BEFORE THE LAND USE HEARINGS OFFICER
OF CLACKAMAS COUNTY, OREGON

Regarding an Appeal of a Planning Director	)	**Case File No.**
Decision Approving an Alteration of a Marijuana	)	**Z0265-18-E**
Growing Nonconforming Use.	)	**(Angel Hill Farms)**

A. SUMMARY

1. The applicant and owner is Angel Hill Farms LLC
2. The appellant is the Colton Community Planning Organization.
3. The subject property is located at 30725 South Wall Street, Colton, Oregon 97017. The legal description is T5S, R3E, Section 04, Tax Lot 2402 W.M. The subject property is approximately 13.35 acres and is zoned RA-2 – Rural Area Residential – 2 Acre.
4. On October 4, 2018, the Hearings Officer conducted a public hearing to receive testimony and evidence about the application. At the conclusion of the public hearing, the record was closed.

B. HEARING AND RECORD HIGHLIGHTS

1. The Hearings Officer received testimony at the public hearing on this application on October 4, 2018. All exhibits and records of testimony are filed with the Planning Division, Clackamas County Department of Transportation and Development. At the beginning of the hearings, the Hearings Officer made the declaration required by ORS 197.763. The Hearings Officer disclaimed any *ex parte* contacts, bias, or conflicts of interest. The Hearings Officer stated that the only relevant criteria were those identified in the Planning Director's decision, that participants should direct their comments to those criteria, and failure to raise all arguments may result in waiver of arguments at subsequent appeal forums.
2. At the hearing, county planner Lizbeth Dance discussed the Planning Director's decision and recommended that the Planning Director's decision be upheld.

3. Mitch Yeckes, a member of Angel Hill Farms, and his attorney Corrine Celko, testified in favor of the application.
4. A number of neighbors, as well as the Colton Community Planning Organization, testified against the application.
5. At the conclusion of the public hearing, the Hearings Officer closed the record.

C. FACTS

This case involves the appeal of a Planning Director decision approving an alteration of a nonconforming use. The subject property is located at 30725 South Wall Street, Colton, OR 97017. The property is 13.35-acres, and is zoned RA-2. The property is roughly rectangular in shape, with a narrower rectangle connecting to South Wall Street. The applicant purchased the property fairly recently and began medical marijuana operations. On March 1, 2016, County ordinances prohibiting such uses in the RA-2 zone became effective. The applicant filed a nonconforming use determination application in a previous case, Z0558-17-E, in order to establish the use of a pole barn, two greenhouses, and four shipping containers for use in a medical marijuana operation for eight registered medical marijuana card holders. In Z0558-17-E, I approved the nonconforming use to allow use of the pole barn and greenhouses for medical marijuana use. I did not approve the use of water or electricity in the greenhouses or the use of the shipping containers. The present application involves the applicant's request to allow a switch to recreational marijuana, the use of the shipping containers, and the use of water and electricity in the greenhouses. An alteration of a nonconforming use determination is subject to a type II procedure, whereby the decision is made by the Planning Director. The Planning Director approved the alteration of the nonconforming use to switch to recreational marijuana, the use of the four shipping containers, and to allow water and electricity to be provided to the greenhouses.[1] This appeal followed.

D. DISCUSSION

1. Alteration of a Nonconforming Use

[1] Under ZDO 1307.03(B), the Planning Director includes "any County staff member authorized by the Planning Director to fulfill the responsibilities assigned to the Planning Director by the [ZDO]."

Clackamas County Zoning and Development Ordinance (ZDO) 1206.06(B) provides the standards for altering a nonconforming use:

> "Alterations Not Required by Law: An alteration of a nonconforming structure or other physical improvements, or a change in the use, requires review as a Type II application pursuant to Section 1307, Procedures, and shall be subject to the following standards and criteria:
>
> "1. The alteration or change will, after the imposition of conditions pursuant to Subsection 1206.06(B)(4), have no greater adverse impact on the neighborhood than the existing structure, other physical improvements, or use; and
>
> "2. The nonconforming use status of the existing use, structure(s), and/or physical improvements is verified pursuant to Subsection 1206.07.
>
> "3. The alteration or change will not expand the nonconforming use from one lot of record to another unless:
>
> "* * * * *
>
> "4. Conditions of approval may be imposed on any alteration of a nonconforming structure or other physical improvements, or a change in the use, permitted under Subsection 1206.06(B), when deemed necessary to ensure the mitigation of any adverse impacts."

