MEMORANDUM

TO: Deschutes County Board of Commissioners

FROM: Tanya Saltzman, Associate Planner

DATE: June 19, 2019

SUBJECT: Reconsideration of Marijuana Text Amendments

I. OVERVIEW OF PROCESS TO DATE

On June 1, 2016, Deschutes County adopted Ordinance 2016-019, and on June 15, 2016, Ordinances 2016-013, 2016-014, 2016-015, 2016-016, 2016-017, and 2016-018, implementing comprehensive land use amendments governing marijuana production, processing, and retailing in unincorporated Deschutes County (the “Original Marijuana Regulations”). The Original Marijuana Regulations were not appealed to the Land Use Board of Appeals (“LUBA”), and thereby were deemed “acknowledged” pursuant to OAR 660-018-0085 after the County provided notice of the ordinances are required by state law.

After adopting the Original Marijuana Regulations, the Board of County Commissioners (the “Board,” or individually, the “Commissioners”) indicated an intent to consider technical correction after gaining additional experience regulating the entirely new marijuana industry and land use. As such, the Board directed staff to prepare a Marijuana Regulatory Assessment sixteen months after the Original Marijuana Regulations took effect, summarizing marijuana applications received between September 2016 and September 2017. The draft Marijuana Regulatory Assessment was released on April 2, 2018. Since that date, the Board conducted eight work sessions to discuss requisite technical corrections and clarifications. Informed by the work sessions and their experiences adjudicating quasi-judicial appeals of marijuana land use applications, the Commissioners requested that County staff prepare specific draft text amendments designed to provide additional clarity to both the public and the growing marijuana industry (the “Marijuana Text Amendments”). Staff's proposed amendments were then first formally presented to the Planning Commission for review on August 9, 2018.¹

The Board subsequently conducted a public hearing on August 28, 2018, to consider Ordinance 2018-012, formerly adopting the Marijuana Text Amendments as reviewed by the Planning Commission. Public comments received during the open record period, August 29 through September 14, 2018, were provided to the Board for a work session held on September 24, 2018 to review options for next steps.² The Board began deliberations on the proposed amendments on October 1, 2018,³ and continued them on October 17, 2018.⁴ Informed by the public process and comments, the Board directed staff to make further edits. Staff offered a revised version of Ordinance 2018-012 for consideration of first reading on October 24, 2018. And, first and second reading were ultimately adopted by emergency on October 24.

Differing from the Original Marijuana Regulations, twelve petitioners filed a Notice of Intent to Appeal with LUBA challenging the County’s new “Marijuana Text Amendments” on November 13, 2018. The petitioners filed their Petition for Review on February 12, 2019, arguing new and expanded issues that were not previously raised before the Board. As such, on February 28, 2019, Deschutes County filed with LUBA a Notice of Withdrawal to thereby provide the petitioners the opportunity to raise their new arguments to the Board in a continued public process. This continued public process will also provide both the County and other proponents of the Marijuana Text Amendment the opportunity to augment the record and respond to the petitioners’ assignments of error, thus ensuring a more thorough local vetting before the petitioners’ arguments are considered by LUBA on appeal.

At the completion of the continued public process, the Board may repeal the Marijuana Text Amendments, amend the Marijuana Text Amendments, or take no action in which case the Marijuana Text Amendments remain unaltered. Assuming the petitioners proceed with their LUBA appeal, any documents and testimony provided to the Board during the continued public process (such as this memorandum) will be added to the record before LUBA.

Typically, LUBA grants 90 days for reconsideration of an ordinance, but owing to the complex and controversial subject matter, Deschutes County submitted a request to LUBA for additional time—180 days instead of 90. LUBA granted this request in an order dated March 7, 2019. The final deadline for a decision on the reconsideration of the ordinance is September 3, 2019.

A work session with the Board is scheduled for June 24, 2019. A public hearing with the Board is scheduled for July 3, 2019.

II. SUMMARY OF PETITIONERS’ BRIEF

The petitioners presented four assignments of error (two of which include sub-parts), which are summarized below. The summaries also include brief descriptions of perceived issues with the petitioners’ arguments as noted by County staff. To aid the productivity of the upcoming continued

2 https://deschutescounty.iqm2.com/Citizens/FileOpen.aspx?Type=1&ID=1934&Inline=True
public process beginning on July 3, County staff is encouraging both the petitioners and other proponents who support the Marijuana Text Amendments to comprehensively address these issues.

**Assignment of Error 1: The County Exceeded its Jurisdiction**

a. **Marijuana is a Legal Farm Crop Under Oregon Law**

The petitioners argue that the Oregon legislature classified marijuana as a farm crop, and thus when grown in a farm zone, it may not be more heavily regulated than other crops under the Right to Farm ordinance (i.e. ORS 30.930 *et seq*.). They maintain that by citing concerns about compatibility, the County is seeking to ensure protection of non-farm uses in Exclusive Farm Use-zoned land, which goes against the purpose of the EFU land designation—to preserve land for agricultural purposes and limit nonfarm uses.

However, the *Petition for Review* filed with LUBA failed to address the following issues:

- **Collateral Attack.** The petitioners fail to explain how the First Assignment of Error is not an impermissible collateral attack on the Original Marijuana Regulations. Because they were not appealed when adopted, it seems that facial challenges to the Original Marijuana Regulations, an acknowledged text amendment, are no longer justiciable by LUBA. (This issue applies to the majority of the sub-assignments constituting the First Assignment of Error, but is not repeated below to ensure the brevity of this memorandum.)

- **Opt-Out.** The petitioners fail to explain how this argument is anything other than a critique of state statutes and regulations regarding marijuana, most of which are necessary because marijuana is still federally illegal pursuant to the Controlled Substances Act. If the County’s Marijuana Text Amendments violate Oregon’s Right to Farm laws, then how does ORS 475B.968, which allows counties to opt-out, not also violate Right to Farm laws? How does OLCC’s numerous and comprehensive regulations not violate Right to Farm laws? (This issue applies to the majority of the sub-assignments constituting the First Assignment of Error, but is not repeated below to ensure the brevity of this memorandum.)

- **Legislative History.** The petitioners fail to cite any legislative history in the record that supports their contention that Oregon’s Right to Farm laws are an exception to, or otherwise curtail, ORS 475B.928 authorizing the County to adopt reasonable “time, place, and manner” land use regulations.

b. **The Ordinance Conflicts with Goal 3**

The petitioners state that the ordinance violates Statewide Goal 3, To Preserve and Maintain Agricultural Lands, by “effectively removing a viable crop, perhaps one of the only crops that could be grown on some of these lands, from the EFU zone.” The petitioners further maintain that the removal of marijuana production from allowable uses in the MUA-10 zone is also a violation of Goal 3.
However, the Petition for Review filed with LUBA failed to address the following issues:

- **Inherent Differences.** In the context of Goal 3, petitioners fail to account for the inherent differences distinguishing most marijuana production from other agriculture operations. As noted by LUBA, marijuana production “can occur equally as well on a parking lot as it could on 80 acres of high value farmland” because marijuana production is often “entirely separate and disconnect from the land.” See LandWatch Lane County v. Lane County, 77 Or LUBA 368, 373 (2018).

- **MUA-10.** The petitioners fail to explain how land zoned MUA-10 falls under the purview of Goal 3.

c. The Ordinance Conflicts with the Farm Act

The petitioners maintain that the ordinance alters state law in that it conflicts with the Farm Act, which protects farming practice on lands zoned for farm use from any private right of action or claim for relief based on nuisance or trespass. They state that the ordinance creates a private cause of action for nuisance and trespass specifically against marijuana farmers in the context of noise and odor from marijuana farming activities.

However, the Petition for Review filed with LUBA failed to address the following issue:

- **Relocated Provision.** The petitioners fail to explain how an existing provision relocated from the previous DCC 18.116.330(B)(10)(c) to a new subjection DCC 18.116.330(B)(19) “attempts to create a new nuisance right of action.” Petitioners further fail to explain how the aforementioned provision conflicts with state law when, the provision's own terms condition applicability on first complying with state statutes.

d. The Ordinance Does Not Comply with the Plan

The petitioners note that the Deschutes County Comprehensive Plan requires EFU ordinances to preserve, protect and support current and future farming in EFU zones, and state that to the contrary, the ordinance essentially removes a crop that is contributing to the local agricultural economy from a large portion of EFU land, and makes it “extremely difficult, if not impossible” to continue operations or expand. The petitioners state that this is inconsistent with the Comprehensive Plan.

