

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

3  
4                                   KEN KOVASH,  
5                                   *Petitioner,*

6  
7                                   vs.

8  
9                                   COLUMBIA COUNTY,  
10                                  *Respondent.*

11  
12                                  LUBA No. 2015-040

13  
14                                  FINAL OPINION  
15                                  AND ORDER

16  
17                                  Appeal from Columbia County.

18  
19                                  Ross Day, Portland, filed the petition for review and argued on behalf of  
20                                  petitioner. With him on the brief was Day Law Group, PC.

21  
22                                  Robin Rojas McIntyre, County Counsel, St. Helens, filed a response  
23                                  brief and argued on behalf of respondent.

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

27  
28                                  INVALIDATED                                  09/17/2015

29  
30                                  You are entitled to judicial review of this Order. Judicial review is  
31                                  governed by the provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioner appeals Ordinance 2015-3, a county ordinance adopting a moratorium under ORS 197.520 on the establishment of new and expansion of existing marijuana facilities in the county.

**INTRODUCTION**

A brief explanation of the state’s laws regulating the growing, production and sale of marijuana is necessary in order to understand this appeal. In 1998, Oregon voters approved Ballot Measure 67, the Oregon Medical Marijuana Act (OMMA), which allowed the medical use of marijuana and established a permit system for medical marijuana use. ORS 475.300 to 475.346 and OAR chapter 333, division 8. The Oregon Health Authority (OHA) administers the state’s medical marijuana program and, among other duties, issues registry identification cards to persons who qualify to use marijuana for medical purposes. Petitioner is a medical marijuana card holder and also grows “ingestible tinctures and seeds” on his three-acre property located in the county. Record 141-143.

In 2013, the legislature amended the OMMA to create a system of registered dispensaries for medical marijuana card holders. Or Laws 2013, ch726 (House Bill 3460). In 2014, the legislature further amended the OMMA to (1) allow local governments to adopt ordinances that impose reasonable regulations on medical marijuana dispensaries that are located within the area of the city or county, and (2) allow local governments to enact a moratorium on the operation of medical marijuana dispensaries until May 1, 2015. Or Laws 2014, ch 79, §§ 2 and 3 (Senate Bill (SB) 1531C). On April 9, 2014, the county adopted Ordinance 2014-5, pursuant to SB 1531C, and imposed a one

1 year moratorium on medical marijuana dispensaries. Record 8-9. That  
2 moratorium expired on May 1, 2015. Record 9.

3 In November 2014, Oregon voters approved Ballot Measure 91, which  
4 legalized recreational marijuana and effective July 1, 2015, allowed state  
5 residents to grow and possess in their homes limited amounts of marijuana for  
6 personal recreational use. Measure 91 placed administrative authority over the  
7 state’s recreational marijuana program with the Oregon Liquor Control  
8 Commission (OLCC). OLCC is required to begin accepting applications for  
9 recreational marijuana licensing of growers, processors, wholesalers, and  
10 retailers beginning January 4, 2016. The operative date of Ballot Measure 91  
11 is January 1, 2016.

12 On April 29, 2015, the county adopted Ordinance 2015-3, the subject of  
13 this appeal, pursuant to ORS 197.520. Ordinance 2015-3 imposed a 120-day  
14 moratorium, to expire on August 27, 2015. The Ordinance 2015-3 moratorium  
15 is on “establishment of new and expansion of existing marijuana facilities” in  
16 the county.<sup>1</sup> The Ordinance defines “marijuana facilities” as “[o]utdoor areas  
17 used for growing marijuana whether for medical or recreational purposes” and  
18 “[a]ny facility that dispenses marijuana pursuant to ORS 475.314 or any other  
19 provision of Oregon law.” Record 9. The Ordinance, then, imposed a  
20 moratorium on (1) new or expanded outdoor grow sites; and (2) medical  
21 marijuana dispensaries.<sup>2</sup>

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<sup>1</sup> The county has informed the Board and the parties that on August 25, 2015, the county adopted an ordinance that extended the moratorium adopted by Ordinance 2015-3 for an additional six months to February 27, 2016.

<sup>2</sup> After Ordinance 2015-3 was adopted, during the 2015 legislative session, the legislature amended Measure 91. Oregon Laws 2015, chapter 614 (HB

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3400) passed the Senate on June 30, 2015. HB 3400 becomes operative on January 1, 2016 but different prospective operative dates apply to different provisions of HB 3400. Sections 133 and 134 are effective on passage.

