

1 **BEFORE THE LAND USE HEARINGS OFFICER FOR**
2 **CITY OF TALENT, OREGON**

3
4 In the matter of an appeal from the City)
5 of Talent Planning Commission revoking)
6 a conditional use permit (CUP 2016-004))
7 for a marijuana retail use located at 630)
S. Pacific Highway, Talent, Oregon, and)
described as Map 381W25B Lot 2801)

File No. APL 2020-001 (CUP 2016-004)

DECISION AND FINAL ORDER

8 Applicant: City of Talent)

9 Appellant: Grateful Meds LLC)
10)

11 **THE APPEAL IS GRANTED AND THE APPLICATION IS DENIED**

12 **I. INTRODUCTION AND PROCEDURAL POSTURE**

13 On November 1, 2016, the City of Talent Planning Commission issued an order under
14 File No. 2016-004 approving a conditional use permit (the “CUP”) to Grateful Meds LLC, for
15 retail marijuana sales.¹ The site had previously been approved in 2014 for use as a Medical
16 Marijuana Dispensary, which only required site development plan review.² The addition of the
17 retail marijuana sales use required conditional permit review. *See* Former Talent Zoning
18 Ordinance §8-3D.450. Although not discussed in this matter by the parties, revocation of that
19 conditional use permit would only affect the retail marijuana sales use and not the medical
20 marijuana dispensary use.

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¹ Administrative Record (“AR”) 54 – 64.

23 ² AR 28

1 The property on which the use is located has the common address of 630 South Pacific
2 Highway, Talent, Oregon, and is described as Township 38, Range 1W, Section 25B, Tax Lot
3 2801.³ The business has had a number of instances of noncompliance with City regulations,
4 including failure to obtain business licenses and failure to pay City-imposed taxes.⁴ In response,
5 the City Community Development Department applied to the Planning Commission to revoke
6 the CUP approval pursuant to Talent Municipal Code (“TMC”) 18.155.110.⁵ The Commission
7 held a property-noticed hearing on January 28, 2020.⁶ The Commission issued an Order on
8 January 31, 2020, revoking the CUP based on both current and past violations of business license
9 regulations, tax payments, and failure to comply with a CUP condition of approval (the
10 “Revocation Decision”).⁷ The Commission’s Notice of Decision was published on February 3,
11 2020.⁸

12 Permit holder Grateful Meds, LLC, (“Appellant”) timely appealed the Revocation
13 Decision on February 14, 2020, by and through its legal counsel Eric Stark and Stark and
14 Hammack, PC.⁹ The City mailed and published a Notice of Hearing for a *de novo* hearing
15 before the City of Talent Land Use Hearings Officer.¹⁰ On July 22, 2020, the Hearings Officer
16 conducted a hearing via videoconference (the “Hearing”) pursuant to Oregon Governor’s
17 Executive Order 20-16 and City of Talent Resolution 2020-009-R.¹¹ At the close of the Hearing,
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19 ³ Id.

20 ⁴ AR 16 0 17; AR 28 – 29.

21 ⁵ AR 12 – 64.

22 ⁶ AR 65 – 70.

23 ⁷ AR 98 – 101.

24 ⁸ AR 102 – 104.

⁹ AR 105 – 109.

¹⁰ AR 111 – 115.

¹¹ AR 124.

1 the Hearings Officer left the administrative record open at the request of Appellant for three
2 post-hearing periods.¹² The record was closed on August 19, 2020.

3 All the documents in the administrative record, the oral testimony at the Hearing, and the
4 evidence and argument submitted during the three post-hearing periods comprise the
5 administrative record in this proceeding. The matter is now properly before the City's Hearings
6 Officer for decision.

7 Unfortunately, the building in which Appellant's use was located at 630 South Pacific
8 Highway was destroyed in the Almeda Fire, which destroyed many buildings in Talent on
9 September 8 – 9, 2020. The destruction of the premises does not make this matter moot. The
10 parties and property owner need to know the status of the CUP for rebuilding purposes, for
11 planning, and potentially for insurance purposes.

12 **II. APPLICABLE CRITERIA**

13 The applicable land use criteria for this matter is Talent Municipal Code 18.155.110
14 (Termination of a Conditional Use).