However, the Petition for Review filed with LUBA failed to address the following issues:

- **Permit History.** The petitioners fail to account for the 45 approved marijuana production facilities to date on EFU land compared to only 7 denials under the Original Marijuana Regulations, nor did the petitioners explain how the Marijuana Text Amendments will alter those trends.
• **Diesel v. Jackson County.** The petitioners’ only citation under this sub-assignment of error is to LUBA’s decision in the aforementioned case (74 Or LUBA 286 (2016)), which considered Jackson County’s prohibition on marijuana production in its rural residential zones. The petitioners neglect to cite or discuss the Court of Appeal's subsequent decision in the same matter which more directly considers Jackson County's EFU lands (284 Or App 301 (2017)).

e. The Ordinance Imposes Unreasonable Time, Place, and Manner Regulations

The petitioners argue that the issues listed below and the ordinance as a whole are unreasonable. ORS 475B.456 allows counties to impose reasonable conditions on the manner in which a marijuana producer may produce marijuana. The petitioners argue that the ordinance drastically reduces the amount of land available for production as well as removes one zone (MUA-10) entirely from available production land. The petitioners further state that the County singled out marijuana production to uphold a standard of having zero impact on neighbors, which they argue is not true to the meaning of land use “compatibility” and is considered to be unreasonable. Further arguments concerning specific aspects of the amendments follow.

1. Buffer/Separation Distances

The petitioners argue that the increased separation distances essentially push farming away from numerous other uses, serving to hurt the agricultural activity, reduce competitiveness and market access. They argue that no findings were presented supporting the specific separation distances. In addition the petitioners state that there is no identified need for the regulation of distance from federal land or from jurisdictions that have opted out of the marijuana program. Lastly, the petitioners argue that the separation distances function as a cap of marijuana producers, in absence of the ability to impose an outright cap.

2. Light, Noise, and Odor Regulations

The petitioners argue that the light, noise, and odor regulations all exceed the limits of “reasonable” regulations. They maintain that it is unreasonable to require noise and odor abatement plans to protect neighbors from a farm crop in a farm zone, and noted that the existing regulations concerning these issues were working. The petitioners note that an engineering firm, ColeBreit Engineering, testified that the County’s odor and noise regulations were essentially an impossible standard to meet as written.

3. Inspections and Annual Reporting

The petitioners maintain that the revised annual inspections procedures require applicants to waive their privacy rights, and that the searches, which assume that marijuana production applicant will not comply with the law, are conducted without probable cause.
However, the Petition for Review filed with LUBA failed to address the following issues:

- **Public Testimony.** With regard to buffers and separation distances, the petitioners fail to account for the persuasive public testimony received during quasi-judicial hearings preceding the Board's consideration of the Marijuana Text Amendments offered by federal land agencies, municipalities, and residents concerned about concentrated impacts to their neighborhoods from numerous production facilities.

- **Pre-existing standard.** With regard to light, noise, and odor, the petitioners fail to explain how clarifying pre-existing standards without substantively changing the standard nonetheless makes the pre-existing standard unreasonable. The petitioners further fail to explain how their argument is not contradicted by the 49 production applications approved to date, many of which were approved based on assurances of code compliance made by the same engineers now concerned that code compliance is impossible.

- **Administrative Search Doctrine.** With regard to the annual inspections, the petitioners fail to explain how the Marijuana Text Amendments do anything other than codify the County's pre-existing practice. More importantly, the petitioners do not explain how the County's annual inspections do not fall under the doctrine of “administrative searches,” a known exception to the prohibition on warrantless searches recognized by both state and federal case law.

**Assignment of Error 2: The County Failed to Follow Required Procedures in Adopting the Ordinance on an Emergency Basis**

The petitioners state that the County failed to follow required procedures in adopting the ordinance on an emergency basis, and that the findings do not address the basis—ostensibly to benefit the health, safety, and welfare of County residents—for the emergency declaration.

However, the Petition for Review filed with LUBA failed to address the following issues:

- **Standard Practice.** The petitioners fail to explain how the County's emergency clause is inconsistent with standard practice throughout Oregon.

- **Procedural Errors.** While complaining that the County's emergency adoption of the Marijuana Text Amendment was procedurally in error, the petitioners fail to account for their own procedural errors underpinning the second assignment of error. Specifically, the Petition for Review failed to state that the second assignment of error was preserved or was not required to be preserved pursuant to OAR 661-010-0030(4)(d). Likewise, the petitioners failed to demonstrate that the County's alleged procedural error “prejudiced the substantial rights of the petitioner[s]” as required by ORS 197.835(9)(a)(B). Regardless, the upcoming public process provides the County
the opportunity to cure this alleged procedural error in the same manner the petitioners will now have the opportunity to cure their procedural errors.

Assignment of Error 3: The Ordinance is Not Factually Supported

The petitioners note that arguments supporting legislative decisions must be based on substantial evidence contained in the full record, rather than a belief concerning “need” or “reasonableness.” Statewide Goal 2 requires that planning decisions and actions have an adequate factual base. They maintain that the County ignored selected staff findings and testimony from stakeholders concerning the difficulty of complying with the new standards, and as such did not provide substantial evidence.

However, the Petition for Review filed with LUBA failed to address the following issues:

- **Confused Citations.** Although attempting to distinguish between legislative and quasi-judicial decision at the outset of the third assignment of error, the petitioners nevertheless mix case law relevant to the two types of decision and thereby failed to demonstrate that the County's original findings were inadequate. Also relevant to the legislative versus quasi-judicial distinction, the Petition for Review fails to account for the heightened standard of review applicable to facial challenges. To succeed, the petitioners have the arduous task of demonstrating that the Marijuana Text Amendments “are categorically incapable of being clearly and objectively applied under any circumstances where they may be applicable.” See Rogue Valley Assoc. of Realtors v. City of Ashland, 158 Or App 1, 4970 P2d 685 (1999).

- **Procedural Errors.** Similar to the second assignment of error, the Petition for Review again failed to state that the third assignment of error was preserved or was not required to be preserved pursuant to OAR 661-010-0030(4)(d). Even if the County's original findings were lacking, the upcoming public process provides the opportunity to bolster those findings in the same manner the petitioners will now have the opportunity to correct their procedural error.

Assignment of Error 4: The County Made an Unconstitutional Decision in Enacting the Ordinance

a. The Ordinance Violates Federal Equal Protection under the 14th Amendment of the U.S. Constitution

The petitioners argue that the ordinance violates the Equal Protection Clause of the 14th Amendment of the United States Constitution. The petitioners further argue they belong to a class of marijuana producers, processors, and wholesalers—specifically those participating in Oregon's regulated recreational marijuana market. The petitioners argue that this class alone is subject to unreasonable regulations, thereby renewing early arguments that the Original Marijuana Regulations are not reasonable “time, place, and manner” restrictions. Further, the
petitioners maintain that the adoption of the ordinance lacked a rational basis because it was for extra-statutory purposes, namely to “impermissibly cap marijuana production.”

However, the Petition for Review filed with LUBA failed to address the following issues:

- **Collateral Attack.** Similar to the first assignment of error, the petitioners fail to explain how the fourth assignment of error is anything other than an impermissible collateral attack on the acknowledged Original Marijuana Regulations. (This issue applies to the majority of the sub-assignments constituting the fourth assignment of error, but is not repeated below to ensure the brevity of this memorandum.)

- **Controlled Substances Act.** Again similar to the first assignment of error, the petitioners fail to explain how this argument is anything other than a critique of the federal Controlled Substances Act which significantly influenced the unique regulatory environment put in place by the State of Oregon and which in turn specifically authorized the Original Marijuana Regulations adopted by Deschutes County. It is not clear how a self-selecting group of individuals electing to participate in an activity illegal under federal law become a class deserving protection under the federal constitution. If the County’s Original Marijuana Regulations are unconstitutional, then how are other federal and state laws that, for example, negatively impact the petitioners’ income taxes and access to banking not equal unconstitutional?

b. The Ordinance Violates State Privileges and Immunities under Article 1, Section 20 of the Oregon Constitution

The petitioners argue that the ordinance impermissibly grants a privilege (in this case, the right to bring a nuisance claim) to a specific class—that is, neighbors of marijuana production, processing, and wholesale operations. Neighbors of other farm operations in the same zone are not allowed to bring nuisance claims against their neighbors due to Right to Farm protections, and as such, this creates a privileged class.