HB 3400 allows local governments to adopt reasonable regulations on the production, processing, and wholesale and retail sale of medical and recreational marijuana. Section 33 of HB 3400 provides:

- “(1) For purposes of this section, ‘reasonable regulations’ includes:
  - “(a) Reasonable conditions on the manner in which a marijuana producer licensed under section 19, chapter 1, Oregon Laws 2015, may produce marijuana;
  - “(b) Reasonable conditions on the manner in which a marijuana processor licensed under section 20, chapter 1, Oregon Laws 2015, may process marijuana;
  - “(c) Reasonable conditions on the manner in which a marijuana wholesaler licensed under section 21, chapter 1, Oregon Laws 2015, may sell marijuana at wholesale;
  - “(d) Reasonable limitations on the hours during which a marijuana retailer licensed under section 22, chapter 1, Oregon Laws 2015, may operate;
  - “(e) Reasonable conditions on the manner in which a marijuana retailer licensed under section 22, chapter 1, Oregon Laws 2015, may sell marijuana items;
  - “(f) Reasonable requirements related to the public’s access to a premises for which a license has been issued under section 19, 20, 21 or 22, chapter 1, Oregon Laws 2015; and

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- “(g) Reasonable limitations on where a premises for which a license may be issued under section 19, 20, 21 or 22, chapter 1, Oregon Laws 2015, may be located.
- “(2) Notwithstanding ORS 633.738, the governing body of a city or county may adopt ordinances that impose reasonable regulations on the operation of businesses located at premises for which a license has been issued under section 19, 20, 21 or 22, chapter 1, Oregon Laws 2015, if the premises are located in the area subject to the jurisdiction of the city or county, except that the governing body of a city or county may not adopt an ordinance that prohibits a premises for which a license has been issued under section 22, chapter 1, Oregon Laws 2015, from being located within a distance that is greater than 1,000 feet of another premises for which a license has been issued under section 22, chapter 1, Oregon Laws 2015.
- “(3) Regulations adopted under this section must be consistent with city and county comprehensive plans and zoning ordinances and applicable provisions of public health and safety laws.”

HB 3400 Section 89 provides:

- “(1) For purposes of this section, ‘reasonable regulations’ includes:
- “(a) Reasonable limitations on the hours during which the marijuana grow site of a person designated to produce marijuana by a registry identification cardholder, a marijuana processing site or a medical marijuana dispensary may operate;
- “(b) Reasonable conditions on the manner in which a marijuana processing site or medical marijuana dispensary may transfer usable marijuana, medical cannabinoid products, cannabinoid concentrates,

1 **SECOND ASSIGNMENT OF ERROR**

2 **A. ORS 197.520**

3 ORS 197.520 distinguishes between moratoria that are needed “to  
4 prevent a shortage of public facilities” and moratoria that are “not based on a  
5 shortage of public facilities.” The moratorium challenged in this proceeding is  
6 of the latter type. ORS 197.520(3) allows the county to adopt a moratorium on  
7 “construction or land development” based on the following:

8 “A moratorium not based on a shortage of public facilities under  
9 subsection (2) of this section may be justified only by a  
10 demonstration of compelling need. Such a demonstration shall be  
11 based upon reasonably available information and shall include, but  
12 need not be limited to, findings:

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cannabinoid extracts, immature marijuana plants and seeds;

“(c) Reasonable requirements related to the public’s access to the marijuana grow site of a person designated to produce marijuana by a registry identification cardholder, a marijuana processing site or a medical marijuana dispensary; and

“(d) Reasonable limitations on where the marijuana grow site of a person designated to produce marijuana by a registry identification cardholder, a marijuana processing site or a medical marijuana dispensary may be located.

“(2) Notwithstanding ORS 633.738, the governing body of a city or county may adopt ordinances that impose reasonable regulations on the operation of marijuana grow sites of persons designated to produce marijuana by registry identification cardholders, marijuana processing sites and medical marijuana dispensaries that are located in the area subject to the jurisdiction of the city or county.”