The only standard at issue in this appeal is ZDO 1206.06(A) regarding whether the proposed alteration would have greater adverse impacts on the neighborhood than the existing use. Although opponents argue that growing marijuana is not an allowed use in the R-2 zone and that the applicant is not entitled to a nonconforming use in the first place, that issue was conclusively decided in Z0588-17-E. In the earlier decision, I concluded that the applicant had established a nonconforming use to continue growing marijuana. All arguments that there is no valid nonconforming use are impermissible collateral attacks on the decision in Z0588-17-E. If opponents wished to argue that the applicant was not entitled a nonconforming use then they needed to appeal the decision in Z0588-17-E. ZDO

1206.06(B)(2) is already satisfied by the decision in Z0588-17-E. Opponents may not challenge that determination in this proceeding.[2]

ZDO 1206.06(B)(1) requires that the proposed alteration have no greater adverse impacts on the neighborhood than the existing structure, other physical improvements, or use. The proposed alteration encompasses three changes to the existing use: (1) the change from medical marijuana to recreational marijuana; (2) use of the four shipping containers; and (3) adding plumbed water and electricity to the greenhouses.

a. Medical Versus Recreational Marijuana

The Planning Director found that the change from medical to recreational marijuana would not have any greater adverse impacts on the neighborhood:

> "The applicant provides the following: 'As a practical matter, the method of growing marijuana will not change regardless of whether the finished marijuana product is going to the medical market or recreational market.' They also note that there will be no change or increase of plants grown on site. Staff agrees that medical marijuana is the same or very similar to recreational marijuana. From a land use perspective, and especially when considering ZDO Sec. 841, medical marijuana and recreation are essentially regulated the same (save a few State required exceptions for medical marijuana production). Since the overall operational characteristics are not changing, except for as identified herein, there should not be a significant adverse impact on the neighborhood, if any. Assuming the applicant does not increase plants or increase marijuana production as they assert, this request can be granted. Conditions of Approval associated with this section of the analysis will be address below, in the final section of this analysis." Planning Director Decision 10-11.

Opponents argue that there is a big difference between growing medical marijuana and recreational marijuana. Opponents point to numerous Oregon Administrative Rules (OARs) pertaining to the regulation of medical and recreational marijuana. While opponents are correct that there are differences between medical and recreational marijuana regulatory schemes, opponents do not explain how that would result in any differences in the actual use of the property or how that would result in greater adverse impacts to the neighborhood. As the Planning Director found, the *growing* of the marijuana is the same

[2] ZDO 1206.06(B)(3) involves expanding the nonconforming use onto another lot or parcel, which is not the case in the present circumstances. ZDO 1206.06(B)(4) merely allows for the imposition of conditions of approval. Thus, ZDO 1206.06(B)(1) is the only relevant standard.

whether it is being grown for medical or recreational use. The only difference is what happens to the marijuana after if leaves the property. I do not see that the switch to recreational marijuana would have any difference on the use of the property, let alone create any adverse impacts.

b. Shipping Containers

The Planning Director found that the use of the four shipping containers would not have any greater adverse impacts on the neighborhood:

> "The applicant's written narrative contends that the four shipping containers were sited to support the operation's needs for storage, drying/curing/trimming, and security. According the applicant, the containers were too small to need a permit and that the County approved electricity service to the containers back in June of 2016. Given the small size of the containers, their utilitarian nature to support a marijuana grow site of this scale, and the fact that marijuana is not being produced on the inside of each container, staff finds that this request will not have an adverse impact on the surrounding neighborhood assuming the applicant meets Conditions of Approval to offset any exterior or interior lighting that may be illuminated after dark. Furthermore, any mechanical equipment used to control temperature, humidity, circulation, etc. shall be subject to a noise study. These requirements are detailed above in the Conditions of Approval Section." Planning Director Decision 10.