However, the Petition for Review filed with LUBA failed to address the following issue:

- **Code Enforcement.** The petitioners fail to cite anything in the record that demonstrates the veracity of their claim, i.e. that the Marijuana Text Amendment empowers neighbors through a civil nuisance action to force the shutting of a marijuana productions. Instead, the petitioners are likely confused by the Original Marijuana Regulation’s usage of what is best described as a “nuisance-like standard” to limit odor permitted to emit from a marijuana production facility. Violation of that standard would be addressed through the County’s code enforcement process and not pursuant to civil nuisance complaint. Further, as previously mentioned, the Marijuana Text Amendments clarify and relocate a pre-existing provision that only allows “private actions alleging nuisance or trespass” when so authorized by “applicable state statutes.”
c. The Ordinance is Arbitrary and Capricious in Violation of Federal Substantive Due Process Rights

The petitioners argue that the County must establish that it had a rational basis for applying the ordinance; they continue by renewing yet again earlier arguments previously raised in the Petition for Review, and likewise previously addressed in this memorandum.

III. PUBLIC COMMENT

As of the time of submittal of this memorandum and since the County submitted the Notice of Withdrawal, two written public comments have been received from the following parties and are included as attachments to this memorandum:

- Stephanie Marshall, Bennu Law (successor entity to Clifton Cannabis Law LLC)
- Jenny Mueller, Cannabis Nation Inc.

IV. NEXT STEPS

A public hearing with the Board of County Commissioners is scheduled for July 3, 2019.

Attachments:

A. Marijuana Text Amendments (redlined) – adopted October 24, 2018\(^5\)
B. Public Comment: Marshall
C. Public Comment: Cannabis Nation

\(^5\) The attached text amendments utilize redlines to indicate adopted changes that deleted, replaced, or otherwise altered text from the Original Marijuana Regulations only. The redlined text amendments that were included as attachments to Ordinance 2018-012 also include interim edits that were considered—but not necessarily adopted—during the public process, in addition to the final adopted changes.
Chapter 9.12. RIGHT TO FARM


A. It is the purpose of DCC 9.12 to protect farm and forest-based economically productive activities of Deschutes County in order to assure the continued health, safety and prosperity of its residents. Farm and forest uses sometimes offend, annoy, interfere with or otherwise affect others located on or near farm and forest lands. Deschutes County has concluded in conformance with ORS chapter 30 that persons located on or near farm and forest lands must accept resource uses and management practices.

B. DCC 9.12 is intended to limit the availability of remedies based on nuisance or trespass, rights of action and claims for relief and issuance of citations for violations over which Deschutes County has jurisdiction, when they otherwise would either have an adverse impact on farm and forest uses that Deschutes County seeks to protect, or would impair full use of the farm and forest resource base within Deschutes County.

C. Scope. DCC Chapter 9.12 (The Deschutes County Right To Farm Ordinance) applies to all crops. However, subject to ORS 475B, Cannabis regulation, the governing body of a county may adopt ordinances that impose reasonable regulations on marijuana production, processing, wholesaling, and retailing.

(Ord. 2018-012 §1, 2018; Ord. 2003-021 §21, 2003; Ord. 95-024 §2, 1995)
Chapter 18.24 REDMOND URBAN RESERVE AREA COMBINING ZONE


* * *


A. Subject to the prohibitions provided for in DCC 18.24.030(B), Uses permitted conditionally in the Redmond Urban Reserve Area Combining Zone shall be those identified as conditional uses in the underlying zoning districts. Conditional uses shall be subject to all conditions of those zones as well as the requirements of this chapter.

B. The following uses are prohibited and not permitted in the Redmond Urban Reserve Area Combining Zone:
   1. Marijuana production; and
   2. Marijuana processing.

(Ord. 2018-012 §2, 2018; Ord. 2005-024 §1, 2005)
Chapter 18.116. SUPPLEMENTARY PROVISIONS

18.116.330 Marijuana Production, Processing, and Retailing
18.116.340 Marijuana Production Registered by the Oregon Health Authority (OHA)

* * *

18.116.330. Marijuana Production, Processing, and Retailing
A. Applicability. Section 18.116.330 applies to:
   1. Marijuana Production in the EFU, MUA-10, and RI zones.
   2. Marijuana Processing in the EFU, MUA-10, TeC, TeCR, TuC, TuI, RI, and SUBP zones.
   3. Marijuana Retailing in the RSC, TeC, TeCR, TuC, TuI, RC, RI, SUC, SUTC, and SUBP zones.
B. Marijuana production and marijuana processing. Marijuana production and marijuana processing shall be subject to the following standards and criteria:
   1. Minimum Lot Area.
      a. In the EFU and MUA-10 zones, the subject legal lot of record shall have a minimum lot area of five (5) acres.
   2. Indoor Production and Processing.
      a. In the MUA-10 zone, marijuana production and processing shall be located entirely within one or more fully enclosed buildings with conventional or post framed opaque, rigid walls and roof covering. Use of greenhouses, hoop houses, and similar non-rigid structures is prohibited.
      b. In the EFU zone, marijuana production and processing shall only be located in buildings, including greenhouses, hoop houses, and similar structures.
      c. In all zones, marijuana production and processing are prohibited in any outdoor area.
   3. Maximum Mature Plant Canopy Size. In the EFU zone, the maximum canopy area for mature marijuana plants shall apply as follows:
      a. Parcels from 5 acres to less than 10 acres in lot area: 2,500 square feet.
      b. Parcels equal to or greater than 10 acres to less than 20 acres in lot area: 5,000 square feet. The maximum canopy area for mature marijuana plants may be increased to 10,000 square feet upon demonstration by the applicant to the County that:
         i. The marijuana production operation was lawfully established prior to January 1, 2015; and
         ii. The increased mature marijuana plant canopy area will not generate adverse impact of visual, odor, noise, lighting, privacy or access greater than the impacts associated with a 5,000 square foot canopy area operation.
      c. Parcels equal to or greater than 20 acres to less than 40 acres in lot area: 10,000 square feet.
      d. Parcels equal to or greater than 40 acres to less than 60 acres in lot area: 20,000 square feet.
      e. Parcels equal to or greater than 60 acres in lot area: 40,000 square feet.
   4. Maximum Building Floor Area. In the MUA-10 zone, the maximum building floor area used for all activities associated with marijuana production and processing on the subject property shall be:
      a. Parcels from 5 acres to less than 10 acres in lot area: 2,500 square feet.
      b. Parcels equal to or greater than 10 acres: 5,000 square feet.

54. Limitation on License/Grow Site per Parcel. No more than one (1) Oregon Liquor Control Commission (OLCC) licensed marijuana production or Oregon Health Authority (OHA)
registered medical marijuana grow site shall be allowed per legal parcel or lot.

65. Setbacks. The following setbacks shall apply to all marijuana production and processing areas and buildings:

a. Minimum Yard Setback/Distance from Lot Lines: **400-150** feet.

b. Setback from an off-site dwelling: **300-400** feet. For the purposes of this criterion, an off-site dwelling includes those proposed off-site dwellings with a building permit application submitted to Deschutes County prior to submission of the marijuana production or processing application to Deschutes County.

c. Setback from Federal public lands: **300** feet.

d. Exception: Any reduction to these setback requirements may be granted by the Planning Director or Hearings Body provided the applicant demonstrates the reduced setbacks afford equal or greater mitigation of visual, odor, noise, lighting, privacy, and access impacts.

76. Separation Distances. Minimum separation distances shall apply as follows:

a. The use applicant property line shall be located a minimum of **4000-1,320** feet from:
   i. A public elementary or secondary school for which attendance is compulsory under Oregon Revised Statutes 339.010, et seq., including any parking lot appurtenant thereto and any property used by the school;
   ii. A private or parochial elementary or secondary school, teaching children as described in ORS 339.030(1)(a), including any parking lot appurtenant thereto and any property used by the school;
   iii. A licensed child care center or licensed preschool, including any parking lot appurtenant thereto and any property used by the child care center or preschool. This does not include licensed or unlicensed child care which occurs at or in residential structures;
   iv. A youth activity center; and
   v. National monuments and state parks, State, local, and municipal parks, including land owned by a parks district;
   vi. Redmond Urban Reserve Area;
   vii. The boundary of any local jurisdiction that has opted out of Oregon’s recreational marijuana program; and
   viii. Any other lot or parcel approved by Deschutes County for marijuana production.

b. For purposes of DCC 18.116.330(B)(76), all distances shall be measured from the lot line of the affected properties listed in DCC 18.116.330(B)(76)(a) to the closest point of the buildings and land area applicant’s property line of land occupied by the marijuana producer or marijuana processor.

c. A change in use of another property to those identified in DCC 18.116.330(B)(76) shall not result in the marijuana producer or marijuana processor being in violation of DCC 18.116.330(B)(76) if the use is:
   i. Pending a local land use decision;
   ii. Licensed or registered by the State of Oregon; or
   iii. Lawfully established.

