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DPER Staff Report & Response to Appellant Statement of Appeal
Cloud Bud LLC Marijuana Production and Processing (File CDUP16-0002)

The Statement of Appeal, submitted by Adrian Medved, Scott Valdez and Marney Valdez (the Appellants) on July 3, 2017, raised fifteen objections to DPER's conditional use permit approval (file CDUP16-0002) and nine objections to the associated SEPA determination. With the understanding that post-hearing legal briefing is anticipated, DPER offers the following responses to these objections:

Introduction:

DPER relies mostly upon its staff report decision dated June 9, 2017, for the findings, conclusions and conditions justifying the conditional approval of the conditional use permit and SEPA DNS. Additionally, DPER offers the following brief responses to the objections raised in the Appellants Statement of Appeal.

Objections 1, 2, 3, and 9:

1. *The KC Zoning Code expressly prohibits home-based marijuana businesses.*
2. *The application could not have vested because the proposed use is prohibited.*
3. *The proposal violates the KC Comprehensive Plan because the use is prohibited.*
9. *The application is not complete because it included highly relevant misrepresentations.*

DPER Response:

Marijuana production and processing were both allowed uses in the RA-5 zone, with conditional use permit approval, at the time of complete application. The proposal is not considered a home occupation or home industry business, and was not reviewed under those regulations.

The Appellants misunderstand the home occupation and home industry regulations as restricting the permitted uses on a property. In actuality, the home occupation and home industry provisions expand the uses allowed in a given zone, not the opposite. The purpose of the home occupation regulations is to allow for small-scale home-based uses that would not otherwise be allowed in the zone. When the use *is* allowed in the zone, as was the case with marijuana production and processing in the RA-5 zone, a home occupation or home industry approval is not necessary. The presence of a single-family home on the property, as well as the ownership of the home and/or business, is irrelevant when the proposed use is allowed in the zone in question.

The purpose of the King County Code (KCC) 21A.30.085(J)(4) is to clarify that marijuana businesses must comply with the regulations of 21A.08.090 and 21A.08.080, and that they cannot bypass these requirements by applying for approval as a home occupation or home business. KCC 21A.08.090 land use tables clearly identify that marijuana production is a permitted use or conditional use, subject to footnote restrictions in KCC 21A.08.090.B. DPER actually confirms and agrees that the use is not allowed as a home occupation, but CDUP is a conditional use permit, not a home occupation approval. The arguments about it not being allowed as a home occupation are irrelevant.

Objection 4 and 10:

4. *The proposal is not vested because building permit applications (and more) were not complete.*
10. *The application was not complete because it did not satisfy the complete-application requirements of KCC 20.20.040.*

DPER Response:

The conditional use application was determined complete on March 18, 2016, and as a Type 2 decision, the proposal is considered vested from that time (KCC 20.20.070(A)). Any implementing permits in order to effectuate the approved decision and plans are also vested with the land use regulations in place at that time.

In regards to SEPA review for this project, the final paragraph in the "background" section of the DPER decision explains why SEPA was triggered mid-process.

KCC 20.20.040 states that "a permit application is complete…when it meets the procedural submission requirements of the department and is sufficient for continued processing *even though additional information may be required or project modifications may be undertaken subsequently.* The determination of completeness *shall not preclude the department from requesting additional information or studies either at the time of notice of completeness or subsequently if new or additional information is required or substantial changes in the proposed action occur."* (Emphasis added.) Additionally, KCC 20.20.070(B) states that supplemental information required after vesting of a complete application does not affect the validity of the vesting. Therefore, the project revisions that triggered SEPA have no impact on the complete application determination or the project's vested status.

Ultimately, if DPER fails to identify what is needed for a complete application within 28 days, the application shall be deemed complete (KCC 20.20.050.B.). These arguments can't be used to rationalize denial of the CUP.

Objections 5 and 6:

5. *The proposed use is not consistent with KCCP R-204 and R-205*
6. *The proposed use is not consistent with KCCP Policy R-324*

DPER Response:

The Appellants argue that, because KCC 21A.06.040 differentiates the sale of marijuana from the sale of other agricultural products, that marijuana production is not an agricultural use and is therefore not compatible with the property's rural land-use designation. This interpretation is incorrect. The permitted land uses table in KCC 21A.08.090 clearly lists "Marijuana Producer" under the heading "AGRICULTURE." The fact that King County has chosen to place stricter regulations on the sale of marijuana than on the sale of agricultural products such as corn or tomatoes does not change the fact that growing marijuana is a type of agricultural land use. Declaring marijuana as not being an agricultural product is not the same as declaring it not an agricultural use. Looking to the land use tables (KCC 21A.08.090.A) one would reasonable agree that other agricultural land uses such as an agricultural manure digester or training facility are agricultural uses but not agricultural products.

