Skagit County
Planning & Development Services
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Staff Report

From: Dale Pernula, AICP, Director

Re: Final Proposed Land Use Regulations for Marijuana Facilities

Date: May 21, 2015

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Background

The I-502 Recreational Marijuana System

In November 2012, with 56% of the vote statewide (55% in Skagit County), voters approved Initiative 502, which legalized recreational marijuana in Washington State and directed the Washington State Liquor Control Board ("LCB") to develop regulations for permitting marijuana production, processing, and retail facilities. The LCB filed its rules on October 21, 2013.

In December 2013, the Planning Department issued a memo on marijuana permitting (the "Guidance Memo") on its website that established how the Department would apply existing county code to marijuana facilities. In general, the Guidance Memo considered outdoor marijuana

production operations to be "agriculture" under the zoning code, but indoor marijuana production and processing facilities to be industrial uses. Marijuana retail facilities were considered similar to other retail or commercial uses. Each was allowed in the zones that already allowed "agriculture," "industrial," or "retail" uses. In January 2014, Attorney General Bob Ferguson issued a formal opinion confirming that local government has the authority to regulate or prohibit the sale of I-502 marijuana within its jurisdiction.

Skagit County's Interim Ordinances

On December 15, 2014, in response to public comments and complaints about the locations and impacts of marijuana production and processing operations, the Board adopted an interim ordinance (O20140008) that created a partial moratorium on new recreational marijuana production or processing facilities in the following zones: Rural Intermediate, Rural Reserve, Rural Business, Rural Center, Rural Resource-NRL, Rural Village Commercial, Bayview Ridge Residential, and Hamilton Residential. The ordinance also included a complete moratorium on new medical marijuana collective gardens or dispensaries.[1]

On December 22, 2014, the Board of County Commissioners adopted a new interim ordinance (O20140009) that retained the partial moratorium but modified the other restrictions. On February 17, after holding a public hearing and considering public comments, the Board of County Commissioners met and directed the Department to draft a revised interim ordinance implementing the recommendations in its February 12 memo. The Board adopted that new interim ordinance on March 3.

Under direction from the Board of Commissioners, the Planning Department expedited the process for permanent regulations and released a code proposal on March 12. The comment period for that proposal ended on April 9, and the Planning Commission issued its recommendation on May 5. On May 12, the Board of County Commissioners then directed staff to produce this final proposal for written comment and public hearing. The Board will make a decision on the final regulations sometime after the written comment period ends on June 18.

State Law Governing Marijuana Facilities

Washington State's Initiative 502 legalized the recreational use and possession of marijuana in specified amounts and created a three-tiered licensing scheme and designated the state Liquor Control Board ("WSLCB") to manage it. The scheme includes three new marijuana licenses: producer, processor, and retailer.

- **Marijuana Producer**: produces marijuana for sale at wholesale to marijuana processors and allows for production, possession, delivery, distribution.

- **Marijuana Processor**: processes, packages, and labels marijuana/marijuana-infused product for sale at wholesale to marijuana retailers and allows for processing, packaging, possession, delivery, distribution.

[1] Snohomish County had a similar experience, adopting permanent regulations in November 2013 but then adopting emergency ordinances at the end of September 2014 to prohibit marijuana facilities in their R-5 rural zone.

- **Marijuana Retailer**: allows for sale of usable marijuana/marijuana-infused products at retail outlets regulated by the WSLCB.

A single entity can hold both a producer and processor license, but not also a retail license.

Producer Tiers

The maximum amount of space for marijuana production is limited to two million square feet. Applicants must designate on their operating plan the size category of the production premises and the actual square footage in their premises that will be designated as plant canopy. There are three categories:

- Tier 1: Less than 2,000 square feet;
- Tier 2: 2,000 square feet to 10,000 square feet;
- Tier 3: 10,000 square feet to 30,000 square feet.