The Planning Director explained that the shipping containers would not be used for growing marijuana, but rather would be used for storage, drying/curing/trimming, and security. I agree with the Planning Director that the use of the shipping containers would not create any adverse impacts on the neighborhood. Opponents argue that the shipping containers were not approved as part of the earlier nonconforming use determination. While that is correct, the applicant is requesting an alteration of the nonconforming use. That almost by definition entails changes from the existing nonconforming use – such as the use of the shipping containers.

c. Plumbed Water And Electricity In The Greenhouses

The Planning Director found that adding plumbed water and electricity to the greenhouses would not have any greater adverse impacts on the neighborhood:

> "According to the applicant, the County approved new water service and plumbing to the greenhouses on May 27, 2016 and electrical service to the greenhouses on July 27, 2016. In general, the applicant asserts that

> adding electricity to the greenhouse will may offset (and possibly improve existing) adverse impacts created by the use because the greenhouse will have power to regulate odor, light, security cameras, etc. According to the applicant, using electricity will subject the greenhouses to more stringent tracking, security, lighting, odor, and noise regulations, than those that apply to the prior nonconforming use. Staff agrees, allowing electricity will not create significant adverse impacts since the use was already existing. Furthermore, by imposing numerous conditions of approval, the impacts can be reduced. Staff has not identified any specific adverse impacts associated with a plumbed water service. The applicant will need to water the plants one way or the other. Staff finds that these requests will not have an adverse impact on the surrounding neighborhood assuming the applicant meets Conditions of Approval to offset any exterior or interior lighting that may be illuminated after dark. Furthermore, any mechanical equipment used to control temperature, humidity, circulation, etc. shall be subject to a noise study. These requirements are detailed above in the Conditions of Approval Section. Staff notes, however, that providing supplemental, year round lighting on plants is considered indoor marijuana production, and this impact is potentially more adverse than growing naturally light plants during part of the year. This is discussed in more detail below." Planning Director Decision 10.

The Planning Director found that the use of plumbed water would have no adverse impacts on the neighborhood. I agree with the Planning Director. Even though the applicant did not establish a nonconforming use that included plumber water in Z0588-17-E, that did not mean the applicant could not water plants in the greenhouses – just that it had to be by other means. Switching to plumbed watering will not have any impacts on the neighborhood, let alone adverse impacts.

The biggest proposed alteration is the use of electricity in the greenhouses. In the original nonconforming use determination, the applicant did not establish that it had the right to continue using electricity in the greenhouses. The obvious change in allowing electricity would be that the greenhouses would be lit up and visible to the surrounding neighborhood at night.[3] The Planning Director addressed this proposed change:

> "The applicant states 'Angel Hill will comply with lighting regulations by utilizing a light deprivation cultivation method…' Since the applicant intends to utilize artificial lighting on marijuana plants (mature and/or immature), it is clear the greenhouses are no longer intended to be an "outdoor marijuana production" facility as set forth in

[3] As discussed later, opponents argue that the greenhouses have already been using electricity.

> ZDO Sec. 841. Although ZDO Sec. 841 does not have to be adhered to for a nonconforming use verification/alteration, it's important to note indoor marijuana production, that is, utilizing artificial lighting on mature marijuana plants, requires several additional operational standards including, lighting, security, noise control, and odor control. This change could, potentially, have an impact on the surrounding neighborhood since 1) light could escape the greenhouse and 2) marijuana could be flowering throughout the year, thus creating ongoing odor concerns. Regarding potential adverse impacts, staff visited the site on May 31, 2018. The two greenhouses are surrounded by thick trees to the south and west with a thinner line of trees to the north. Given the existing vegetation, there already is significant natural vegetation in place that serves as a screen. Since the applicant will use a light depravation system, it will add even more screening for light emanating from the site. Furthermore, staff notes that the home nearest to the greenhouses is some 400 feet away. Also, the applicant has stated that there will be no increase in the number of plants grown on the subject property, so the overall impact will be similar to what is already allowed through the nonconforming use. A Condition is warranted to ensure that the applicant does not increase/change the amount of marijuana plants grown on site. Several other Conditions are warranted to ensure that noise, odor, security cameras, water use, etc. is mitigated on-site. These requirements are detailed above in the Conditions of Approval section." Planning Director Decision 11.