Even if marijuana production was not considered an agricultural use, KCCP R-324 allows for other uses that are appropriate to, contribute to, and blend with the rural character. The Appellant suggests that no use other than farming is compatible with farming ("Because marijuana is expressly excluded from the definition of farming/agriculture in the KCC, the proposed use cannot, as a matter of law, be compatible with farming.") However, KCCP R-324 provides a non-exhaustive list of non-farming uses that are appropriate in the rural area, and the KCC specifically allows marijuana production in the rural area. The character of the development and intensity of use are no different than other agricultural uses that are permitted outright on the subject property, and will not prevent any future use of the property for other types of agriculture.

Objection 7:

The proposed use is inconsistent with the "farm plan" for the underlying property.

DPER Response:

The farm plan was reviewed by DPER and was determined to actually aid in the appropriate regulation of marijuana production at this site by providing guidance on organic farming techniques, soil preservation, water management and other items. The Farm plan aims to preserve the area for current and future agricultural and farm related activity. The proposed improvements are very limited; driveway access, fencing and a 1,080 square foot greenhouse, all of which are proposed for agricultural use and would facilitate and preserve potential agricultural use of the property and site.

Objection 8:

The proposal does not meet the requirements of a conditional use permit.

DPER Response:

The Appellants' argument focuses on the assumed impacts of the proposed use on the rural character of the surrounding community. They state that the proposed fence, greenhouse, plants, and staff members tending to these plants are incompatible with the rural area. Aside from the Appellants' incorrect interpretation of King County's home occupation rules and classification of agricultural uses (addressed above in responses to objections 1, 2, 3, 5, 6, and 9), the Appellant does not provide any evidence or reasoning as to how the use is not compatible with, or would change the character of, the community. An eight-foot fence, (non-marijuana) plants, and a greenhouse would all be allowed on the property without a conditional use permit. The Applicant would also be

allowed to hire employees to tend and process crops on the subject property. The visual impact of seeing fences, plants, agricultural workers, and a greenhouse is the same whether the crop is corn or marijuana.

Additionally, the Applicant's critical area mitigation includes a planting plan. These required mitigation plantings will further obscure the view of the proposed use from surrounding properties. In fact, here the property is actually topographically lower than most of the surrounding properties and only actually visible from properties directly abutting it.

Objection 11:

There has been no subdivision application, as required, so the project did not vest.

DPER Response:

A subdivision application is not required for this proposal. There is no subdivision of land occurring or proposed. KCC does not preclude multiple uses on a single site, and the presence of fences, separate entrances, and utility stubs has no relevance to the need (or lack thereof) for a subdivision. It is common practice for a property owner in the rural area to use, or lease out, a portion of his or her property for a commercial use. Examples of commercial uses frequently co-located with residential development in the RA zone include farming, stables, cell towers, and other utility facilities. As long as the use complies fully with the provisions of the KCC and the KCCP, and all necessary permits are approved, there is no requirement for a subdivision to obtain a Conditional Use Permit approval.

Objection 12:

The proposal cannot meet with requirements of KCC 21A.12.220

DPER Response:

The site is accessed via a private easement road (identified as 169th Ave SE) to a public street SE 200 St., which has been determined to be functioning at a level consistent with King County Road Standards. DPER acknowledges the site does not "abut" SE 200th street, but the code clearly states that that it abut or be accessible from at least one public street……", which this site is. To suggest that 169th Ave does not provide access to 200th St. is not factual or true. If it were, then the existing non-residential uses (agricultural horse barns, designated riding areas, crop production) currently occurring via access from 169th would all be rendered non-conforming. This requirement has never been interpreted or implemented to suggest that sites may only abut the public street, and the code clearly allows that sites also be accessible from at least one public street.

Objections 13, 14, 15:

13. Granting the requested CUP would be incompatible with or detrimental to overall health and safety of the community.
14. Development is not conditioned to assure that any odor generated is in conformance with the requirements of PSCAA.

15. There are safety or nuisance issues associated with allowing the outdoor marijuana production facility, even assuming compliance with state and federal regulations and conditions of this approval.

DPER Response:

As noted in DPER's decision, Puget Sound Clean Air Agency (PSCAA) is the agency with expertise and regulatory authority in regulating odors; King County does not regulate odors or have measurable standards for doing so. DPER's approval is conditioned on compliance with the terms of a Notice of Construction permit from PSCAA. According to the PSCAA's online informational materials, permit approval requires review of "site-specific conditions to achieve compliance with air quality laws and regulations. The NOC applications rely on case-by-case decisions which reflect the specifics of the application and the emission control technology options and projected impacts for that specific proposal." If PSCAA finds that the proposal cannot meet the odor control regulations necessary to receive a permit, then the Applicant has failed to meet the terms of the conditional use approval.