87. Access. Marijuana production over **5,000** square feet of canopy area for mature marijuana plant sites shall comply with the following standards.

a. Have frontage on and legal direct access from a constructed public, county, or state road; or

b. Have access from a private road or easement serving only the subject property.

c. If the property takes access via a private road or easement which also serves other properties, the applicant shall obtain written consent to utilize the easement or private road for marijuana production access from all owners who have access rights to the private road or easement. The written consent shall:
i. Be on a form provided by the County and shall contain the following information;
ii. Include notarized signatures of all owners, persons and properties holding a recorded interest in the private road or easement;
iii. Include a description of the proposed marijuana production or marijuana processing operation; and
iv. Include a legal description of the private road or easement.

98. Lighting. Lighting shall be regulated as follows:
   a. Inside building lighting, including greenhouses, hoop houses, and similar structures, used for marijuana production shall not be visible outside the building from 7:00 p.m. to 7:00 a.m. on the following days: sunset to sunrise.
   b. Lighting fixtures shall be fully shielded in such a manner that all light emitted directly by the lamp or a diffusing element, or indirectly by reflection or refraction, is projected below the horizontal plane through the lowest light-emitting part.
   c. Light cast by exterior light fixtures other than marijuana grow lights shall comply with DCC 15.10, Outdoor Lighting Control.

109. Odor. The building shall be equipped with an effective odor control system which must at all times prevent unreasonable interference of neighbors’ use and enjoyment of their property. As used in DCC 18.116.330(B)(409), building means the building, including greenhouses, hoop houses, and other similar structures, used for marijuana production or marijuana processing. Odor produced by marijuana production and processing shall comply with the following:
   a. Odor control plan. To ensure that the standard stated in DCC 18.116.330(B)(9) is continuously met, the applicant shall submit an odor control plan prepared and stamped by a mechanical engineer licensed in the State of Oregon that includes the following:
      i. The mechanical engineer’s qualifications and experience with system design and operational audits of effective odor control and mitigation systems;
      ii. A detailed analysis of the methodology, including verified operational effectiveness, that will be relied upon to effectively control odor on the subject property;
      iii. A detailed description of any odor control systems that will be utilized, including operational schedules and maintenance intervals;
      iv. Contingence measures if any aspect of the odor control plan fails or is not followed, or if it is otherwise shown that the standard stated in DCC 18.116.330(B)(9) is not met;
      v. Testing protocols and intervals; and
      vi. Identification of the responsible parties tasked with implementing each aspect of the odor control plan.
   b. Modifications. Significant modifications to the odor control plan, including but not limited to replacement of one system for another or a change in odor control methodology shall be approved in the same manner as a modification to a land use action pursuant to DCC 22.36.040.
   c. The system shall at all times be maintained in working order and shall be in use.

a. The building shall be equipped with an effective odor control system which must at all times prevent unreasonable interference of neighbors’ use and enjoyment of their property.
b. An odor control system is deemed permitted only after the applicant submits a report by a mechanical engineer licensed in the State of Oregon demonstrating that the system will control odor so as not to unreasonably interfere with neighbors’ use and enjoyment of their property.

e. Private actions alleging nuisance or trespass associated with odor impacts are
authorized, if at all, as provided in applicable state statute.

d. The odor control system shall:
   i. Consist of one or more fans. The fan(s) shall be sized for cubic feet per minute (CFM) equivalent to the volume of the building (length multiplied by width multiplied by height) divided by three. The filter(s) shall be rated for the required CFM; or
   ii. Utilize an alternative method or technology to achieve equal to or greater odor mitigation than provided by (i) above.

e. The system shall be maintained in working order and shall be in use.

1110. Noise. Noise produced by marijuana production and marijuana processing shall comply with the following:

   a. Standard. To prevent unreasonable interference of neighbors’ use and enjoyment of their property, sustained noise including ambient noise levels shall not be detectable beyond the applicant’s property line above 45 dB(A) in total between 10:00 pm and 7:00 am the following day.
      i. For purposes of DCC 18.116.330(B)(10), “sustained noise” shall mean noise lasting more than five continuous minutes or five total minutes in a one hour period from mechanical equipment used for heating, ventilation, air condition, odor control, fans and similar functions associated with marijuana production and processing.

   b. Noise control plan. To ensure that the standard stated in DCC 18.116.330(B)(10) is continuously met, the applicant shall submit a noise control plan prepared and stamped by a mechanical engineer licensed in the State of Oregon that includes the following:
      i. The mechanical engineer’s qualifications and experience with system design and operational audit of effective noise control and mitigation systems;
      ii. A detailed analysis of the methodology that will be relied upon to effectively control noise on the subject property;
      iii. A detailed description of any noise control systems that will be utilized, including operational schedules and maintenance intervals;
      iv. Contingence measures if any aspect of the noise control plan fails or is not followed, or if it is otherwise shown that the standard stated in DCC 18.116.330(B)(10) is not met;
      v. Testing protocols and intervals; and
      vi. Identification of the responsible parties tasked with implementing each aspect of the noise control plan.

   c. Modifications. Significant modifications to the noise control plan, including but not limited to replacement of one system for another or a change in noise control methodology shall be approved in the same manner as a modification to a land use action pursuant to DCC 22.36.040.
      a. Sustained noise from mechanical equipment used for heating, ventilation, air condition, odor control, fans and similar functions shall not exceed 30 dB(A) measured at any property line between 10:00 p.m. and 7:00 a.m. the following day.
      b. Sustained noise from marijuana production is exempt from protections of DCC 9.12 and ORS 30.395, Right to Farm. Intermittent noise for accepted farming practices is permitted.

1211. Screening and Fencing. The following screening standards shall apply to greenhouses, hoop houses, and similar non-rigid structures and land areas used for marijuana production and processing:

   a. All marijuana uses, buildings, structures, fences, and storage and parking areas, whether a building permit is required or not, in the Landscape Management Combining Zone, shall comply with and require DCC 18.84, Landscape Management Combining
Zone approval. Subject to DCC 18.84, Landscape Management Combining Zone approval, if applicable.

b. Fencing and screening shall be finished in a muted earth tone that blends with the surrounding natural landscape and shall not be constructed of temporary materials such as plastic sheeting, hay bales, tarps, etc., and shall be subject to DCC 18.88, Wildlife Area Combining Zone, if applicable.

c. Razor wire, or similar, shall be obscured from view or colored a muted earth tone that blends with the surrounding natural landscape.

d. The existing tree and shrub cover screening the development from the public right-of-way or adjacent properties shall be retained to the maximum extent possible. This provision does not prohibit maintenance of existing lawns, removal of dead, diseased or hazardous vegetation; the commercial harvest of forest products in accordance with the Oregon Forest Practices Act; or agricultural use of the land.

4312. Water. Applicant shall state the anticipated amount of water to be used, as stated on the water right, certificate, permit, or other water use authorization, on an annual basis. Water use from any source for marijuana production shall comply with all applicable state statutes and regulations. The applicant shall provide:

a. An Oregon Water Resources Department (ORWD) Certificate(s), permit, or other water use authorization proving necessary water supply of proper classification will be available for intended use during required seasons, regardless of source; or

b. A source water provider Will Serve statement referencing valid Water Right to be utilized, if any, as well as a Will Haul statement, including the name and contact information of the water hauler; or

c. In the alternative to (a) and (b) above, proof from Oregon Water Resources Department that the water supply to be used does not require a Water Right for the specific application use classification, volume, and season of use (i.e., roof-collected water). Proof from the Oregon Water Resources Department that the water to be used is from a source that does not require a water right.

d. If the applicant is proposing a year-round production facility, the water right, certificate, permit, or other water use authorization must address all permitted sources of water for when surface water is unavailable.

e. In the event that the water source for the facility changes from the use of an ORWD certificate, permit, or other water use authorization to the use of a water hauler, or from the use of a water hauler to another source, a modification to a land use action pursuant to DCC 22.36.040 is required.

4413. Fire protection for processing of cannabinoid extracts. Processing of cannabinoid extracts shall only be permitted on properties located within the boundaries of or under contract with a fire protection district.

4514. Utility Verification. Utility statements identifying the proposed operation, or operational characteristics such as required electrical load and timing of such electrical loads and a statement from each utility company proposed to serve the operation, stating that each such company is able and willing to serve the operation, shall be provided. The utility shall state that it has reviewed the new service or additional load request and determined if existing capacity can serve the load or if a system upgrade is required. Any new service request or additional load request requiring an upgrade shall be performed per the serving utility’s stated policy.