Retail Outlets

The WSLCB set the number of retail outlets by city and county based on population. Only 334 are allowed statewide. The initiative provides for additional rules for retail outlets:

- Retail outlets may not employ anyone under the age of 21, nor allow anyone under the age of 21 to enter the premises.
- Retail outlets are only authorized to sell marijuana/marijuana products or paraphernalia.
- Retailers are allowed one sign identifying the outlet's business or trade name, not to exceed 1600 square inches.
- They are not allowed to display marijuana or marijuana-related products in a manner that is visible to the general public.

Possession

Individuals twenty-one years of age or older are legally authorized to possess and use:

- One ounce of usable marijuana.
- 16 ounces of marijuana-infused product in solid form; or
- 72 ounces of marijuana-infused product in liquid form.
- Marijuana-related drug paraphernalia.

Individuals are still subject to criminal prosecution for:

- Possession in amounts greater than what is listed above.
- Possession of any quantity or kind of marijuana/marijuana-infused product by a person under 21 years of age.

Distance to Sensitive Entities

State law prohibits marijuana facilities within 1000 feet of the entities listed below (measured as the shortest straight-line distance from the property line of the proposed marijuana facility to the property line of the entity):[2]

- elementary or secondary school
- playground
- recreation center or facility
- child care center
- public park (not including trails)
- library
- game arcade

Advertising

State law limits each retail facility to one sign identifying the retail outlet by the licensee's business name on the outside or windows of the premises. The sign must be visible to the general public from the public right of way and not more than sixteen hundred square inches in size—less than 3½ feet square. Off-premises signs may not be placed within 1000 ft of the sensitive entities listed above.[3]

Medical Marijuana

Washington State has allowed the limited use of marijuana for medicinal purposes since voters approved Initiative 692 in 1998. In 2011, the Legislature adopted a bill expanding the use of medical marijuana and allowing the establishment and cultivation of "collective gardens" for growing marijuana for medicinal purposes.[4] In March 2014, the Division 1 Court of Appeals, in *Cannabis Action Coalition v. City of Kent*, interpreting the effects of then-Governor Gregoire's line-item vetoes of portions of the 2011 bill, held that neither medical marijuana nor collective gardens have been legalized under state law.

On April 14, 2015, the Legislature adopted a new law that integrates medical marijuana into the recreational marijuana (I-502) system.[5] The new law replaces collective gardens with new four-person medical marijuana cooperatives that are prohibited from selling marijuana or rotating patients in the cooperative, and are subject to rules promulgated by the Liquor Control Board (renamed the Liquor and Cannabis Board). Under the new law, medical marijuana may still be grown at home by qualifying patients for personal use.

Summary of Final County Proposal

On May 12, 2015, the Board of County Commissioners met to review the Department's original code proposal, public comment, public hearing testimony, Planning Commission recommendation, and

[2] RCW 69.50.331 and WAC 314-55-050.

[3] WAC 314-55-155.

[4] More precisely, the law provides an affirmative defense to qualifying patients and their designated providers, post-arrest, in state criminal prosecutions for violations of the Controlled Substances Act.

[5] 2SSB 5052 (2015).

staff review of the PC recommendation. The result of that deliberation is this final proposal, which represents a significant evolution from the original proposal and includes a number of options. The County is seeking public comment on each of those options; the public is encouraged to comment not just on options they dislike, but also the ones they prefer.

Definitions

The proposal adds four definitions to county code:

- **Marijuana Production Facility:** any land use involving the growing of marijuana, excluding Marijuana Cooperatives and marijuana grown at home for medical use consistent with state law.

- **Marijuana Processing Facility:** any land use involving the processing of marijuana, excluding Marijuana Cooperatives and marijuana grown at home for medical use consistent with state law.

- **Marijuana Production/Processing Facility:** a Marijuana Production Facility, or a Marijuana Processing Facility, or any combination of the two.

- **Marijuana Retail Facility:** any land use involving the sale or other provision of marijuana for use or consumption.

- **Marijuana Cooperative:** consistent with RCW Chapter 69.51A, a shared cooperative for acquiring and supplying the resources needed to produce and process marijuana for the medical use of the members of the cooperative.

Medical Marijuana

The final proposal would **allow** individual growing of medical marijuana at home for one's own use, consistent with state law.

