

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 ORDER

15 The challenged decision is a city council decision denying petitioners'
16 application for a conditional use permit (CUP) for a marijuana retail store in the
17 General Commercial (GC) zone. The city moves to dismiss the appeal, alleging
18 that an ordinance that the city council adopted after it verbally voted to deny
19 petitioners' application means that our resolution of the appeal will have no
20 practical effect on petitioners' rights or, in other words, that the appeal is moot.¹
21 Petitioners argue that the appeal is not moot. For the reasons explained below,
22 we agree that the appeal is not moot and deny the city's motion.

¹ We previously granted the city's motion to delay transmitting the record and the record has not been received.

1 **BACKGROUND**

2 Under the Troutdale Development Code (TDC), marijuana retail stores are
3 a conditional use in the General Commercial (GC) zone. TDC Section 3.320.² On
4 August 30, 2022, petitioners submitted an application for a CUP for a marijuana
5 retail store in the GC zone.

6 Applications for conditional uses in the GC zone are decided by the city
7 planning commission. The city’s planning staff issued a staff report
8 recommending approval of the application. Petitioners’ Response to
9 Respondent’s Motion to Dismiss 2. The city’s planning commission denied the
10 application on two bases. One basis for denial was that ORS 475C.097(2)(d)
11 prohibits the Oregon Liquor and Cannabis Commission (OLCC) from issuing an
12 OLCC retailer’s license “within 1,000 feet of * * * [a] public elementary or
13 secondary school for which attendance is compulsory under ORS 339.020,” and
14 that the proposed store is located within 1,000 feet of Mt. Hood Community
15 College. NITA Ex 1, at 4.³ The second basis for denial was that the proposal

² Prior to the June 28, 2022 version of the TDC, the TDC prohibited marijuana retail stores in the GC zone within 1,000 feet of a public school, a private school or a public park. Notice of Intent to Appeal (NITA) Ex 1, at 3. The June 28, 2022, amendments to the TDC removed that prohibition.

³ ORS 475C.097(2) requires OLCC to issue an OLCC license for retail sales of marijuana. As relevant here, ORS 475C.097(2)(d) prohibits the OLCC from issuing a license for a marijuana retail store within 1,000 feet of a “[a] public elementary or secondary school for which attendance is compulsory under ORS 339.020[.]” OAR 845-025-1115 includes rules that implement that statute and

1 failed to satisfy TDC 6.320(E), which provides that “[t]he proposed use, as
2 conditioned, will not cause or result in the creation of a public nuisance including,
3 but not limited to, air, land, or water degradation, noise, glare, heat, vibration, or
4 other impacts that may be injurious to public health, safety, and welfare.” *See*
5 NITA Exhibit 1, at 5.

6 Petitioners appealed the planning commission’s decision to the city
7 council. On March 14, 2023, the city council verbally voted to uphold the
8 planning commission’s decision denying the CUP application for the same
9 reasons. At the same meeting on March 14, 2023, the city council adopted
10 Ordinance 882 (the Ordinance) prohibiting new recreational marijuana retail
11 stores within the city, referring the Ordinance to the voters to be voted on in
12 November 2024, and declaring a state of emergency.⁴ On May 12, 2023, the city
13 council sent a notice of decision informing petitioners that the city council had
14 denied petitioners’ application.

OAR 845-025-1015(98) defines “secondary school” as used in the statute and rule to mean “a learning institution containing any combination of grades 9 through 12 and includes junior high schools that have 9th grade.”

⁴ ORS 475C.950(1) and (2) allow the governing body of the city to adopt an ordinance, to be referred to the voters at the next general election, that prohibits marijuana retail sales. Upon receipt of a copy of such an ordinance, OLCC is required to “discontinue licensing those premises to which the prohibition applies until the date of the next statewide general election.” ORS 475C.950(4)(b).

1 **JURISDICTION**

2 Based on ORS 197.805, LUBA has long held that it will decline to exercise
3 its jurisdiction under circumstances where our review would have no “practical
4 effect” on the rights of the parties.⁵ *Graser-Lindsey v. City of Oregon City*, 57 Or
5 LUBA 279, 280-81 (2008); *Thunderbird Hotels, LLC v. City of Portland*, 56 Or
6 LUBA 430, 432 (2008); *Gettman v. City of Bay City*, 28 Or LUBA 121 (1994);
7 *Heiller v. Josephine County*, 25 Or LUBA 555, 556 (1993); *Forest Highlands*
8 *Neigh. Assoc. v. City of Lake Oswego*, 24 Or LUBA 215, 216 (1992). The city
9 moves to dismiss petitioners’ appeal on the grounds of mootness.