4615. Security Cameras. If security cameras are used, they shall be directed to record
only the subject property and public rights-of-way, except as required to comply with
requirements of the OLCC or the OHA.

   a. Marijuana waste shall be stored in a secured waste receptacle in the possession of and
      under the control of the OLCC licensee or OHA Person Responsible for the Grow Site
      (PRMG).
   a.b. Wastewater generated during marijuana production and/or processing shall be disposed
      of in compliance with applicable, federal, state, and local laws and regulations.

18. Residency. In the MUA-10 zone, a minimum of one of the following shall reside in a
dwelling unit on the subject property:
   a. An owner of the subject property;
   b. A holder of an OLCC license for marijuana production, provided that the license
      applies to the subject property; or
   c. A person registered with the OHA as a person designated to produce marijuana by a
      registry identification cardholder, provided that the registration applies to the subject
      property.

1917. Nonconformance. All medical marijuana grow sites lawfully established prior to
June 8, 2016 by the Oregon Health Authority shall comply with Ordinance No. 2016-015
and with the provisions of DCC 18.116.330(B)(9) by September 8, 2016 and with the

20. Prohibited Uses.
   a. In the EFU zone, the following uses are prohibited:
      i. A new dwelling used in conjunction with a marijuana crop;
      ii. A farm stand, as described in ORS 215.213(1)(r) or 215.283(1)(o), used in
          conjunction with a marijuana crop;
      iii. A commercial activity, as described in ORS 215.213(2)(c) or 215.283(2)(a),
          carried on in conjunction a marijuana crop; and
      iv. Agri-tourism and other commercial events and activities in conjunction with a
          marijuana crop.
   b. In the MUA-10 Zone, the following uses are prohibited:
      i. Commercial activities in conjunction with farm use when carried on in conjunction
         with a marijuana crop.
   eb. In the EFU, MUA-10, and Rural Industrial zones, the following uses are prohibited on
      the same property as marijuana production:
      i. Guest Lodge.
      ii. Guest Ranch.
      iii. Dude Ranch.
      iv. Destination Resort.
      v. Public Parks.
      vi. Private Parks.
      viii. Bed and Breakfast.
      ix. Room and Board Arrangements.

   a. Odor. On-going compliance with the odor control plan is mandatory and shall be
      ensured with a permit condition of approval. The odor control plan does not supersede
      required compliance with the standard set forth in DCC 18.116.330(B)(9). If provided
      in applicable state statutes, private actions alleging nuisance or trespass associated with
      odor impacts are authorized.
   b. Noise. On-going compliance with the noise control plan is mandatory and shall be
      ensured with a permit condition of approval. The noise control plan does not supersede
Chapter 18.116 (11/2018)

required compliance with the standard set forth in DCC 18.116.330(B)(10). If provided in applicable state statutes, private actions alleging nuisance or trespass associated with noise impacts are authorized.

C. Marijuana Retailing. Marijuana retailing, including recreational and medical marijuana sales, shall be subject to the following standards and criteria:

1. Hours. Hours of operation shall be no earlier than 9:00 a.m. and no later than 7:00 p.m. on the same day.
2. Odor. The building, or portion thereof, used for marijuana retailing shall be designed or equipped to prevent detection of marijuana plant odor off premise by a person of normal sensitivity.
3. Window Service. The use shall not have a walk-up or drive-thru window service.
4. Secure Waste Disposal. Marijuana waste shall be stored in a secured waste receptacle in the possession of and under the control of the OLCC licensee or OHA registrant.
5. Minors. No person under the age of 21 shall be permitted to be present in the building, or portion thereof, occupied by the marijuana retailer, except as allowed by state law.
6. Co-Location of Related Activities and Uses. Marijuana and tobacco products shall not be smoked, ingested, or otherwise consumed in the building space occupied by the marijuana retailer. In addition, marijuana retailing shall not be co-located on the same lot or parcel or within the same building with any marijuana social club or marijuana smoking club.
7. Separation Distances. Minimum separation distances shall apply as follows:
   a. The use shall be located a minimum of 1,000 feet from:
      i. A public elementary or secondary school for which attendance is compulsory under Oregon Revised Statutes 339.010, et seq., including any parking lot appurtenant thereto and any property used by the school;
      ii. A private or parochial elementary or secondary school, teaching children as described in ORS 339.030(1)(a), including any parking lot appurtenant thereto and any property used by the school;
      iii. A licensed child care center or licensed preschool, including any parking lot appurtenant thereto and any property used by the child care center or preschool. This does not include licensed or unlicensed family child care which occurs at or in residential structures;
      iv. A youth activity center;
      v. National monuments and state parks; and
      vi. Any other marijuana retail facility licensed by the OLCC or marijuana dispensary registered with the OHA.
   b. For purposes of DCC 18.116.330(B)(7), distance shall be measured from the lot line of the affected property to the closest point of the building space occupied by the marijuana retailer. For purposes of DCC 18.116.330(B)(7)(a)(vi), distance shall be measured from the closest point of the building space occupied by one marijuana retailer to the closest point of the building space occupied by the other marijuana retailer.
   c. A change in use to another property to a use identified in DCC 18.116.330(B)(7), after a marijuana retailer has been licensed by or registered with the State of Oregon shall not result in the marijuana retailer being in violation of DCC 18.116.330(B)(7).

D. Inspections and Annual Reporting

1. An annual report shall be submitted to the Community Development Department by the real property owner or licensee, if different, each February 1, documenting all of the following as of December 31 of the previous year, including the applicable fee as adopted in the current County Fee Schedule and a fully executed Consent to Inspect Premises form:
   a. Documentation demonstrating compliance with the:
      i. Land use decision and permits.
ii. Fire, health, safety, waste water, and building codes and laws.
iii. State of Oregon licensing requirements.

b. An optional statement of annual water use. Failure to timely submit the annual report, fee, and Consent to Inspect Premises form or to demonstrate compliance with DCC 18.116.330(C)(1)(a) shall serve as acknowledgement by the real property owner and licensee that the otherwise allowed use is not in compliance with Deschutes County Code; authorizes permit revocation under DCC Title 22, and may be relied upon by the State of Oregon to deny new or license renewal(s) for the subject use.

c. Other information as may be reasonably required by the Planning Director to ensure compliance with Deschutes County Code, applicable State regulations, and to protect the public health, safety, and welfare.

d. As a condition of approval, the applicant must consent in writing to allow Deschutes County to, randomly and without prior notice, inspect the premises and ascertain the extent and effectiveness of the odor control system(s), compliance with Deschutes County Code, and applicable conditions of approval. Inspections may be conducted by the County up to three (3) times per calendar year, including one inspection prior to the initiation of use. Marijuana Control Plan to be established and maintained by the Community Development Department.

e. Conditions of Approval Agreement to be established and maintained by the Community Development Department.

f. Documentation that System Development Charges have been paid.

g. This information shall be public record subject to ORS 192.502(17).

h. Failure to timely submit the annual report, fee, and Consent to Inspect Premises form or to demonstrate compliance with DCC 18.116.330(D)(1)(a) shall serve as acknowledgement by the real property owner and licensee that the otherwise allowed use is not in compliance with Deschutes County Code; authorized permit revocation under DCC Title 22, and may be relied upon by the State of Oregon to deny new or license renewal(s) for the subject use.

(Ord. 2018-012 §3, 2018; Ord. 2016-015 §10, 2016)

18.116.340. Marijuana Production Registered by the Oregon Health Authority (OHA)

A. Applicability. Section 18.116.340 applies to:

1. All marijuana production registered by OHA prior to June 1, 2016; and

2. All marijuana production registered by OHA on or after June 1, 2016 until the effective date of Ordinances 2016-015, 2016-16, 2016-17, and 2016-18, at which time Ordinances 2016-015 through Ordinance 2016-018 shall apply.

B. All marijuana production registered by OHA prior to June 1, 2016 shall comply with the following standards by September 15, 2016:

1. Lighting. Lighting shall be regulated as follows:
   a. Inside building lighting, including greenhouses, hoop houses, and similar structures, used for marijuana production shall not be visible outside the building from 7:00 p.m. to 7:00 a.m. on the following days: sunset to sunrise.
   b. Lighting fixtures shall be fully shielded in such a manner that all light emitted directly by the lamp or a diffusing element, or indirectly by reflection or refraction, is projected below the horizontal plane through the lowest light-emitting part.
   c. Light cast by exterior light fixtures other than marijuana grow lights shall comply with DCC 15.10, Outdoor Lighting Control.