1           “(a) For urban or urbanizable land:

2                   “(A) That application of existing development ordinances  
3                   or regulations and other applicable law is inadequate  
4                   to prevent irrevocable public harm from development  
5                   in affected geographical areas;

6                   “(B) That the moratorium is sufficiently limited to ensure  
7                   that a needed supply of affected housing types and the  
8                   supply of commercial and industrial facilities within  
9                   or in proximity to the city, county or special district  
10                  are not unreasonably restricted by the adoption of the  
11                  moratorium;

12                  “(C) Stating the reasons alternative methods of achieving  
13                  the objectives of the moratorium are unsatisfactory;

14                  “(D) That the city, county or special district has  
15                  determined that the public harm which would be  
16                  caused by failure to impose a moratorium outweighs  
17                  the adverse effects on other affected local  
18                  governments, including shifts in demand for housing  
19                  or economic development, public facilities and  
20                  services and buildable lands, and the overall impact  
21                  of the moratorium on population distribution; and

22                  “(E) That the city, county or special district proposing the  
23                  moratorium has determined that sufficient resources  
24                  are available to complete the development of needed  
25                  interim or permanent changes in plans, regulations or  
26                  procedures within the period of effectiveness of the  
27                  moratorium.

28           “(b) For rural land:

29                   “(A) That application of existing development ordinances  
30                   or regulations and other applicable law is inadequate  
31                   to prevent irrevocable public harm from development  
32                   in affected geographical areas;

1           “(B) Stating the reasons alternative methods of achieving  
2           the objectives of the moratorium are unsatisfactory;

3           “(C) That the moratorium is sufficiently limited to ensure  
4           that lots or parcels outside the affected geographical  
5           areas are not unreasonably restricted by the adoption  
6           of the moratorium; and

7           “(D) That the city, county or special district proposing the  
8           moratorium has developed a work plan and time  
9           schedule for achieving the objectives of the  
10          moratorium.”

11          The county moratorium before us includes mostly rural land but also includes  
12          some “urbanizable” land.

13          Section 3 of Ordinance 2015-3 sets out the objectives of the moratorium:

14          “\* \* \* The purpose of the temporary moratorium is to delay  
15          development of County land use regulations for recreational and  
16          medical marijuana until the state regulations have been adopted.  
17          The moratorium will therefore allow the County to develop  
18          comprehensive zoning regulations that are consistent with state  
19          regulations for both recreational and medical marijuana.  
20          Furthermore, by waiting until the state regulations are adopted, the  
21          County seeks to avoid adopting local land use regulations that  
22          would have to be immediately revisited to comply with the new  
23          state regulations.” Record 8.

24          The county adopted findings stating:

25          “[t]he intent of the moratorium is to allow the County additional  
26          time to develop land use regulations to govern the siting and  
27          development of marijuana facilities and to seek public input in  
28          doing so. Additional time is needed in light of the staggered  
29          effective dates of state regulations affecting medical and  
30          recreational marijuana and the County’s desire to adopt one  
31          comprehensive zoning ordinance for both medical and recreational  
32          marijuana land uses.” Record 12.

1 According to the county, then, the objective of the moratorium is to allow the  
2 county time to develop comprehensive zoning regulations for both medical and  
3 recreational marijuana related uses.

4 **B. ORS 197.520(3)(a)(C) and ORS 197.520(3)(b)(B) - Alternative**  
5 **Methods of Achieving the Moratorium’s Objectives**

6 The county found that the county’s alternatives to achieve the objective  
7 of developing zoning regulations for marijuana related uses were to (1) apply  
8 its current regulations; (2) adopt a moratorium; or (3) adopt zoning regulations  
9 for medical marijuana by May 1, 2015 and then later adopt zoning regulations  
10 for recreational marijuana. Regarding the first alternative the county identified,  
11 the county found that its current zoning ordinance “provides no guidance or  
12 regulation for the siting of either medical or recreational marijuana facilities.”  
13 Record 16. Regarding the other, non-moratorium option of adopting zoning  
14 regulations, the county found:

15 “[That option] is unsatisfactory because it will require a  
16 duplication of efforts within a relatively short time frame. As  
17 explained in the Background section, \* \* \* Oregon’s two  
18 marijuana programs have staggered time lines for implementation.  
19 To comply with the OMMA, the County would have to adopt  
20 regulations for medical marijuana dispensaries by May 1, 2015.  
21 The County would then be revisiting those regulations around  
22 January 2016 when it implements regulations for recreational  
23 marijuana. The County’s resources are too limited to duplicate the  
24 significant effort that legislative land use actions require, which  
25 includes the costly notice pursuant to ORS 215.503.” Record 17.