10 The city points out that following its adoption of the Ordinance, ORS
11 475C.950(4)(b) prohibits the OLCC from issuing petitioners a marijuana retail
12 license until November 2024 at the earliest. *See* n 4. Accordingly, the city argues,

⁵ Mootness is a judicial justiciability doctrine that is not codified in statutes or rules governing LUBA’s jurisdiction. *See Graser-Lindsey v. City of Oregon City*, 57 Or LUBA at 280 (“Because LUBA is an Executive Department administrative review tribunal, and not part of the Judicial Department, it is not constitutionally required to dismiss appeals simply because a decision by LUBA in an appeal would have no practical effect.”).

However, we note that ORS 14.175(3) allows courts to adjudicate a moot case if the circumstances call for it. *See Couey v. Atkins*, 357 Or 460, 522, 355 P3d 866 (2015) (so holding); *Bishop v. Deschutes County*, 77 Or LUBA 15 (2018) (assuming without deciding that ORS 14.175 is relevant to LUBA’s consideration of a mootness claim under ORS 197.805, which states the policy that LUBA’s review be consistent with “sound principles governing judicial review”).

1 “regardless of the outcome of this LUBA appeal[,]” the challenged decision is
2 moot because petitioners cannot at present secure an OLCC license, and are
3 unable to use the property for the use proposed without an OLCC license. Motion
4 to Dismiss 4. The city argues that LUBA’s decision will not affect the statutory
5 prohibition on OLCC’s issuance of a license prior to November 2024.

6 Petitioners respond that under TDC 2.220(A)(3)(b), a final decision on a
7 CUP application expires two years from the effective date of the decision.
8 Petitioners’ Response to Respondent’s Motion to Dismiss 6. Petitioners point out
9 that November 2024 is less than two years from the date of the final decision,
10 May 12, 2023, and that the voters may reject the Ordinance. In that case,
11 petitioners explain, if petitioners succeed in their appeal to LUBA, they will
12 possess a valid CUP, and will have ample time to obtain an OLCC license for the
13 retail store.

14 We agree with petitioners that the appeal is not moot. The city cites
15 *Altamont Homeowners’ Association, Inc. v. City of Happy Valley*, 76 Or LUBA
16 388, 392 (2017) in support of its motion. Motion to Dismiss 5. In *Altamont*, we
17 dismissed as moot an appeal of a city decision annexing property where the
18 electorate subsequently rejected the annexation while the LUBA appeal was
19 pending. Here, unlike the facts in *Altamont*, the electorate has not yet voted on
20 the issue of whether to prohibit marijuana sales within the city. LUBA’s review
21 of appeals of land use decisions generally results in a decision within four months
22 after the city transmits the record to LUBA and the parties. LUBA’s review of

1 petitioners' challenges to the city council's decision will result in a decision to
2 either affirm, remand, or reverse the city council's decision. If LUBA's decision
3 results in a reversal or remand of the decision, the city will be required to take
4 final action on that reversal or remand within 120 days of the effective date of
5 LUBA's decision. ORS 227.181(1). It is at least possible, then, that petitioners
6 could secure a CUP to operate the store in the GC zone and that they could secure
7 that CUP well before the November 2024 general election.⁶ We also agree with
8 petitioners that depending on the outcome of the 2024 general election
9 referendum on the Ordinance, and depending on the outcome of the LUBA
10 appeal, petitioners may be able to secure an OLCC license for the retail marijuana
11 store.

12 Petitioners requested a telephone conference hearing on the motion to
13 dismiss pursuant to OAR 661-010-0065(3). We exercise our discretion to resolve
14 the motion without a telephone conference.

15 The city's motion to dismiss is denied.

16 **RECORD TRANSMITTAL**

17 Within 14 days of the date of this Order, the city shall transmit the record
18 to the Board and serve the same on petitioners.

⁶ ORS 227.178(3)(a) requires in relevant part that "approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted."

1 Dated this 4th day of August 2023.

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Melissa M. Ryan

6 Board Chair