

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

3
4 JOHN WIDMER and WSW INVESTMENTS, LLC,
5 *Petitioners,*

6
7 vs.

8
9 CITY OF TROUTDALE,
10 *Respondent.*

11
12 LUBA No. 2023-044

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from City of Troutdale.

18
19 Logan Leichtman filed the petition for review, the amended petition for
20 review, and reply brief and argued on behalf of petitioners. Also on the briefs
21 were Matthew A. Goldberg, Nicole C. Gossett-Roxbury, and Lotus Law Group,
22 LLC.

23
24 Edward H. Trompke filed the respondent's brief, the amended response
25 brief, and response brief to the state agency brief and argued on behalf of
26 respondent. Also on the brief was Jordan Ramis PC.

27
28 Nicholas Greenfield filed a state agency brief on behalf of the Oregon
29 Liquor and Cannabis Commission. Also on the brief was Ellen F. Rosenblum,
30 Attorney General.

31
32 RYAN, Board Chair; RUDD, Board Member; ZAMUDIO, Board
33 Member, participated in the decision.

34
35 AFFIRMED

 02/06/2024

36
37 You are entitled to judicial review of this Order. Judicial review is
38 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a city council decision denying their application for a retail marijuana store in the General Commercial (GC) zone.

FACTS

On August 30, 2022, petitioners applied for a conditional use permit for a “marijuana facility,” a retail marijuana store, within the city’s General Commercial (GC) zone.¹ Under the version of the Troutdale Development Code (TDC) that was in effect on the date of the application, “marijuana facilities” are allowed in the GC zone subject only to satisfaction of the conditional use standards in TDC 6.320.² The planning department issued a staff report to the planning commission that recommended approval of the application. On November 9, 2022, and December 14, 2022, the planning commission held hearings on the application. At its December 14, 2022, meeting, the planning

¹ TDC 1.020 defines “marijuana facilities” as “[a] marijuana producer, marijuana retailer, marijuana wholesaler, medical marijuana dispensary, or marijuana grow site as those terms are defined under ORS 475B.015 and ORS 475B.410, but not including a Marijuana Processor, as defined by this Code.”

² On the application date, the applicable version of the Troutdale Development Code (TDC) (June 28, 2022) did not include any special conditional use standards for marijuana facilities in the GC zone. The parties agree that after the application was submitted, the city amended the TDC to prohibit in the GC zone marijuana facilities that are located within 1,000 feet of “real property which is the site of a public or private school or a public park.” TDC 3.320(C) and TDC 3.325(A) (October 29, 2023).

1 commission voted to deny the application on the basis that it failed to satisfy TDC
2 6.320(A) and (E), which we set out and discuss later in this opinion.

3 Petitioners appealed the decision to the city council. On March 14, 2023,
4 the city council held a hearing on the appeal, and at the conclusion of the hearing
5 voted to deny the appeal and uphold the planning commission’s decision.³ This
6 appeal followed.

7 **ASSIGNMENTS OF ERROR**

8 **A. Substantial Evidence**

9 As noted, TDC 6.320 contains the approval criteria for conditional use
10 applications. One of the two bases for the city council’s denial of the application
11 was that it failed to satisfy TDC 6.320(E), which provides:

12 “The Planning Commission may approve an application, approve
13 with modifications, or deny an application for a conditional use. The
14 applicant must submit evidence substantiating that all requirements
15 of this Code relative to the proposed use are satisfied and
16 demonstrate that the proposed use also satisfies the following
17 criteria:

18 “ * * * * *

19 “(E) The proposed use, as conditioned, will not cause or not result
20 in the creation of a public nuisance including, but not limited
21 to, air, land, or water degradation, noise, glare, heat, vibration,
22 or other impacts that may be injurious to public health, safety,
23 and welfare.”

³ Petitioners explain that the city council adopted the planning commission’s findings as its own. Petition for Review 5.

1 The city council concluded that the impacts from the proposed retail marijuana
2 store “may be injurious to public health safety and welfare” and denied the
3 application on that basis. Record 5.

4 In their third assignment of error and a portion of their second assignment
5 of error, petitioners argue that the council’s denial of their application under TDC
6 6.320(E) is not supported by substantial evidence in the record, and that the
7 evidence in the record supports a conclusion that petitioners’ required compliance
8 with the Oregon Liquor and Cannabis Commission (OLCC) rules that require
9 surveillance and security mitigate the potential concerns about safety.