It is also important to note that there are many uses allowed in the RA zone that generate odors. Marijuana plants generate their strongest odor during the flowering phase and harvesting or processing, which encompasses only a small portion of the year for outdoor grows. On the other hand, there are a number of allowed uses in the rural area which would generate stronger or more frequent odors than the proposed use. For instance, the Applicant could keep cattle, pigs, or other livestock on the property without conditional use approval. The seasonal odor of marijuana would likely be less impactful than the constant odor of manure that would be associated with such a use.

SEPA Objection 1:

The Notice of Decision and Threshold Determination were issued "with conditions," which requires an MDNS or DS.

DPER Response:

SEPA does not require that MDNS be issued just because the project decision includes conditions. Conversely, SEPA actually provides that a DNS may be issued when the project includes mitigation sufficient to mitigate probable adverse impacts and / or that development regulations adequately provide mitigation. WAC 197.11.330(1.c.), WAC 197.11.158.

DPER acknowledges that work activity on site has occurred without permit, an active code enforcement case is open on the site and the permitting process is a viable option for correcting and rectifying the violation. The code enforcement action is not part of the project application CUP or SEPA review or this appeal.

SEPA Objection 2:

Wetlands delineation is incorrect, so the SEPA official did not have sufficient information to adequately assess water and other environmental impacts.

DPER Response:

DPER has reasonably relied upon both the Applicant's qualified wetland ecologist's findings and delineation reports and our Department's qualified wetland ecologists review of those critical area those reports. Onsite investigations by both experts were performed, and supplemental information was provided, reviewed and ultimately concurred with by the DPER qualified reviewing ecologist. Those reports and reviews were performed using the best practices from well-established prescribed scientific criteria and methodology for preparing and evaluating wetlands. Potential wetland areas that extend or exist well beyond the project scope, boundaries or any potential buffers were determined not to be germane for regulatory purposes, with exception of determining of wetland category. SEPA does not require that speculative and unrelated impacts or conditions be evaluated. Furthermore, DPER has not been in possession of any qualified data or information within the record that suggested the wetlands reports as modified through the review were in error.

SEPA Objection 3:

The known elk-breeding area on the site is not addressed in the SEPA documents or the CUP.

DPER Response:
DPER is not restricted to solely using information within the checklist in evaluating and determining probably significant impacts. WAC 197-11-158 (2.a.) references use of "other information". Public comment in response to the Notice of Application and SEPA, contained concerns about impacts to Elk. The ecological review, identified the site as inclusive to a wider area that serves as elk habitat. The Applicant through his ecological consultant was required to inquire with Washington State Department of Fish and Wildlife (WSDOFW) about potential impacts. The WSDOFW, the Applicant's ecologist and DPER's ecologist were all satisfied that the limited scope and scale of the project was not likely to result in any probable significant impacts to the Elk. So DPER did in fact consider this issue and stated such within the CUP decision.

SEPA Objection 4:

The SEPA official did not have sufficient information to adequately assess odor impacts.

DPER Response:

First, the Appellants' characterization of marijuana odors as noxious is simply not true. DPER acknowledges that unmitigated marijuana odors may be subjectively objectionable and perhaps even a nuisance, but no evidence suggest that they are noxious – hazardous, poisonous or harmful – and air quality experts and regulators have often clarified this and that no identifiable toxins or known health hazards exist from marijuana plant odors. As stated earlier in this response, and the CUP decision, King County does not regulate odors, and there exists an agency, the Puget Sound Clean Air Agency (PSCAA) does in fact implement standards, permitting and oversight of odors that affect air quality. The Applicant proposal and SEPA checklist identifies potential air quality impacts and stated requirement and intent to obtain and comply permits from PSCAA. The project CUP also is clearly conditioned upon these requirements.

SEPA Objection 5:

The SEPA official had inaccurate information regarding traffic impacts.

DPER Response:

A vehicle trip generation memo was prepared by a qualified traffic engineering consultant estimating a total 14 daily trips and 7 pm peak hour trip. These are likely to occur seasonally with even lower trip generation during the late fall, winter and early spring time. DPER has some familiarity with agricultural crop and growing operations and finds the projected traffic volumes within expected amounts. These volumes are consistent with traffic generation manuals for similar type and size of seasonal grow (agricultural) operations as well. Here, it seems that the Appellant is discussing the temporary traffic associated with construction activity, which could occur regardless of use and is temporary in nature. Even when considering the temporary construction traffic, the projected volumes are so low –less than that of even a single family residence – that they could not be considered a "probable significant impact".