The proposal would **prohibit:**

- medical marijuana collective gardens (the existing and arguably illegal unregulated medical marijuana grow/retail operations) in all zones;

- marijuana cooperatives (the four-person home grows allowed by the new state law) in all zones;

- any hazardous chemical processing anywhere other than a Marijuana Processing Facility;

- any growing or processing of marijuana, and keeping marijuana plants not in compliance with state law governing the growing of medical marijuana at home; and

- the storage or growing of plants if any portion of such activity can be readily seen by normal unaided vision or readily smelled from a public place or the private property of another housing unit.

The Planning Commission found that medical marijuana collective gardens (a) are not actually authorized by state law due to the governor's veto of the required patient registry system, (b) operate free of any state regulation, and (c) will be formally prohibited by new state legislation as of July 2016. The Planning Commission also considered the medical marijuana cooperatives, although they are significantly more constrained by state law than the collective gardens, to have a high likelihood of inappropriate impacts on neighboring properties; because they allow up to four people and a total of sixty plants, cooperatives are likely to have significant impacts similar to businesses. Therefore, the Planning Commission found, only marijuana facilities licensed by the Liquor Control Board should be allowed in Skagit County.

Retail Facilities

The Planning Commission found that marijuana retail facilities are most similar in their impacts to other retail uses and should be allowed in zones where retail uses are allowed. Under the new state law, retail facilities will be able to sell medical marijuana as well.

The proposal would **allow** retail facilities only in the following zones:

- Rural Freeway Service zone.
- Rural Center and Rural Village Commercial zone, optionally:
    - prohibited; or
    - allowed as an administrative special use permit; or
    - allowed without requiring an administrative special use. The County has not generated a list of special use criteria other than the basic criteria for all special uses in SCC 14.16.900(1)(b)(v). Properly permitted marijuana retail facilities, such as "221" in Conway, have not been the source of any complaints. By state law and Liquor Control Board rule, access is restricted to people age 21 and over, and ID is checked at the door. Signage is limited to 1600 sq inches. The Department does not anticipate public comments on such special use permits other than general complaints about the presence of marijuana, which is a concern that cannot be mitigated, and the Department does not want to create a public expectation that a special use permit process would deny a marijuana permit on that basis. The Department has drafted and included new language for special use permits for retail facilities to require appropriate conditions to avoid customer use of marijuana onsite or in adjacent areas (e.g., security cameras, fences, or site design).
- Rural Business zone, optionally:
    - as an administrative special use; or
    - by allowing conversion of retail facilities per existing code. The Rural Business zone exists to allow for continuation of existing non-residential uses in rural areas, and SCC 14.16.150(2)(b) and (4)(d) and (4)(e) allow for changes of use from the existing use to a new use with administrative or hearing examiner review to ensure rural compatibility. No other new commercial uses are allowed outright or by

special use in this zone, and it would be incongruent with the existing code and with the GMA foundation of the zone to list marijuana retail facilities that way. The Department strongly recommends relying on the existing change of use provisions to allow for marijuana retail, where appropriate, in this zone. To do otherwise would be to provide special privileges for marijuana retail uses in this zone and may be contrary to GMA.

- Urban Reserve Commercial-Industrial zone, optionally:
    - as an administrative special use; or
    - without requiring an administrative special use. The URC-I zone is different from the RC, RVC, and RB zones in that it is not a spot zone but instead a large UGA zone intended for commercial and industrial uses. For the same reasons as above, the Department does not believe that a Special Use Permit process is appropriate for retail facilities in this zone; the Department also believes that the URC-I zone is one of the most appropriate zones for these types of facilities.

Production/Processing Facilities

Although the Liquor Control Board can issue separate licenses for production and processing, most applicants have applied for both production and processing licenses to achieve the beneficial tax implications. Because the land use impacts are similar, the County's proposal treats production and processing facilities the same.

The Planning Commission found that marijuana production and processing facilities are most similar in their impacts to industrial uses, and should primarily be allowed in zones where other industrial uses are allowed, and that production and processing facilities are incompatible with the rural landscape and rural residential communities.