10 The city responds, initially, that petitioners failed to demonstrate that they
11 preserved the issue raised in their third assignment of error.⁴ In the amended

⁴ The city timely filed a response brief that asserted that the petition for review failed to comply with the requirement in OAR 661-010-0030(4)(d) that the assignments of error demonstrate where the issue raised in the assignment of error was preserved. On January 3, 2024, petitioners filed a motion to amend the petition for review, pursuant to OAR 661-010-0030(6), to amend the petition for review in order to establish where the issues were preserved. The motion included the amended petition for review at pages five through 10.

In an order dated January 8, 2024, we granted petitioners’ motion to amend the petition for review because we concluded that doing so would serve a purpose and would not materially interfere with the city’s ability to respond or with our ability to timely resolve the appeal. *Widmer v. City of Troutdale*, ___ Or LUBA ___ (Order, LUBA No 2023-044, Jan 8, 2024) (slip op at 3). We allowed the city the time set forth in our rules to file an amended response brief that responded to the amended petition for review. The city then filed an amended response brief, which we have considered.

1 petition for review, petitioners identify Record 211-212, 553, and testimony at
2 the December 14, 2022 planning commission hearing to demonstrate that the
3 issue was preserved. In the amended response brief, the city disagrees that the
4 issues raised in the third assignment of error were raised on those record pages
5 or in the cited testimony. Amended Response Brief 35-38. We have reviewed the
6 cited record pages and testimony and we agree with petitioners that the issues
7 were preserved.

8 We will reverse or remand a land use decision if we determine that the
9 local government made a decision not supported by substantial evidence in the
10 whole record. ORS 197.835(9)(a)(C). Substantial evidence is evidence a
11 reasonable person would rely upon to make a decision. *Dodd v. Hood River*
12 *County*, 317 Or 172, 179, 855 P2d 608 (1993).

13 The decision cites and relies on (i) a July 1, 2022 news release from the
14 OLCC (OLCC News Release) that refers to workers in the marijuana industry
15 having been targeted at gun point, (ii) public testimony regarding safety concerns
16 that was presented at the planning commission hearings, and (iii) a current
17 shortage of law enforcement personnel to respond promptly to emergency calls.
18 Record 5.

19 In their third assignment of error, petitioners first argue that the OLCC
20 News Release is not substantial evidence to support the city council's conclusion

1 that allowing the retail marijuana store will result in a threat to public safety.⁵

2 According to petitioners, the purpose of the OLCC News Release was to
3 emphasize OLCC's efforts to achieve legislative banking reform for the
4 marijuana industry, not to highlight safety issues in the industry. Petition for
5 Review 17.

6 Petitioners also argue that the public testimony that the city council relied
7 on is not substantial evidence to support its conclusion. First, petitioners argue
8 that the testimony at the first planning commission hearing on November 9, 2022
9 consisted of "a single vague and conclusory statement that 'crime will be there.
10 Crime happens at Albertson's almost every day. Crime will be at that marijuana
11 shop too.'" Petition for Review 18 (citing November 9, 2022 planning
12 commission hearing at 42:28-42:40). Next, petitioners argue that testimony at the
13 December 14, 2022, planning commission hearing related to existing crime in the
14 city, and that petitioners are not responsible for mitigating existing public safety
15 concerns in order to satisfy TDC 6.320(E). Petition for Review 18-19.

16 In a portion of their second assignment of error, petitioners argue that
17 evidence in the record includes evidence that petitioners will comply with OLCC
18 rules that require security and surveillance, "additional safety measures that they

⁵ In this portion of the third assignment of error, petitioners include a one sentence argument that alleges that a planning commissioner was biased. Petition for Review 17. That argument is undeveloped and we will not develop it for them. *Deschutes Development Co. v. Deschutes County*, 5 Or LUBA 218, 220 (1982).

1 take at other locations to mitigate these concerns,” and third-party security patrols
2 to be provided by the landlord. Petition for Review 12-14. We understand
3 petitioners to argue that that evidence supports a conclusion that TDC 6.320(E)
4 is met.

5 The city responds that the city council’s decision is supported by
6 substantial evidence in the whole record, because the evidence the city council
7 relied on is evidence that a reasonable person would rely on. We agree.

8 Petitioners have not established that the totality of the evidence, including
9 the OLCC News Release and the public testimony regarding safety as well as the
10 undisputed shortage of law enforcement personnel, is not evidence a reasonable
11 person would rely on. *Dodd*, 317 Or at 179. In addition, given the subjective
12 nature of the standard, it is unremarkable that reasonable persons could weigh the
13 evidence differently. The city weighed the petitioners’ evidence and the other
14 evidence in the record and chose to give more weight to certain evidence. Our
15 standard of review does not allow us to reweigh the evidence. *1000 Friends of*
16 *Oregon v. Marion County*, 116 Or App 584, 587-88, 842 P2d 441 (1992).