The project was granted a road variance from having to unnecessarily widen the roadway 169th Ave. with shoulders and was based upon the existing roadway configuration and available widths, limited traffic generation and proportionality of the proposal. As a condition, the project will have to provide pull out to allow vehicles to pass each other when necessary for wider vehicles approximately within the mid-point between the site and 200th Street SE to the north. This is a proportionate mitigation. DPER is clearly allowed, and obligated, to consider this required mitigation when evaluating the proposal under SEPA.

SEPA Objection 6:

The SEPA official had insufficient information regarding aesthetics.

DPER Response:

The project scope is limited to plants, wood fencing, a one story 1,080 greenhouse and 10-12 foot wide driveway access with a parking area to accommodate four vehicles. These are not improvements that pose probable significant aesthetic impacts in area, where they could be characterized as typical. The minor improvements are located on site more than 30 ft. from any adjacent property, and hundreds of feet from any adjacent residence. There are no designated view corridors in the area and the proposed improvements cannot actually obstruct any adjacent properties views of any significant landscape or built feature.

The Appellant's statement appears to be focusing on the potential view of employees urinating (behavior) or a 7.5 ft. tall, 10 square ft. porta potty toilet, that is located at least a couple of hundred feet from any adjacent property, as causing significant aesthetic impact. These cannot be reasonably interpreted as probable significant environmental impacts.

SEPA Objection 7:

The SEPA official had insufficient information regarding water.

DPER Response:

DPER is not clear about what information concerning water was insufficient. The site is served by an exempt well that provides water for irrigation purposes. Agricultural growing operations and a 1080 sf greenhouse do not necessitate septic approval from the Health Department nor is the site proposed to be served by septic system. If the Appellants' concerns are about human (worker)

generated waste, workers will have to be provided a portable toilet facility during work hours that will be serviced in accordance with State Labor & Industries and Health standards.

SEPA Objection 8:

No critical areas report and critical area alterations application were submitted.

DPER Response:
This is incorrect. A wetland delineation and classification report was submitted, reviewed by staff and supplemented. This is identifiable within the project application file and CUP decision. Additionally, a conceptual wetland buffer averaging plan, and data supporting the plan, was submitted to accommodate a portion of the westerly fence. The conceptual plan was deemed adequate and the CUP decision conditioned upon approval of a final buffer averaging plan at construction permit review. As stated earlier, SEPA clearly allows DPER to utilize this information in evaluating probable significant impacts and it isn't necessary or required to be submitted as part of the SEPA checklist when already available. The SEPA checklist appropriately identified that critical areas were present. A critical area alteration exception is not required for approval of buffer averaging.

SEPA Objection 9:

No separate, independent review was conducted.

DPER Response:

This argument is not based in any understandable regulatory SEPA requirement or local policy. The referenced WAC 197-11-910 in its entirety states; *"Agency SEPA procedures shall designate or provide a method of designating the responsible official with speed and certainty (WAC 197-11-906 (1)(d)). This designation may vary depending upon the nature of the proposal. The responsible official shall carry out the duties and functions of the agency when it is acting as the lead agency under these guidelines. Since it is possible under these rules for an agency to be acting as a lead agency prior to actually receiving an application for a license to undertake a private project, designation of the first department within the agency to receive an application as the responsible official will not be sufficient."*

This simply means that a SEPA lead agency must adopt standards/policy that designates who the SEPA Official is or will be and the determination can't solely rely on designation of "the first department within the agency to receive an application" as the responsible official. Ty Peterson, who served as SEPA Official for this decision, is a designated King County SEPA Official consistent with King County's adopted SEPA policies and Administrative guidelines, and has over 20 years' experience serving as a SEPA Official in a variety of capacities and agencies. DPER required SEPA review and assumed lead agency status when the application's project scope was altered to include replacement of a culvert that necessitated work on lands covered by water.

Conclusion

The proposed improvements and alterations are clearly of a minor scale consistent with the types of improvements commonly found in rural areas and in fact within the actual vicinity of the site. DPER contends that the Appellants' objections are nearly entirely based upon the Applicant's use of the designated planting area and greenhouse for marijuana. This is essentially a moral objection

and not a land use or environmental issue. Marijuana production uses of this size are permitted conditional uses under the zoning code and state law when properly licensed. If this were another odorous plant material such as lavender, mint, or mustard, there would unlikely be any objection.