C. All marijuana production registered by OHA prior to June 1, 2016 shall comply with the following standards by December 15, 2016:

1. Odor. As used in DCC 18.116.330(B)(4) (od), building means the building, including
greenhouses, hoop houses, and other similar structures, used for marijuana production or marijuana processing.

a. The building shall be equipped with an effective odor control system which must at all times prevent unreasonable interference of neighbors’ use and enjoyment of their property.

b. An odor control system is deemed permitted only after the applicant submits a report by a mechanical engineer licensed in the State of Oregon demonstrating that the system will control odor so as not to unreasonably interfere with neighbors’ use and enjoyment of their property.

c. Private actions alleging nuisance or trespass associated with odor impacts are authorized, if at all, as provided in applicable state statute.

d. The odor control system shall:
   i. Consist of one or more fans. The fan(s) shall be sized for cubic feet per minute (CFM) equivalent to the volume of the building (length multiplied by width multiplied by height) divided by three. The filter(s) shall be rated for the required CFM; or
   ii. Utilize an alternative method or technology to achieve equal to or greater odor mitigation than provided by i. above.

e. The system shall be maintained in working order and shall be in use.

2. Noise. Noise produced by marijuana production and marijuana processing shall comply with the following:

a. Sustained noise from mechanical equipment used for heating, ventilation, air condition, odor control, fans and similar functions shall not exceed 30 dB(A) measured at any property line between 10:00 p.m. and 7:00 a.m. the following day.

b. Sustained noise from marijuana production is not subject to the Right to Farm protections in DCC 9.12 and ORS 30.395. Intermittent noise for accepted farming practices is however permitted.

3. Screening and Fencing. The following screening standards shall apply to greenhouses, hoop houses, and similar non-rigid structures and land areas used for marijuana production and processing:

a. Subject to DCC 18.84, Landscape Management Combining Zone approval, if applicable.

b. Fencing shall be finished in a muted earth tone that blends with the surrounding natural landscape and shall not be constructed of temporary materials such as plastic sheeting, hay bales, tarps, etc., and shall be subject to DCC 18.88, Wildlife Area Combining Zone, if applicable.

c. Razor wire, or similar, shall be obscured from view or colored a muted earth tone that blends with the surrounding natural landscape.

d. The existing tree and shrub cover screening the development from the public right-of-way or adjacent properties shall be retained to the maximum extent possible. This provision does not prohibit maintenance of existing lawns, removal of dead, diseased or hazardous vegetation; the commercial harvest of forest products in accordance with the Oregon Forest Practices Act; or agricultural use of the land.

4. Water. The applicant shall provide:

a. A copy of a water right permit, certificate, or other water use authorization from the Oregon Water Resource Department; or

b. A statement that water is supplied from a public or private water provider, along with the name and contact information of the water provider; or

c. Proof from the Oregon Water Resources Department that the water to be used is from a source that does not require a water right.

5. Security Cameras. If security cameras are used, they shall be directed to record only the
subject property and public rights-of-way, except as required to comply with requirements of the OLCC or the OHA.

6. Secure Waste Disposal. Marijuana waste shall be stored in a secured waste receptacle in the possession of and under the control of the OLCC licensee or OHA Person Responsible for the Grow Site (PRMG).

D. All new marijuana production registered by OHA on or after June 1, 2016 shall comply with DCC 18.116.340.330(A, B, and D-C), and the following standards:

1. Shall only be located in the following zones
   a. EFU;
   b. MUA-10; or
   c. Rural Industrial in the vicinity of Deschutes Junction.

   b. In the EFU and MUA-10 zones, the subject property shall have a minimum lot area of five (5) acres.

3. Maximum Building Floor Area. In the MUA-10 zone, the maximum building floor area used for all activities associated with medical marijuana production on the subject property shall be:
   a. Parcels from 5 acres to less than 10 acres in area: 2,500 square feet.
   b. Parcels equal to or greater than 10 acres: 5,000 square feet.

4. Setbacks. The following setbacks shall apply to all marijuana production areas and buildings:
   a. Minimum Yard Setback/Distance from Lot Lines: 100 feet.
   b. Setback from an off-site dwelling: 300 feet.

For the purposes of this criterion, an off-site dwelling includes those proposed off-site dwellings with a building permit application submitted to Deschutes County prior to submission of the marijuana production or processing application to Deschutes County.

e. Exception: Reductions to these setback requirements may be granted at the discretion of the Planning Director or Hearings Body provided the applicant demonstrates that the reduced setbacks afford equal or greater mitigation of visual, odor, noise, lighting, privacy, and access impacts.

5. Indoor Production and Processing.
   a. In the MUA-10 zone, marijuana production shall be located entirely within one or more fully enclosed buildings with conventional or post framed opaque, rigid walls and roof covering. Use of greenhouses, hoop houses, and similar non-rigid structures is prohibited.
   b. In the EFU zone, marijuana production shall only be located in buildings, including greenhouses, hoop houses, and similar structures.
   c. In all zones, marijuana production is prohibited in any outdoor area.

6. Maximum Mature Plant Canopy Size. In the EFU zone, the maximum canopy area for mature marijuana plants shall apply as follows:
   a. Parcels from 5 acres to less than 10 acres in lot area: 2,500 square feet.
   b. Parcels equal to or greater than 10 acres to less than 20 acres in lot area: 5,000 square feet.

The maximum canopy area for mature marijuana plants may be increased to 10,000 square feet upon demonstration by the applicant to the County that:
   i. The marijuana production operation was lawfully established prior to January 1, 2015; and
   ii. The increased mature marijuana plant canopy area will not generate adverse impact of visual, odor, noise, lighting, privacy or access greater than the impacts associated with a 5,000 square foot canopy area operation.
   e. Parcels equal to or greater than 20 acres to less than 40 acres in lot area: 10,000 square feet.
d. Parcels equal to or greater than 40 acres to less than 60 acres in lot area: 20,000 square feet.
e. Parcels equal to or greater than 60 acres in lot area: 40,000 square feet.

7. Separation Distances. Minimum separation distances shall apply as follows:
a. The use shall be located a minimum of 1000 feet from:
   i. A public elementary or secondary school for which attendance is compulsory under Oregon Revised Statutes 339.010, et seq., including any parking lot appurtenant thereto and any property used by the school;
   ii. A private or parochial elementary or secondary school, teaching children as described in ORS 339.030(1)(a), including any parking lot appurtenant thereto and any property used by the school;
   iii. A licensed child care center or licensed preschool, including any parking lot appurtenant thereto and any property used by the child care center or preschool.
   This does not include licensed or unlicensed child care which occurs at or in residential structures;
   iv. A youth activity center; and
   v. National monuments and state parks.
b. For purposes of DCC 18.116.330(B)(7), all distances shall be measured from the lot line of the affected properties listed in DCC 18.116.330(B)(7)(a) to the closest point of the buildings and land area occupied by the marijuana producer or marijuana processor.
c. A change in use of another property to those identified in DCC 18.116.330(B)(7) shall not result in the marijuana producer or marijuana processor being in violation of DCC 18.116.330(B)(7) if the use is:
   i. Pending a local land use decision;
   ii. Registered by the State of Oregon; or
   iii. Lawfully established.

8. Access. Marijuana production over 5,000 square feet of canopy area for mature marijuana plants shall comply with the following standards.
a. Have frontage on and legal direct access from a constructed public, county, or state road; or
b. Have access from a private road or easement serving only the subject property.
c. If the property takes access via a private road or easement which also serves other properties, the applicant shall obtain written consent to utilize the easement or private road for marijuana production access from all owners who have access rights to the private road or easement. The written consent shall:
   i. Be on a form provided by the County and shall contain the following information;
   ii. Include notarized signatures of all owners, persons and properties holding a recorded interest in the private road or easement;
   iii. Include a description of the proposed marijuana production or marijuana processing operation; and
   iv. Include a legal description of the private road or easement.

9. Residency. In the MUA-10 zone, a minimum of one of the following shall reside in a dwelling unit on the subject property:
a. An owner of the subject property; or
b. A person registered with the OHA as a person designated to produce marijuana by a registry identification cardholder, provided that the registration applies to the subject property.