The Planning Director explained that the change from indoor to outdoor growing of marijuana had the potential to increase adverse impacts from light and odor. The greenhouses cast a significant glow when the lights are on at night, as demonstrated by photos submitted by opponents. This could be an adverse impact on the neighborhood. The applicant, however, is proposing to switch to an indoor growing method that utilizes technology to block all light from escaping the greenhouses. The proposed conditions of approval specifically requires that "[l]ight cast by light fixtures inside any storage container, pole building, or greenhouse shall not be visible outside the building from 7:00 p.m. to 7:00 a.m. the following day." Given that the only potential adverse impact from electrifying the greenhouse would be light and that the proposed conditions of approval would eliminate any impact from lights, I agree with the Planning Director that the electrification of the greenhouses would not cause any adverse impacts to the neighborhood.

Opponents argue that the Planning Director improperly described the screening from existing vegetation. Even if opponents are correct, the Planning Director's findings

on this issue are mere surplusage. There are no adverse impacts from merely seeing a greenhouse. The greenhouses are part of the established nonconforming use. The only potential adverse impact from the greenhouses is if they were lit up at night. The proposed conditions of approval would prevent that from occurring. The extent of the existing screening or vegetation would have no effect. In other words, as long as the greenhouses are not lit up at night it does not matter how direct the neighbors' view of the greenhouses is. This argument does not provide a basis to deny the application.[4]

2. Other Issues

Opponents raise other issues that do not pertain to the approval criteria. Opponents argue (and provide extensive evidence) that the applicant is in violation of the conditions of approval of the original nonconforming use determination in Z0588-17-E. According to opponents, the applicant is already using the shipping containers, already using plumber water in the greenhouses, and already using the lighting in the greenhouses. I agree with opponents that the applicant has not been abiding by the conditions of approval in Z0588-17-E. Opponents argue that the original nonconforming use permit should therefore be revoked, and thus the current application denied because there is no valid nonconforming use to alter.

While I agree with opponents that the applicant has been violating the conditions of approval from Z0588-17-E, this is proceeding on the application for an alteration of a nonconforming use. This is not a code enforcement proceeding. While I certainly sympathize with neighbors who have endured ongoing code violations, for better or worse the County generally requires property owners that are not in compliance with zoning regulations or conditions of approval to either begin complying with the applicable regulations of conditions or file for the appropriate permit to allow the use to continue. That is what occurred in the present situation. This decision only addresses whether the applicant has satisfied the approval criteria for an alteration of a nonconforming use – it does not address a code enforcement action against the applicant. This argument does not provide a basis for denying the application.

[4] Opponents also argue that the Planning Director misconstrued whether marijuana could be grown on nearby properties. Again, even if opponents are correct, that is mere surplusage and does not have anything to do with whether the proposed alteration would have adverse impacts on the neighborhood.

Opponents argue that the applicant does not have water rights to use the property for growing marijuana. Even if that is true, that does not have anything to do with the applicable approval criteria. Nevertheless, the proposed conditions of approval require the applicant to submit proof of a legal source of water. This argument does not provide a basis to deny the application.

Finally, opponents argue that the application does not comply with ZDO Section 841. ZDO Section 841 is the section of the ZDO that regulates marijuana production, processing, and retailing. ZDO 841, however, is the zoning regulation that made the use of the property a nonconforming use – in other words, the existing use predated the enactment of ZDO Section 841. While the applicant will abide by certain requirements of ZDO Section 841, in particular regulation of indoor marijuana growing, the applicant is not required to comply with ZDO Section 841. This argument does not provide a basis to deny the application.

The applicant has satisfied all of the approval criteria for alteration of the nonconforming use.[5]

E. DECISION

Based on the findings, discussion and conclusions provided or incorporated herein and the public record in this case, the Hearings Officer hereby **APPROVES** the nonconforming use alteration application in Z0265-18-E, with the following conditions of approval.

F. CONDITIONS OF APPROVAL

I. General and Advisory Conditions:

1. This application is approved for the alteration of the nonconforming use as described and depicted in the application materials, the Findings discussed above and subject to the conditions of approval contained herein. Any additional alterations or changes in use shall be reviewed under separate application by the Planning and Zoning Div.