Zoning

The proposal would **allow** production/processing facilities only in the following zones:

- Bayview Ridge Light Industrial, but only by special use permit when within 1000 ft of a residential zone or a residence. When the use is proposed in an opaque structure, the special use permit would be decided administratively; when the use is proposed in a translucent structure (e.g., a greenhouse), the special use permit would be decided by the Hearing Examiner.
    - Optionally, delete "from a residence" in the measure of distance for BR-LI. There are very few existing residences in BR-LI. Residences in an industrial zone are pre-existing non-conforming uses that would otherwise not be allowed to locate there and should expect much more significant industrial uses (e.g., a FedEx distribution center) than an opaque marijuana production facility.
- Bayview Ridge Heavy Industrial.
- Urban Reserve Commercial-Industrial, by Hearing Examiner Special Use Permit.

- Agricultural—Natural Resource Land zone. Optionally:
    - only by administrative special use permit and only in opaque structures existing as of January 1, 2014; or
    - only in structures existing as of January 1, 2014, and only by administrative special use permit for translucent structures (that includes a requirement for restoration of the ag land when the use is discontinued). Under existing code, greenhouses in Ag-NRL are permitted uses only if they do not have a floor and directly use the soil. Greenhouses in Ag-NRL are an admin special use if they do have a floor, and must return the soil to its previous state when the use is discontinued.
- Optionally, in the Rural Resource zone, but not on Guemes Island due to the sensitive nature of the aquifer. The Rural Resource zone is characterized by large parcels in remote areas, including old gravel pits with limited potential for other uses. The Planning Commission found that marijuana production should not be allowed on Guemes Island due to the limited aquifer and possibility of groundwater contamination from fertilizer, pesticides, and waste.

Translucent Structures (Greenhouses)

Optionally, the proposal would **prohibit** production/processing facilities in translucent structures anywhere in the County. The Planning Commission found that translucent structures and security fencing are likely to have a more significant impact on neighboring residences than opaque buildings due to lighting, odor, aesthetics, and noise. The Department anticipates that translucent structures are the most likely to have significant impacts on neighboring uses and the least likely to be desirable by serious marijuana producers. Greenhouses don't allow for the control of lighting that is required for efficient marijuana production; require sight-obscuring fencing and more security cameras; make it more difficult to install HVAC systems that prevent the release of odors; and will not comply with the State Energy Code requirements, resulting in greater greenhouse gas emissions. There are no existing greenhouses in Bayview Ridge, and opaque buildings are cheaper and more desirable for new construction. The Department therefore recommends simplifying the code by requiring all marijuana production and processing facilities to be in opaque buildings.

Setback

As recommended by the Planning Commission, the proposal would impose a 400-foot setback for all production and processing facilities, as well as any security fencing, from residences not owned by the facility operator. The Department believes such a setback is problematic because:

- The setback is not from the property line, so some of the setback may "use" neighboring property rather than the facility operator's property.
- In some cases there may be a residence on the same parcel as the marijuana facility, but the marijuana facility may be owned by a renter of the real property; the house would therefore not be "owned by the facility operator," willing to give its consent but not allowed to by code.
- No rational basis for the 400-ft distance has been articulated. For a permanent regulation that imposes a prohibition, there needs to be some basis for the distance.

- The only zones at issue are Ag-NRL, BR-LI, and BR-HI (and possibly Rural Resource). There is only one residence that we found in BR-LI and none in BR-HI. In Ag-NRL, almost all residences are located close to the roads, because that is part of our longstanding policy to help preserve open tracts of agricultural land. In all zones, residences are not preferred uses and should expect greater impacts from outright permitted industrial or agricultural uses than they would incur from opaque structures.
- One possible alternative would be to require an Admin Special Use Permit for facilities in all three of these zones when locating within 1000 ft of a residential zone (or a residence, as the PC recommended for BR-LI). That would allow additional review and additional requirements (including landscaping screening, controls on lighting and odor, etc, as listed in the proposal) without imposing a fixed and arbitrary numeric distance.

Summary of Zoning for Production, Processing, and Retail

About the Table

In the table, P = Permitted, AD = Administrative Special Use, HE = Hearing Examiner Special Use, X = Prohibited. Slashes (/) represent options and are presented to invite public comment on all such options. In the Rural Business zone, SUP would result in not adding a line to the zoning code section because the zone already allows for conversion of existing uses by special use permit.