10. Annual Reporting. An annual report shall be submitted to the Community Development Department by the real property owner or licensee, if different, each February 1, documenting all of the following as of December 31 of the previous year, including the applicable fee as adopted in the current County Fee Schedule and a fully-executed Consent
to Inspect Premises form:

a. Documentation demonstrating compliance with the:
   i. Land use decision and permits.
   ii. Fire, health, safety, waste water, and building codes and laws.
   iii. State of Oregon licensing requirements.

b. Failure to timely submit the annual report, fee, and Consent to Inspect Premises form or to demonstrate compliance with DCC 18.116.330(C)(1)(a) shall serve as acknowledgement by the real property owner and licensee that the otherwise allowed use is not in compliance with Deschutes County Code; authorizes permit revocation under DCC Title 22, and may be relied upon by the State of Oregon to deny new or license renewal(s) for the subject use.

c. Other information as may be reasonably required by the Planning Director to ensure compliance with Deschutes County Code, applicable State regulations, and to protect the public health, safety, and welfare.

d. Marijuana Control Plan to be established and maintained by the Community Development Department.

e. Conditions of Approval Agreement to be established and maintained by the Community Development Department.

f. This information shall be public record subject to ORS 192.502(17).


a. In the EFU zone, the following uses are prohibited:
   i. A new dwelling used in conjunction with a marijuana crop;
   ii. A farm stand, as described in ORS 215.213(1)(r) or 215.283(1)(o), used in conjunction with a marijuana crop;
   iii. A commercial activity, as described in ORS 215.213(2)(c) or 215.283(2)(a), carried on in conjunction with a marijuana crop; and
   iv. Agri-tourism and other commercial events and activities in conjunction with a marijuana crop.

b. In the MUA-10 Zone, the following uses are prohibited:
   i. Commercial activities in conjunction with farm use when carried on in conjunction with a marijuana crop.

c. In the EFU, MUA-10, and Rural Industrial zones, the following uses are prohibited on the same property as marijuana production:
   i. Guest Lodge.
   ii. Guest Ranch.
   iii. Dude Ranch.
   iv. Destination Resort.
   v. Public Parks.
   vi. Private Parks.
   viii. Bed and Breakfast.
   ix. Room and Board Arrangements.

(Ord. 2018-012 §3, 2018; Ord. 2016-019 §1, 2016)
Chapter 18.124. SITE PLAN REVIEW

18.124.060. Approval Criteria.

* * *

18.124.060. Approval Criteria.

Approval of a site plan shall be based on the following criteria:

| A. The proposed development shall relate harmoniously to the natural and man-made environment and existing development, minimizing visual impacts and preserving natural features including views and topographical features. |
| B. The landscape and existing topography shall be preserved to the greatest extent possible, considering development constraints and suitability of the landscape and topography. Preserved trees and shrubs shall be protected. |
| C. The site plan shall be designed to provide a safe environment, while offering appropriate opportunities for privacy and transition from public to private spaces. |
| D. When appropriate, the site plan shall provide for the special needs of disabled persons, such as ramps for wheelchairs and Braille signs. |
| E. The location and number of points of access to the site, interior circulation patterns, separations between pedestrians and moving and parked vehicles, and the arrangement of parking areas in relation to buildings and structures shall be harmonious with proposed and neighboring buildings and structures. |
| F. Surface drainage systems shall be designed to prevent adverse impacts on neighboring properties, streets, or surface and subsurface water quality. |
| G. Areas, structures and facilities for storage, machinery and equipment, services (mail, refuse, utility wires, and the like), loading and parking and similar accessory areas and structures shall be designed, located and buffered or screened to minimize adverse impacts on the site and neighboring properties. |
| H. All above-ground utility installations shall be located to minimize adverse visual impacts on the site and neighboring properties. |
| I. Specific criteria are outlined for each zone and shall be a required part of the site plan (e.g. lot setbacks, etc.). |
| J. All exterior lighting shall be shielded so that direct light does not project off-site. |
| K. Transportation access to the site shall be adequate for the use. |
| 1. Where applicable, issues including, but not limited to, sight distance, turn and acceleration/deceleration lanes, right-of-way, roadway surfacing and widening, and bicycle and pedestrian connections, shall be identified. |
| 2. Mitigation for transportation-related impacts shall be required. |
| 3. Mitigation shall meet applicable County standards in DCC 17.16 and DCC 17.48, applicable Oregon Department of Transportation (ODOT) mobility and access standards, and applicable American Association of State Highway and Transportation Officials (AASHTO) standards. |

(Ord. 2018-012 §4, 2018; Ord. 2010-018 §2, 2010; Ord. 93-043 §§21, 22 and 22A, 1993; Ord. 91-038 §1, 1991; Ord. 91-020 §1, 1991)
Chapter 22.24.  LAND USE ACTION HEARINGS


* * *


A. Individual Mailed Notice.

1. Except as otherwise provided for herein, notice of a land use application shall be mailed at least 20 days prior to the hearing for those matters set for hearing, or within 10 days after receipt of an application for those matters to be processed administratively with notice. Written notice shall be sent by mail to the following persons:
   a. The applicant.
   b. Owners of record of property as shown on the most recent property tax assessment roll of property located:
      1. Within 100 feet of the property that is the subject of the notice where any part of the subject property is within an urban growth boundary;
      2. Within 250 feet of the property that is the subject of the notice where the subject property is outside an urban growth boundary and not within a farm or forest zone, except where greater notice is required under DCC 22.24.030(A)(4) for structures proposed to exceed 30 feet in height; or
      3. Within 750 feet of the property that is the subject of the notice where the subject property is within a farm or forest zone, except where greater notice is required under DCC 22.24.030(A)(4) for structures proposed to exceed 30 feet in height.
      4. Within 1000 feet of the property that is subject of a marijuana production or processing notice where the subject property is within a farm zone.
   c. For a solar access or solar shade exception application, only those owners of record identified in the application as being burdened by the approval of such an application.
   d. The owner of a public use airport if the airport is located within 10,000 feet of the subject property.
   e. The tenants of a mobile home park when the application is for the rezoning of any part or all of a mobile home park.
   f. The Planning Commission.
   g. Any neighborhood or community organization formally recognized by the board under criteria established by the Board whose boundaries include the site.
   h. At the discretion of the applicant, the County also shall provide notice to the Department of Land Conservation and Development.

2. Notwithstanding DCC 22.24.030(A)(1) (b)(1), all owners of property within 250 feet of property that is the subject of a plan amendment application or zone change application shall receive notice.

3. The failure of a property owner to receive mailed notice shall not invalidate any land use approval if the Planning Division can show by affidavit that such notice was given.

4. For structures proposed to exceed 30 feet in height that are located outside of an urban growth boundary, the area for describing persons entitled to notice under DCC 22.24.030(A)(1)(b) shall expand outward by a distance equal to the distance of the initial notice area boundary for every 30 foot height increment or portion thereof.

B. Posted Notice.
1. Notice of a land use action application for which prior notice procedures are chosen shall be posted on the subject property for at least 10 continuous days prior to any date set for receipt of comments. Such notice shall, where practicable, be visible from any adjacent public way.

2. Posted notice of an application for a utility facility line approval shall be by posting the proposed route at intervals of not less than one-half mile. The notice shall be posted as close as practicable to, and be visible from, any public way in the vicinity of the proposed route.

3. Notice of a solar access application shall be posted as near as practicable to each lot identified in the application.

C. Published Notice. In addition to notice by mail and posting, notice of an initial hearing shall be published in a newspaper of general circulation in the County at least 20 days prior to the hearing.

D. Media Notice. Copies of the notice of hearing shall be transmitted to other newspapers published in Deschutes County.

Chapter 22.32.  APPEALS

22.32.015. Filing Appeals.

* * *

22.32.015. Filing appeals.

A. To file an appeal, an appellant must file a completed notice of appeal on a form prescribed by the Planning Division and an appeal fee.

B. Unless a request for reconsideration has been filed, the notice of appeal and appeal fee must be received at the offices of the Deschutes County Community Development Department no later than 5:00 PM on the twelfth day following mailing of the decision. If a decision has been modified on reconsideration, an appeal must be filed no later than 5:00 PM on the twelfth day following mailing of the decision as modified. Notices of Appeals may not be received by facsimile machine.

C. Unless a request for reconsideration has been filed for a marijuana production or processing administrative decision, the notice of appeal and appeal fee must be received at the offices of the Deschutes County Community Development Department no later than 5:00 PM on the fifteenth day following mailing of the decision.

CD. If the Board of County Commissioners is the Hearings Body and the Board declines review, a portion of the appeal fee may be refunded. The amount of any refund will depend upon the actual costs incurred by the County in reviewing the appeal. When the Board declines review and the decision is subsequently appealed to LUBA, the appeal fee may be applied toward the cost of preparing a transcript of the lower Hearings Body’s decision.

DE. The appeal fee shall be paid by method that is acceptable to Deschutes County.

June 13, 2019

re: Written Public Comments on County CDD 2019-2020 Work Plan (Hearing on June 12, 2019)

Dear Chair Henderson, Commissioner DeBone and Commissioner Adair:

This law firm is the successor entity to Clifton Cannabis Law LLC, which represented twelve (12) petitioners (the “Petitioners”) in an appeal of Ordinance No. 2018-012 to the Land Use Board of Appeals (LUBA) in 2018. These written comments are submitted pursuant to the Board’s statement at the public hearing on June 12, 2019 that the record on the matter would be left open through June 13, 2019.