26 In his second assignment of error, petitioner argues that the county’s  
27 findings setting forth the “reasons alternative methods of achieving the  
28 objectives of the moratorium are unsatisfactory” fail to demonstrate a  
29 compelling need for the moratorium because the county has sufficient time to  
30 adopt zoning regulations to address the irrevocable public harms that it has

1 identified, but simply chose not to do so for the sake of administrative  
2 convenience.<sup>3</sup>

3 The county responds that adopting zoning regulations for medical  
4 marijuana facilities that would have to potentially be amended within  
5 approximately 8 months after they were initially adopted to include recreational  
6 marijuana facilities is a sufficient justification for imposing a moratorium,  
7 because it is costly to the county and requires a duplication of effort that is  
8 inefficient.

9 In *Davis v. City of Bandon*, 19 Or LUBA 327, 336 (1991), we explained:

10 “The statutory scheme demonstrates a clear legislative preference  
11 for proceeding by way of normal planning processes, not by way  
12 of moratoria. Before existing development ordinances and  
13 regulations are suspended by way of a moratorium, they must be  
14 shown to be inadequate. ORS 197.520(3)(a). Even if the  
15 ordinances and regulations are inadequate, alternative methods of  
16 achieving the objectives of the moratorium must be unsatisfactory.  
17 ORS 197.520(3)(c). \* \* \* The nature and scope of the irrevocable  
18 public harm must be such that it outweighs the adverse effects on  
19 other affected local governments that may result from the  
20 moratorium. ORS 197.520(3)(d). Finally, the city must determine  
21 that it has the resources to develop needed plans or regulations  
22 within the term of the moratorium. ORS 197.520(3)(e). ORS  
23 197.520(3) states that all of these determinations must be part of  
24 the determination of compelling need.” (Original emphasis and  
25 footnote omitted).

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<sup>3</sup> Those irrevocable public harms are identified at Record 15-16 and are briefly described as: (1) strong odor associated with mature plants that is offensive and can cause respiratory problems; (2) increased risk to public safety from the presence of high-value plants; and (3) the lack of a buffer allowance in the OMMA for day care centers, public parks, and other locations where children are present.

1 We first note that in its findings the county takes the position that zoning  
2 regulations can address the irrevocable public harms identified by the county in  
3 other findings.<sup>4</sup> Given that position, we are not persuaded that the county has  
4 demonstrated a compelling need for the moratorium that cannot be addressed  
5 by adopting zoning regulations. Administrative convenience for the county in  
6 avoiding duplicative amendments to its zoning regulations is not a sufficient  
7 justification to delay or avoid the normal planning process for planning and  
8 zoning land uses.

9 With respect to medical marijuana facilities, since March 2014,  
10 approximately 14 months before the county adopted the challenged  
11 moratorium, the county had the authority through SB 1531C to adopt  
12 reasonable regulations to regulate medical marijuana dispensaries located  
13 within the county.<sup>5</sup> At that time, the only marijuana program that existed in the  
14 state was the OMMA, and therefore the only potential marijuana related uses to  
15 zone for in the county were ones authorized under the OMMA. Had the county  
16 taken advantage of the approximately 14-month period between March 2014  
17 and May 1, 2015 to develop and adopt reasonable regulations on medical

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<sup>4</sup> In identifying the irrevocable public harm that the moratorium seeks to prevent, the county found that “the impacts of grow sites can be mitigated through zoning regulations[.]” and that “without zoning regulations, dispensaries and other marijuana facilities could be sited in locations that put children at risk thus causing irrevocable harm.” Record 16.

<sup>5</sup> Section 2 of SB 1531C defines “reasonable regulations” to include “reasonable limitations on the hours during which medical marijuana facility may be operated, reasonable limitations on where a medical marijuana facility may be located within a zone described in ORS 475.314(3)(a) and reasonable conditions on the manner in which a medical facility may dispense medical marijuana.”

1 marijuana facilities, those regulations would have been in place on May 1,  
2 2015, when the county adopted the challenged moratorium, and would  
3 presumably have addressed the harm from medical marijuana facilities that the  
4 county now identifies in its findings.