15 **III. FINDINGS OF FACT AND LEGAL CONCLUSIONS**

16 **A. Applicable Legal Standards.**

17 The request by the City for CUP revocation called for the application TMC Chapter
18 18.155 regarding conditional uses. Conditional use decisions are a Type III approval, and the
19 City correctly treated the revocatin as a Type III process under the Talent Municipal Code.
20 TMC 18.190.020. Type III applications are decided by the City of Talent Planning Commission.
21 TMC 18.190.050.D & E. The Planning Commission decision may be appealed to the City's
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23 ¹² AR 70 – 71.

1 Land Use Hearings Officer, and that appeal is a *de novo* proceeding. Accordingly, the Hearings
2 Officer is allowed to take new evidence on any relevant issue and is not required to accord
3 deference to the decision of the Planning Commission. TMC 18.190.050.F. The applicant has
4 the burden of proof to show that its application meets the applicable land use criteria for
5 approval. TMC 18.190.050.B.2

6 Because this is a *de novo* proceeding, the applicable standard of review is preponderance
7 of the evidence. *Morgan v. Jackson County*, LUBA No. 2017-053 (Or. LUBA 2018 – Final
8 Opinion and Order on Remand) at 15 – 17. Court decisions in land use matters often refer to the
9 substantial evidence standard of review. That standard is applicable in proceedings before the
10 Land Use Board of Appeals, where the court gives some deference to the decision below.¹³ The
11 preponderance of evidence standard is applicable in this *de novo* proceeding before the Hearings
12 Officer. *Morgan* at 15 – 17.

13 If required to interpret the County’s ordinances or state statutes, the Hearings Officer’s
14 primary task is to discern the intent of the legislative body, beginning with an examination of the
15 text of the ordinance or statute in its context. *State v. Gaines*, 346 Or. 160, 171, 206 P.3d 1042
16 (2009) (text and context provide the best evidence of legislative intent). The Hearings Officer
17 must also apply the rule of statutory construction set out by the Legislature in ORS 174.010:

18 In the construction of a statute, the office of the judge is simply to ascertain and declare
19 what is, in terms or in substance, contained therein, not to insert what has been omitted,
20 or to omit what has been inserted; and where there are several provisions or particulars
21 such construction is, if possible, to be adopted as will give effect to all.

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¹³ See ORS 197.835(9)(a)(C) and (D).

1 ORS 174.010; *Clackamas County v. Gay*, 146 Or. App. 706, 711, 934 P.2d 551 (1997) (court
2 refused to add automatic repeal language to statute affecting local land use regulations, citing
3 ORS 174.010 as authority).

4 **B. Resolution of Procedural Issues**

5 **1. Failure of Planning Commission to Leave Record Open**

6 Appellant argues that the Planning Commission failed to honor a request to leave open
7 the administrative record after its January 28, 2020, hearing. The record was unclear about
8 whether such a request was clearly made to the Commission. Whatever the case, any procedural
9 error has been cured because Appellant has had a chance to submit all relevant evidence in the *de*
10 *novi* Hearing before the Hearings Officer.

11 **2. Substantial Evidence Before Planning Commission**

12 Appellant argues that the Planning Commission decision was not supported by
13 substantial evidence in the record. The Hearings Officer is not required to defer to the
14 evidentiary findings made by the Planning Commission. Accordingly, this issue is not relevant
15 in this proceeding. As noted above, the Hearings Officer review is *de novo*, and the substantial
16 evidence standard of review only applies on appeals to the Land Use Board of Appeals. The
17 standard of review in this proceeding is preponderance of the evidence.

18 **C. Compliance With Land Use Criteria**

19 The criteria in the Talent Municipal Code for revocation of a condition use are found in
20 TMC 18.155.110:

21 A conditional use may be revoked or modified by the planning commission, after
22 public hearing, on any one or more of the following grounds:
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1 A. Approval of the conditional use was obtained by fraud or
2 misrepresentation.

3 B. The use for which approval was granted has ceased to exist.

4 C. The use does not meet the conditions specifically established for it at
5 the time of the approval of the application.

6 D. The use is in violation of any provision of this title or of any other
7 applicable statute, ordinance or regulation.