Zone	*Retail*	*Production/Processing in an **Opaque** Structure*	*Production/Processing in a **Translucent** Structure*
Agricultural—Natural Resource Lands (Ag-NRL)	X	AD, only in structures existing as of 1/1/2014	X
Bayview Ridge Light Industrial (BR-LI)	X	P; AD when within 1000 ft of a residential zone or a residence	X/P; HE when within 1000 ft of a residential zone or a residence
Bayview Ridge Heavy Industrial (BR-HI)	X	P	X/P
Hamilton Industrial (H-I)	X	AD	X/HE
Natural Resource Industrial (NRI)	X	X	X
Rural Business (RB)	SUP/X	X	X
Rural Center (RC)	P/AD/X	X	X
Rural Freeway Service (RFS)	P	X	X
Rural Resource—Natural Resource Lands (RRc-NRL)	X	X/P, except prohibited on Guemes Island	X/AD, except prohibited on Guemes Island
Rural Village Commercial (RVC)	P/AD/X	X	X
Urban Reserve Commercial-Industrial (URC-I)	P/AD	HE	X

Maps

Skagit County GIS has generated a map book that shows the locations of each of the commercial zones in the Department proposal that would allow marijuana facilities, with an overlay showing the areas within 1000-ft of the entities prohibiting siting by LCB rules. The maps are an approximation; please carefully read the description on the first page of the map book. Download the map book at www.skagitcounty.net/marijuana.

Special Use Permit Standards

Special use permits (also known as conditional use permits) are common provisions in zoning codes that allow the approval of certain uses that are inconsistent with the overall zone or need additional location-specific controls to ensure property placement in the community and to limit possible adverse effects on neighboring properties. A conditional use is a permitted use, but it is permitted only if certain conditions set forth in the code are met. As long as the proposed special use meets the requirements described in the zoning code, the use will be granted a special use permit.

The Planning Commission found that special use permits are a reasonable way to regulate marijuana facilities when the facilities are expected to have varied impacts on neighboring properties because the uses are not uniform or the zone is not developed uniformly, e.g., where many residential uses are present in a non-residential zone.

Process for Approval

Skagit County has two kinds of special use permits: administrative SUPs and hearing examiner SUPs. The review process for each is defined in SCC 14.06 and summarized in the following table:

	Admin SUP	*Hearing Examiner SUP*
Application level	I	II
Base application fee (plus publication costs, SEPA, etc.)	$2,520	$3,000 in residential zones $6,000 in commercial zones
Decision-maker	Planning Director	Hearing Examiner
Mail to neighbors	300 ft (or 500 ft if needed)	300 ft (or 500 ft if needed)
Publication in newspaper	Yes	Yes
Comment period	> 15 days but ≤ 30 days	> 15 days but ≤ 30 days
Typical time to decision (less time if SEPA not required)	3-4 months	4-6 months
Administrative appeal body	Hearing Examiner, then BOCC	BOCC

Notification Distance

The proposal would expand the 300 (or 500) ft mailing distance to 1000 feet. The Department recommends against expanding that distance because it is inconsistent with what the County requires for any other special use permit, including uses that have much greater impacts on surrounding uses (e.g., lumber yards or rail terminals). Under existing code, notices for special use permits are posted onsite and published in the paper, and mailed to parcels within 300 feet (or 500 ft if the Administrative Official determines it necessary). Distances are measured from the external property lines of the proposal's parcel. No rational basis has been articulated to expand the notification distance to a 1000-ft radius for marijuana production facilities when a smaller radius is allowed for much more significant uses.