17 Finally, in order to reverse a denial of an application on evidentiary
18 grounds, as petitioners seek to do, we must conclude that “the proponent of
19 change sustained his burden of proof as a matter of law.” *Jurgenson v. Union*
20 *County Court*, 42 Or App 505, 510, 600 P2d 1241 (1979); *see also Garre v.*
21 *Clackamas County*, 18 Or LUBA 877, 881, *aff’d*, 102 Or App 123, 792 P2d 117
22 (1990). “It is not enough for the proponent to introduce evidence supporting

1 affirmative findings of fact and conclusions on all applicable legal criteria. The
2 evidence must be such that a reasonable trier of fact could only say the
3 [proponent's] evidence should be believed." *Weyerhaeuser v. Lane County*, 7 Or
4 LUBA 42, 46 (1982). In other words, in order for LUBA to sustain petitioners'
5 third assignment of error, petitioners must establish that the evidence in the
6 record demonstrates compliance with TDC 6.320(E) as a matter of law.

7 Petitioners have not established that the evidence in the record that they
8 will comply with OLCC surveillance and security requirements establishes
9 compliance with TDC 6.320(E) as a matter of law, given the other evidence in
10 the record that the city council relied on and the subjective nature of the standard.
11 Petitioners also have not established that the evidence that the city council did
12 rely on was not evidence that a reasonable person would rely on.

13 A portion of the second and the third assignment of error are denied.

14 **B. Improper Construction of ORS 475C.097(2)(d) and OAR 845-**
15 **025-1015(98)**

16 TDC 6.320(A) provides that:

17 "The Planning Commission may approve an application, approve
18 with modifications, or deny an application for a conditional use. The
19 applicant must submit evidence substantiating that all requirements
20 of this Code relative to the proposed use are satisfied and
21 demonstrate that the proposed use also satisfies the following
22 criteria:

23 "(A) The use is listed as a conditional use in the underlying district,
24 or approved by the Planning Commission as similar to
25 conditional uses listed in the underlying district."

1 The second basis for the city council’s denial of their application is that the
2 application proposed to locate the retail marijuana store within 1,000 feet of Mt.
3 Hood Community College, which the city council concluded meant that TDC
4 6.320(A) was not met. Record 4. In their first and a portion of their second
5 assignment of error, petitioners argue that the city council’s denial of their
6 application on that basis exceeded its jurisdiction and improperly construed ORS
7 475C.097(2)(d) and OAR 845-025-1015(98), which prohibit the OLCC from
8 issuing a license for retail sale of marijuana items, as relevant here, “within 1,000
9 feet of: (A) A public elementary or secondary school for which attendance is
10 compulsory under ORS 339.020[.]” In a portion of their second assignment of
11 error, petitioners additionally argue that the city council’s decision is inconsistent
12 with ORS 227.173(1) because the city council relied on a state statute and an
13 OLCC rule that are not part of the TDC as a basis to deny the application.⁶

14 Where a local government denies a land use application on multiple
15 grounds, LUBA will affirm the decision on appeal if at least one basis for denial

⁶ ORS 227.173(1) provides:

“Approval or denial of a discretionary permit application shall be based on standards and criteria, which shall be set forth in the development ordinance and which shall relate approval or denial of a discretionary permit application to the development ordinance and to the comprehensive plan for the area in which the development would occur and to the development ordinance and comprehensive plan for the city as a whole.”

1 survives all challenges. *Wal-Mart Stores, Inc. v. Hood River County*, 47 Or
2 LUBA 256, 266, *aff'd*, 195 Or App 762, 100 P3d 218 (2004). In that
3 circumstance, the Board typically does not address challenges directed at other,
4 alternate, bases for denial. Addressing alternate bases for denial once LUBA has
5 affirmed at least one valid basis for denial would result in rendering what are
6 essentially advisory adjudications, which is not consistent with the statutory
7 mandate that LUBA's review should be conducted pursuant to sound principles
8 of judicial review. ORS 197.805.⁷

9 Because we have rejected petitioners' challenges to a sufficient evidentiary
10 basis for denial under TDC 6.320(E) and conclude that the decision is supported
11 by substantial evidence in the whole record, we need not and do not resolve
12 petitioners' challenges under the first and second assignments of error to other
13 bases for denial.

14 The city's decision is affirmed.

⁷ ORS 197.805 provides:

“It is the policy of the Legislative Assembly that time is of the essence in reaching final decisions in matters involving land use and that those decisions be made consistently with sound principles governing judicial review. It is the intent of the Legislative Assembly in enacting ORS 197.805 to 197.855 to accomplish these objectives.”