8 TMC 18.155.110.

9 **1. Past Violations**

10 Appellant argues that the City cannot rely on historic violations that were subsequently
11 cured, in order to revoke the CUP. Appellant is correct. The Commission based its decision in
12 part on a number of past violations such as a delinquent business license in 2016, failure to
13 register with Oregon Health Authority in 2017 as medical marijuana dispensary,¹⁴ and 2019
14 delinquent taxes. To the extent these violations related to the retail marijuana operation and were
15 cured,¹⁵ they are not relevant to this proceeding and cannot be a basis for CUP revocation. The
16 relevant ordinance states that a CUP may be revoked if the “use is in violation of any provision
17 of this title or any other applicable statute, ordinance or regulation.” TMC 18.155.110(D)
18 (emphasis added). The ordinance uses the present tense, so past violations (cured prior to this
19 appeal proceeding) are not relevant here.

20 The Hearings Officer understands that it is irritating and time-wasting for a city to deal
21 with recurrent violations. If the violations have been cured, however, they are not a basis for

22 ¹⁴ As noted above, violations related to the medical marijuana dispensary use are simply
23 irrelevant to the CUP for the retail marijuana use.

24 ¹⁵ The City notes, for example, that the earlier business license violation was cured in June 2019.
AR 29.

1 revocation of a conditional use permit under TMC 18.155.110. That does not mean the City is
2 without remedies. For business license violations, the City may levy a penalty of up to \$100 per
3 violation, and each day without a license is a separate violation. TMC 5.01.110. For retail
4 marijuana tax violations, penalties of 10% may be levied, with the penalty rising to 25% for
5 amounts over 30 days in arrears. TMC 3.10.050.

6 **2. Compliance With Business License Ordinance**

7 The Planning Commission revoked the CUP in part because of Appellant’s failure to
8 obtain a business license.

9 The City’s ordinance allows revocation of a conditional use permit when “[t]he use is in
10 violation of any provision of this title or of any other applicable statute, ordinance or regulation.”
11 TMC 18.155.110(D). This is incredibly broad and certainly has the potential to violate
12 ORS 475B.486 (cities may only impose reasonable conditions on the manner in which a
13 marijuana retailer holding a state license sells marijuana items); *see* ORS 475B.454 (Adult and
14 Medical Use Cannabis Act expressly preempts local regulation except as specifically authorized
15 by state law). The Hearings Officer finds that a requirement to obtain a business license is a
16 reasonable local regulation.

17 It is also unclear whether the term “other applicable statute, ordinance or regulation” in
18 TMC 18.155.110(D) should be construed to encompass laws beyond land use and zoning law.
19 *See Morgan v. Jackson County*, 290 Or. App. 111, 414 P.3d 917 (Or. App. 2018), *rev.den.*, 362
20 Or. 860 (Or. 2018) (in nonconforming use case, the statutory phrase “lawful use of any building,
21 structure or land” held to refer only to land use and zoning laws and not to business licensing
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1 laws). It is unnecessary for the Hearings Officer to decide that question because the Hearings
2 Officer finds there is no current noncompliance with the City’s business license ordinance.

3 The evidence in the record shows that Appellant has applied for the required business
4 license for the current year and paid application fees. The only reason there was no current
5 license is because the City was withholding issuance of the license pending resolution of the
6 financial reporting requirements of CUP Condition 10. As discussed in more detail below, as a
7 result of this proceeding Appellant has complied with Condition 10. Accordingly, the Hearings
8 Officer concludes that the CUP cannot be revoked based on failure to obtain a business license.

9 **3. Compliance with CUP Condition 10**

10 The City’s ordinance allows revocation of a conditional use permit when “[t]he use does
11 not meet the conditions specifically established for it at the time of the approval of the
12 application.” TMC 18.155.110(C). The CUP Decision contained ten conditions of approval.¹⁶
13 There is no allegation of noncompliance with the three general conditions (Conditions 1 – 3).
14 Six conditions (Conditions 4 – 9) had to be complied with prior to issuance of the first business
15 license. The record shows that there were some initial problems with compliance (such as timely
16 supplying state licenses), but the Appellant came into compliance with those conditions and the
17 first business license was issued. Condition 10 is an ongoing condition that requires the
18 Appellant to “provide Community Development with a complete copy of all financial records
19 subject to audit consistent with Ordinance 14-875-O.”¹⁷ (Ordinance 14-875 is the prior
20 ordinance enacting the City’s local marijuana tax. The marijuana tax ordinance is currently
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22 ¹⁶ AR 54 -55.