A. Consideration and Adoption of Revised Marijuana Regulations.

Nick Lelack, Deschutes County Development Department (CDD) Director presented the department’s Annual Report and Draft 2019-2020 Work Plan at the public hearing. Among other things in the report, the County’s regulation of marijuana was addressed.

We are advised by the CDD that you intend to reconsider the marijuana text amendments that were adopted (and appealed and subsequently withdrawn) last fall in a public hearing on July 3. We have further been advised that the Board’s intention is to bring the amendments to the hearing in the same form as they were adopted and proceed from there with the public process. With the upcoming legislative process, the County has the opportunity to address many issues raised by the LUBA Petitioners to come up with regulations that are actually reasonable and supported by the facts.

B. Summary of Legal and Factual Deficiencies in Ordinance 2018-012

The Marijuana Regulatory Assessment prepared by CDD staff at the Board’s request, including a Marijuana Land Use Existing Conditions Report, dated October 23, 2017, shows no issues were identified with respect to permitted operations. There is no basis for increasing regulation of marijuana. The Commissioners should listen to all of their constituents, particularly those most impacted by the regulations, which includes those in the marijuana industry.

Alleged impact of those operations on the public is not supported by evidence, but on fears and a lack of understanding. Elevating presumptions about character, crime and even odor over the documented track record of legal, complaint operations is error.

The result is the erosion of rights under the Farm Bill and the State and Federal constitutions. Why is marijuana treated differently than hemp with respect to odor? Why is a presumption of guilt applied to applicants and operators to justify
unannounced searches? Why are no other businesses and no other farms subject to such extreme exercises of claimed authority? Marijuana is a farm crop entitled to protection under the Farm Act and Goal 3. Small farms are also entitled to protection by the County Comprehensive Plan. The County must not lose sight of these existing protections in the rush to regulate out of existence what is viewed as politically unpopular. The County elected to opt-in, and not prohibit marijuana. It cannot have it both ways.

With respect to legal authority, the County is indeed limited with respect to the scope of marijuana regulations it can adopt. First, they must be “reasonable.” Second, ORS 475B.486 describes the type of police power authority granted, which extends to hours of operations, access and setbacks.

This authority is importantly constrained by ORS 475B.454, Preemption. The provisions of the statutory scheme are designed to operate uniformly throughout the state and are paramount and superior to and fully replace and supersed any municipal charter amendment or local ordinance inconsistent with the provisions of the statutory scheme. Amendments and local ordinances that are inconsistent with the statutory scheme are repealed.

ORS 475B.526 declares marijuana as a crop for purposes of “farm use,” (ORS 215.201), production of marijuana is included within the definitions of “farm” and “farming practice” (for purposes of ORS 30.930), and marijuana is the product of an agricultural activity (for purposes of ORS 568.909) and the product of farm use (for purposes of ORS 308A.062). Marijuana is entitled to the same protections as other crops under Oregon’s Farm Act and is shielded from nuisance and trespass lawsuits under ORS 30.935.

The County has already been warned by the Legislature regarding its local regulations. Defending regulations that the County should know to be unreasonable and inconsistent with state law is a waste of public resources.

C. Specific Challenges to be Raised if the County Reenacts the Same Regulations and Restrictions in Ordinance 2018-012

If the County essentially readopts the Ordinance, challenges to LUBA will be made on these, and other bases.

First, the County would again exceed its jurisdiction and in doing so, would misconstrue controlling laws. The County lacks authority to remove marijuana’s state protections as a legal farm crop (per ORS 475B.526) under Oregon’s Right to Farm Act (“Farm Act”). A new ordinance that reenacts the challenged Ordinance 2018-012 will violate that Act by granting a nuisance and trespass right against marijuana producers. The County violated Goal 3 and its Plan by effectively capping an undisputed viable agricultural use in the EFU.

The County further lacks authority to adopt facially unreasonable restrictions on marijuana production. A local government may only regulate EFU land use as allowed by state law and cannot impose barriers to farm uses outright permitted in the EFU. The carve-out for “reasonable conditions” on the manner of marijuana production (ORS 475B.486 and ORS 475B.928) must be read congruously with these protections because otherwise, marijuana loses its express protections as a farm crop. Each restriction in Ordinance 2018-012 is unreasonable because it demands farm operations with zero impact (in terms of light, noise, odor, etc.). The Ordinance took the strictest marijuana regulations in Oregon and purposefully made them harsher to appease certain constituents. The County sought to sacrifice a farm crop to appease nonfarm uses in EFU lands. Its assertions of compliance with these laws is disproved by the record and the practical effects of its Ordinance.

The Ordinance was not factually supported as required by Goal 2. The record reflects substantive evidence against the Ordinance restrictions, but only speculation, unsubstantiated complaints, and the Commissioners’ manifest prejudice to support them. The County should not again ignore the facts to appease grumblings of certain constituents.
The Ordinance also violated the U.S. and Oregon Constitution. Marijuana growers face unreasonable regulations not suffered by other County farmers or other marijuana growers outside the County. This is not rationally related to a legitimate government endeavor because the County’s true aim in adopting the Ordinance was to usurp state legislative and administrative authorities to regulate marijuana production out of existence. The County’s pretext should fail. The Ordinance’s restrictions also failed rational basis analysis under 14th Amendment substantive due process jurisprudence. Forcing marijuana producers and processors to waive constitutional rights against unlawful searches and seizures is demonstrably unnecessary and pretextual, designed to harass, not enforce. Lastly, the Ordinance unconstitutionally granted a privilege by giving certain EFU owners a right to nuisance and trespass relief against marijuana growers that other citizens cannot exert against the same type of farming byproducts.

We understand a public hearing is scheduled for July 3, 2019 with respect to consideration of a new ordinance to replace Ordinance 2018-012. Please include this letter in that record, as well as in the record for the CDD 2019-2020 Work Plan.

Thank you for your attention to and consideration of these comments.

Sincerely,

Stephanie Marshall

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Dear Chair Henderson, Commissioner DeBone, Commissioner Adair,

What began as a medical grow operation in 2015 and with five dispensaries across Oregon, our goal is to continue to thrive and provide Oregonians with the high-quality cannabis products they've grown to love from Cannabis Nation. In addition to producing over 30 premium strains, we also make our own concentrates, cartridges, and pre-rolls. Our Sunriver store is our newest location, opening in June of 2018. In the coming fiscal year, we are looking for regulations that give our retail store in Sunriver an equal opportunity to participate in the regulated cannabis market.

We would like to propose the extension of our allowable hours of operation to match the legally allowable hours for the neighboring cities of Bend and La Pine. Currently, the allowable operational hours of dispensaries outside of Bend City Limits and La Pine City Limits in Deschutes County is 9:00 a.m. to 7:00 p.m. Cannabis Nation would like the opportunity to provide the same hours of service for the population of rural Deschutes County. We previously testified in August 2018 proposing this change in operating hours. Our proposed hours of operation would be:

8:00 a.m. – 9:00 p.m. Sunday, Monday, Tuesday & Wednesday
8:00 a.m. – 10:00 p.m. Thursday, Friday & Saturday

As Cannabis Nation Sunriver has been operating just over 1 year, we have seen that the customer traffic is much higher in the evening than in the morning. In the first hour of operations in the months of March, April, and May 2019, only 5.49% of sales occurred. However, during the last hour of operations, over 2x that many sales occurred at 11.93%. There have been numerous occasions during closing shifts that customers have continued to arrive after closing at 7:00 p.m. and must be turned away. This indicates that the ability to operate to the legally allowed time of 10:00 p.m. will benefit not only our customers, but our employees and the State of Oregon as well.

Benefits for the increased hours of operation include:

• Additional hours of workable time for all locally-hired employees, potentially generating the need for added positions to be filled by locally sourced staff.

• Residents of rural Deschutes County and vacationing individuals in the area would not feel the need to drive all the way to Bend or La Pine to make a purchase, keeping the roads safer with decreased potential for individuals driving while tired after a long day of work or physical activity or in potentially dangerous weather conditions.

Individuals living in, as well as those visiting, rural Deschutes County and the Sunriver area work and play all hours of the day. We would like the opportunity to provide the local community and numerous visitors with the State of Oregon’s authorized legal right to purchase marijuana during operating hours that fall within the hours of 8:00 a.m. and 10:00 p.m.

Thank you,

Cannabis Nation Team
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