 ORS 197.015(10)(b)(A) excludes from LUBA’s jurisdiction a local government
17 decision “made under land use standards that do not require interpretation or the

⁶ ORS 197.825(1) provides in part:

“[T]he Land Use Board of Appeals shall have exclusive jurisdiction to review any land use decision or limited land use decision of a local government, special district or a state agency in the manner provided in ORS 197.830 to 197.845.”

1 exercise of policy or legal judgment.” We sometimes refer to that exclusion as
2 “the ministerial decision exclusion.”

3 Petitioner bears the burden of establishing our jurisdiction. *Billington v.*
4 *Polk County*, 299 Or 471, 475, 703 P2d 232 (1985). The city moves to dismiss
5 the appeal on the basis that petitioner has not established LUBA’s jurisdiction
6 over the appealed decision. The city alleges that LUBA lacks jurisdiction for
7 three reasons. First, we understand the city to argue that the city’s decision does
8 not concern the application of a land use regulation, because NBCC 5.31.060 is
9 not a “land use regulation” as defined in ORS 197.015(11). Respondent’s Motion
10 to Dismiss 5. Second, the city argues that even if the city’s decision concerns the
11 application of a land use regulation, the city’s decision is subject to the ministerial
12 decision exclusion because the city did not exercise policy or legal judgment in
13 denying the Occupancy Permit. *Id.* at 6. Finally, the city argues that the petition
14 for review so fails to comply with our rules as to warrant dismissal. *Id.* at 8.

15 In its statement of jurisdiction in the second corrected petition for review,
16 petitioner asserts:

17 “LUBA has jurisdiction over this matter because it is a final land use
18 decision made by the City of North Bend which is a local
19 government entity as defined by ORS 197.015(13). *The decision at*
20 *issue is a final land use decision as defined by ORS 197.015(10)*
21 *because it deals with the application of a land use regulation.”*
22 Second Corrected Petition for Review 4 (emphasis added).

23 In their response to the motion to dismiss, petitioner argues:

24 “LUBA jurisdiction in this matter ultimately boils down to whether
25 the decision to deny Petitioner’s Use and Occupancy Permit

1 constituted a land use decision. To do so, Respondent must have
2 exercised some policy or legal judgment when making its
3 determination. In the matter at hand, Respondent determined that the
4 pre-existing LUCS issued by Respondent had no legal effect – in
5 essence, a legal determination was made that the previously issued
6 LUCS did not have any binding effect on the City’s decision. That
7 is both a legal determination and a policy determination which
8 effected Petitioner’s use of its land. Under all the criteria and
9 standards referenced in Respondent’s Motion to Dismiss, that
10 decision is subject to LUBA jurisdiction.” Response to Motion to
11 Dismiss 1.

12 We tend to agree with the argument that the provisions of NBCC 5.31.060
13 are not “land use regulations.” They are part of the city’s business licensing
14 regulations and do not appear to implement the city’s comprehensive plan. If that
15 is all that the city had applied, we would likely agree that the city council’s
16 decision does not concern the application of a land use regulation.

17 However, the city council’s decision also considered and denied
18 petitioner’s separate application for an Occupancy Permit pursuant to NBCC
19 18.04.040. Record 10. There is no question that NBCC 18.04.040 is part of the
20 city’s zoning ordinance and therefore is a land use regulation. For that reason, we
21 disagree with the city that the city’s decision does not concern the application of
22 a land use regulation.

23 We agree with the city that the decision falls within the ministerial decision
24 exclusion to our jurisdiction at ORS 197.015(10)(b)(A), because the city
25 council’s decision that the provisions of NBCC 18.04.040 were not met did not
26 require the exercise of legal or policy judgment. The city council concluded that
27 petitioner lacked an approved building permit and lacked a marijuana retailer’s

1 license, and that therefore the Occupancy Permit could not be issued.⁷ Record 10.
2 Petitioner does not challenge that conclusion or otherwise assert that petitioner
3 possesses a building permit or a marijuana retailer’s license. Rather, petitioner
4 argues that the city council applied policy or legal judgment when it decided that
5 it could not issue the marijuana retailer’s license based on the city’s prior issuance
6 of the 2020 LUCS. However, the city council’s findings that merely responded
7 to petitioner’s arguments regarding the 2020 LUCS do not mean that the city
8 council exercised policy or legal judgment in making its decision. *See Madrona*
9 *Park, LLC v. City of Portland*, ___ Or LUBA ___, ___ (LUBA No 2019-032,
10 July 17, 2019), *aff’d*, 300 Or App 403, 450 P3d 1050 (2019) (an opponent to
11 development cannot, through comments during the process that leads to the
12 challenged decision, convert a decision that is subject to an exclusion to LUBA’s
13 jurisdiction into a land use decision that is subject to LUBA’s jurisdiction) (slip
14 op at 14). Petitioner does not take the position or otherwise explain how the city’s
15 decision that petitioner lacked a building permit and lacked a marijuana retailer’s
16 permit required the exercise of policy or legal judgment.

17 Because we agree with the city that the city council’s decision is subject to
18 the ministerial decision exclusion, we lack jurisdiction over the appeal.⁸

⁷ The Annual Marijuana Retailer’s Permit was denied in the challenged proceeding.

⁸ We do not reach the city’s arguments that we do not have jurisdiction because the petition for review so failed to comply with our rules that we should not consider it a petition for review at all.

1 The appeal is dismissed.