23 ¹⁷ AR 55.

1 codified at TMC Chap. 3.10.) Non-compliance with Condition 10 was one of the reasons the
2 Planning Commission revoked Appellant’s CUP.

3 Prior to this proceeding, Appellant had not provided this annual accounting to the City.
4 Appellant argued that it had provided the accounting annually to the Oregon Department of
5 Revenue (“DOR”), which they argue is the “tax administrator” referenced in TMC 3.10.040(A).
6 The term “tax administrator” is defined in TMC 3.10.010 as the Talent City Manager or her
7 designee, not the DOR. Because the City has entered into an agreement with DOR that allows
8 the Department to administer the tax on the City’s behalf, Appellant is probably correct that
9 DOR is the City Manager’s designee under TMC 3.10.010.¹⁸ CUP Condition 10, however,
10 requires financial records be forwarded to City of Talent Community Development, which has
11 not been done prior to this proceeding.

12 Appellant also argues that the City never requested the records as contemplated in
13 TMC 3.10.040. That ordinance allows the City to inspect retail marijuana business records and
14 requires the taxpaying retail marijuana business to furnish those records. This argument also
15 ignores the actual language of CUP Condition 10, which affirmatively requires Appellant to
16 furnish records annually to the City prior to the issuance of its annual business license.¹⁹

17 By way of explanation, Appellant’s managing member stated that the organization had
18 experienced difficulty in complying with the Oregon marijuana regulatory scheme at this store,
19 but he thought they were now doing well with the paperwork. Several employees of the business
20 also testified to the improved organization and compliance of the business. This is no excuse for

21 ¹⁸ DOR website at [https://www.oregon.gov/dor/programs/businesses/Pages/marijuana-local-](https://www.oregon.gov/dor/programs/businesses/Pages/marijuana-local-tax.aspx)
22 [tax.aspx](https://www.oregon.gov/dor/programs/businesses/Pages/marijuana-local-tax.aspx). DOR’s public records of which jurisdictions have entered into retail marijuana tax
23 administration agreements is a public record of which the Hearings Officer may take notice.

¹⁹ AR 55.

1 failure to comply with CUP Condition 10, however, and as part of the post-Hearing submittals
2 Appellant provided the City with the same reporting data that it had provided to Oregon Liquor
3 Control Commission regarding the retail marijuana use.²⁰

4 The Hearings Officer finds that appellant’s provision of financial records in this
5 proceeding cures any noncompliance with Condition 10 of the CUP. Accordingly, the Hearings
6 Officer holds that the CUP may not be revoked for noncompliance with CUP Condition 10 based
7 on TMC 18.155.110(C).

8 **4. Compliance With City of Talent Marijuana Tax Ordinance.**

9 The City’s ordinance allows revocation of a conditional use permit when “[t]he use is in
10 violation of any provision of this title or of any other applicable statute, ordinance or regulation.”
11 TMC 18.155.110(D). The Planning Commission revoked the CUP in part because of
12 Appellant’s failure to pay the local marijuana tax imposed by TMC Chapter 3.10.

13 State law allows, with local voter approval, local jurisdictions to levy a tax of up to three
14 percent on retail marijuana sales, which is in addition to the 17 percent state tax on retail
15 marijuana sales. TMC Chapter 3.10 imposes the allowable three percent tax, and provides for
16 penalties for late payment unless the taxpayer has been “granted an extension of time for
17 remittance of tax due.” TMC 3.10.050(A) & (B).

18 State law also allows local jurisdictions to enter into an agreement with the Oregon
19 Department of Revenue (“DOR”) under which DOR will administer the local retail marijuana

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21 ²⁰ AR 173 – 174. Because the submittal contained confidential business records exempt from
22 public disclosure under state statute, the records were provided to the Hearings Officer and to the
23 City Financial Officer as a password-protected document. Pursuant to agreed motion of the
24 parties, the Hearings Officer issued an order prohibiting public disclosure of the business
records. AR 176 -177.