Approval Criteria

Under existing code, an applicant for an SUP must prove the following:[6]

> (A) The proposed use will be compatible with existing and planned land use and comply with the Comprehensive Plan.
>
> (B) The proposed use complies with the Skagit County Code.
>
> (C) The proposed use will not create undue noise, odor, heat, vibration, air or water pollution impacts on surrounding, existing, or potential dwelling units, based on the performance standards of SCC 14.16.840.
>
> (D) The proposed use will not generate intrusions on privacy of surrounding uses.
>
> (E) The proposed use will not cause potential adverse effects on the general public health, safety, and welfare.
>
> (F) For special uses in Industrial Forest—Natural Resource Lands, Secondary Forest—Natural Resource Lands, Agricultural—Natural Resource Lands, and Rural Resource—Natural Resource Lands, the impacts on long-term natural resource management and production will be minimized.
>
> (G) The proposed use is not in conflict with the health and safety of the community.
>
> (H) The proposed use will be supported by adequate public facilities or services and will not adversely affect public services to the surrounding areas, or conditions can be established to mitigate adverse impacts on such facilities.
>
> (I) The proposed use will maintain the character, landscape and lifestyle of the rural area. For new uses, proximity to existing businesses operating via special use permit shall be reviewed and considered for cumulative impacts.

The proposal adds the following special additional criteria. Special use permits for marijuana facilities must:

> (a) address impacts on surrounding properties, including but not limited to the appropriate distance of the facility from residences, schools, daycare facilities, public parks, other public facilities, and other marijuana facilities;
>
> (b) include appropriate controls on odor;
>
> (c) include appropriate screening or other requirements to avoid lighting impacts and the visual impacts of security fencing;
>
> (d) include protections against security cameras infringing on neighbors' privacy;

[6] SCC 14.16.900(1)(b)(v).

(e) include any additional controls on hazardous processing methods with potential to injure neighboring properties;

(f) include appropriate disposal of the waste and byproducts of production and processing;

(g) mitigate other impacts.

Additional Standards for all Marijuana Facilities

Characterization of Marijuana as Industrial

The proposal would clearly characterizes marijuana production and processing as industrial uses, not agricultural, to avoid arguments that marijuana production should receive the same protections as agriculture, such as in SCC 14.38 (Right to Manage Natural Resource Lands), or for treatment of marijuana as an agricultural use, which is a preferred use in many zones.

Hazardous Chemical Processing

The proposal would **prohibit** hazardous chemical processing in any zone other than BR-HI and by anything other than a licensed processing facility. The Planning Commission found that marijuana processing involving hazardous chemicals creates a potential explosion hazard, even when conducted in a closed loop system, especially when leaks may not be easily detectable; therefore, marijuana processing or extraction involving flammable or combustible liquids or gases should not be allowed in areas where the chemicals and explosions may affect neighboring properties. A CO_2 processing system would be allowed in any zone where processing is allowed.

The Fire Marshal would be required to notify the local fire district or other fire authority whenever the Department approves a permit for any Marijuana Production or Processing Facility.

Odors

Even when not regulated by a special use permit, all marijuana production or processing facilities must employ ventilation systems such that no odors from the production or processing are detectable off the premises.

Security Cameras

Any LCB-required security cameras must be aimed so as to view only the facility property, not public rights-of-way or neighboring properties. This has been a frequently cited neighborhood concern.

The Planning Commission found that although security cameras are a reasonable requirement by the Liquor Control Board to ensure security of marijuana facilities, neighboring properties should not be observed by such cameras.

Adoption Process

An earlier draft of the proposed marijuana regulations has received public comment through a written comment period and a public hearing before the Planning Commission. Separately, the interim ordinance also received written comment and a public hearing before the Board of County Commissioners. Now is the time to comment on the final draft proposal.

The Board of County Commissioners is expected to make a decision to adopt final marijuana development regulations (and repeal the interim ordinance) sometime after the close of the written comment period.

SEPA Threshold Determination

The Skagit County SEPA Responsible Official has issued a Determination of Non-Significance for this non-project legislative proposal; the final proposal will not result in a significant difference in environmental impacts.

How to Comment

The final proposal is scheduled for a public hearing and written comment period before the Board of County Commissioners, consistent with the process for adoption of land use regulations in SCC Chapter 14.08. The Board of County Commissioners must approve the final adoption.

For More Information

Please visit the project website at www.skagitcounty.net/marijuana and click on "Notice of Availability" for information on the public hearing and how to comment.