5         With respect to recreational marijuana facilities, as noted above, under  
6 both Measure 91 and HB 3400, the operative date of that legislation is January  
7 1, 2016, and the earliest that the OLCC must begin processing applications for  
8 recreational marijuana facilities is January 4, 2016. Therefore, when the  
9 county adopted the challenged moratorium on May 1, 2015, there were no  
10 recreational marijuana uses authorized under the state’s recreational marijuana  
11 program. Stated differently, the county has adopted a moratorium on uses that  
12 are not allowed in the county until January 1, 2016 rather than adopt reasonable  
13 plan and zone regulations for those uses so that they can be in effect when the  
14 legislation becomes operative. The county has not explained why it cannot,  
15 between May 1, 2015 and January 1, 2016, adopt zoning regulations governing  
16 recreational marijuana facilities that might eventually be located in the county  
17 sometime after January 1, 2016.

18         In summary, the county has failed to demonstrate a compelling need for  
19 the moratorium, because it has failed to demonstrate that adopting zoning  
20 regulations for medical and recreational marijuana facilities is unsatisfactory,  
21 especially given the county’s position that zoning regulations will address the  
22 harm to the public identified in the county’s decision. Accordingly, we  
23 conclude that the moratorium was not adopted in compliance with ORS  
24 197.540(3)(a)(C) and 197.540(3)(b)(B).

25         The second assignment of error is sustained.

1 **FIRST ASSIGNMENT OF ERROR**

2 In his first assignment of error, petitioner argues that the moratorium  
3 violates ORS 633.738(2), which prohibits the county from adopting regulations  
4 that have the effect of preventing a property owner in the county from growing  
5 marijuana seed.<sup>6</sup> Because we conclude above that the county has failed to

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<sup>6</sup> ORS 633.738 provides:

(1) As used in this section:

“(a) ‘Local government’ has the meaning given that term in ORS 174.116.

“(b) ‘Nursery seed’ means any propagant of nursery stock as defined in ORS 571.005.

“(2) Except as provided in subsection (3) of this section, a local government may not enact or enforce a local law or measure, including but not limited to an ordinance, regulation, control area or quarantine, to inhibit or prevent the production or use of agricultural seed, flower seed, nursery seed or vegetable seed or products of agricultural seed, flower seed, nursery seed or vegetable seed. The prohibition imposed by this subsection includes, but is not limited to, any local laws or measures for regulating the display, distribution, growing, harvesting, labeling, marketing, mixing, notification of use, planting, possession, processing, registration, storage, transportation or use of agricultural seed, flower seed, nursery seed or vegetable seed or products of agricultural seed, flower seed, nursery seed or vegetable seed.

“(3) Subsection (2) of this section does not prohibit a local government from enacting or enforcing a local law or measure to inhibit or prevent the production or use of agricultural seed, flower seed, nursery seed or vegetable seed or products of agricultural seed, flower seed, nursery

1 demonstrate a compelling need for the moratorium, we are required under ORS  
2 197.540(2) to issue an order invalidating the moratorium.<sup>7</sup> Accordingly, we  
3 need not and do not reach the first assignment of error.

4 In addition, we question whether the issue presented in the first  
5 assignment of error is within our scope of review under ORS 197.540(4).<sup>8</sup> As  
6 we explained in *Thunderbird Hotels, LLC v. City of Portland*, 54 Or LUBA  
7 487, 491 (2007), in reviewing a challenge to a moratorium, LUBA’s scope of  
8 review is limited to determining whether the moratorium was adopted in  
9 violation of ORS 197.505 to 197.530. *See also Schatz v. City of Jacksonville*,  
10 21 Or LUBA 149, 155-158 (1991) (finding that an assignment of error that the  
11 city’s adoption of a moratorium violated the city’s charter and ORS 221.310  
12 was outside of LUBA’s scope of review). The first assignment of error argues  
13 that the moratorium violates ORS 633.738. That issue is almost certainly  
14 beyond the limited scope of review the legislature enacted in ORS 197.540(4).

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seed or vegetable seed on property owned by the local  
government.”

<sup>7</sup> ORS 197.540(2) provides:

“If the board determines that a moratorium or corrective program  
was not adopted in compliance with the provisions of ORS  
197.505 to 197.540, the board shall issue an order invalidating the  
moratorium.”

<sup>8</sup> ORS 197.540(4) provides:

“Notwithstanding any provision of ORS Chapters 195, 196 and  
197 to the contrary, the sole standard of review of a moratorium on  
construction or land development or a corrective program is under  
the provisions of this section, and such a moratorium shall not be  
reviewed for compliance with the statewide planning goals  
adopted under ORS chapters 195, 196 and 197.”

1           The Ordinance is invalidated.