1 tax on behalf of the local jurisdiction. The City of Talent has entered into such an agreement
2 with DOR that allows the Department to administer the tax on the City's behalf.²¹

3 The evidence in the administrative record shows that Appellant has been in arrears on its
4 retail marijuana tax payments. The evidence also shows that Appellant has entered into a
5 settlement agreement and payment plan with DOR; and Appellant is current with its payments on
6 that payment plan.²²

7 The City recognizes that the Appellant has a payment plan with DOR but argues that
8 Appellant has not completed the payment plan and is, therefore, not compliant with the City of
9 Talent marijuana tax ordinance. The Hearings Officer finds that City of Talent has entered into
10 an agreement with DOR whereby DOR administers the City's retail marijuana tax on the City's
11 behalf. DOR has authority to grant extensions to taxpayers, to enter into settlements with
12 taxpayers, and to enter into payment agreements with taxpayers. Here, DOR has entered into a
13 settlement agreement and payment plan with Appellant for retail marijuana tax. Because DOR
14 administers the retail marijuana tax for the City, so long as Appellant is compliant with its DOR
15 settlement agreement and payment plan, Appellant is also compliant with the City's marijuana
16 tax ordinance.

17 The City argues that penalties are due under TMC Chapter 3.10, and the City is unable to
18 calculate the penalties due under that ordinance because of Appellant's failure to provide
19 financial information. However, under the City ordinance, there is no penalty when the taxpayer
20 has been "granted an extension of time for remittance of tax due." TMC 3.10.050(A) & (B).

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22 ²¹ DOR website at <https://www.oregon.gov/dor/programs/businesses/Pages/marijuana-local-tax.aspx>.

23 ²² AR 173; AR 178 – 181.

1 The Hearings Officer finds that DOR administers the City’s retail marijuana tax on behalf of the
2 City, and DOR has granted Appellant an extension by entering into a settlement agreement and
3 payment plan with Appellant. Therefore, the Hearings Officer concludes that no penalties are
4 due from Appellant under TMC Chapter 3.10.

5 Finally, the City argues that, even if Appellant has paid the retail marijuana tax in full to
6 DOR, Appellant was in arrears at the time of the Planning Commission’s Revocation Decision
7 on July 31, 2020. The City’s argument is incorrect for two separate reasons. First, the
8 administrative record shows that Appellant was current in its payments to DOR under its
9 payment plan with DOR as of July 31, 2020. Because DOR administers the local retail
10 marijuana tax on behalf of the City, Appellant was not in arrears on July 31, 2020. Second, this
11 appeal to the Hearings Officer is *de novo* with no deference due to the Planning Commission.
12 Accordingly, the relevant date to determine Appellant’s compliance is the date on which the
13 administrative record closed in this appeal proceeding. As of that date, the Hearings Officer
14 concludes that Appellant was in compliance with TMC Chapter 3.10.

15 In summary, the Hearings Officer concludes that Appellant’s CUP cannot be revoked for
16 noncompliance with TMC Chapter 3.10.

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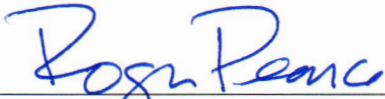
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IV. ORDER

Having reviewed all of the evidence, arguments, and applicable criteria, the Land Use Hearings Officer for the City of Talent ORDERS as follows:

- 1. The appeal of Grateful Meds LLC, is hereby GRANTED.
- 2. The City’s application for revocation of the conditional use permit approved under Talent Planning Commission File No. 2016-004 is hereby DENIED.

Dated this 28th day of September 2020.



Roger Pearce,
City of Talent Land Use Hearings Officer

APPEAL NOTICE

The Hearings Officer’s Decision and Final Order is the final decision of the City of Talent on this application. This decision may be appealed to the Oregon Land Use Appeals Board (LUBA) within 21 days of the date it is mailed. This decision is being mailed on 10/6/2020, 2020. Please contact LUBA for specific information at DSL Building, 775 Summer Street NE, Suite 330, Salem, OR 97301-1283 or by phone at (503) 373-1265.