2. If necessary, the applicant shall obtain all building, electrical, mechanical or any other permits deemed necessary by the County Building Codes Division for the change of use prior to the commencement of construction and occupancy of the structure. Contact 503-742-4240, or dtdbps@co.clackamas.or.us or bldservice@clackmas.us .

[5] The Planning Director's decision also addressed other issues that were not challenged. I agree with the Planning Director's decision on those issues. I therefore adopt and incorporate the Planning Director's decision in this decision, except as discussed earlier.

II. Planning and Zoning Division Conditions:

1. All marijuana plants shall be grown in the pole barn or greenhouses. Any increase in employees, additions, or uses, except for those listed in ZDO Sec. 1206.05, shall be reviewed under a new alteration of nonconforming use permit.

2. **Approval Period:** Approval of this alteration of a nonconforming use, pursuant to Subsection 1206.06(B), is valid for a period of four years from the date of the final decision. If the County's final decision is appealed, the approval period shall commence on the date of the final appellate decision. During this four-year period, the approval shall be implemented, or the approval will become void.

3. Applicant is still required to comply with Condition of Approval 4 in the Hearings Officer Decision of Z0558-17-E (Wetland Land Use Notification).

III. Four (4) Shipping Container Conditions:

1. Use of shipping containers are limited to those uses described in the application materials and are limited to drying, trimming, curing, storage, and security/surveillance systems.

IV. Two (2) Greenhouses:

1. Odor. The following odor control measure are required in the two greenhouses:

i. The building shall be equipped with an activated carbon filtration system for odor control to ensure that air leaving the building through an exhaust vent first passes through an activated carbon filter.

ii. The filtration system shall consist of one or more fans and activated carbon filters. At a minimum, 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 applicable CFM.

iii. The filtration system shall be maintained in working order and shall be in use. The filters shall be changed a minimum of once every 365 days.

iv. Negative air pressure shall be maintained inside the building.

v. Doors and windows shall remain closed, except for the minimum length of time needed to allow people to ingress or egress the building.

vi. The filtration system shall be designed by a mechanical engineer licensed in the State of Oregon. The engineer shall stamp the design and certify that it complies with Subsection 841.03(H).

vii. An alternative odor control system is permitted if the applicant submits a report by a mechanical engineer licensed in the State of Oregon demonstrating that the

alternative system will control odor as well or better than the activated carbon filtration system otherwise required.

V. Entire Site (Pole Building, Two Greenhouses and Four (4) Storage Containers):

1. Noise. The applicant shall submit a noise study by an acoustic engineer licensed in the State of Oregon. The study shall demonstrate that generators as well as mechanical equipment used for heating, ventilating, air conditioning, or odor control will not produce sound that, when measured at any lot line of the subject tract, exceeds 50 dB(A).

2. Security Cameras. If used, security cameras shall be directed to record only the subject tract and may be directed to public rights-of-way as applicable, except as required to comply with licensing requirements of the Oregon Liquor Control Commission or registration requirements of the OHA.

3. Water. The applicant shall submit proof of a legal source of water as evidenced by:

i. A copy of a water right permit, certificate, or other water use authorization from the Oregon Water Resources Department (OWRD);

ii. A statement from a public or private water provider that water is supplied by that water provider. The statement shall include the name and contact information of the water provider; or

iii. Proof from the OWRD that the water to be used for marijuana production is from a source that does not require a water right.

4. Waste Management. 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. Light cast by light fixtures inside any storage container, pole building, or greenhouse shall not be visible outside the building from 7:00 p.m. to 7:00 a.m. the following day.

6. Light cast by exterior light fixtures (e.g., security lights, driveway lights) shall not be directed skyward and shall be directed within the boundaries of the subject property.

DATED this 30th day of October, 2018.

Fred Wilson
Clackamas County Hearings Officer

ENDANGERED SPECIES ACT NOTICE

The federal Endangered Species Act (ESA) is not a criterion for approval of this application. The County has reviewed the approval standards in light of the requirements of the ESA, believes that the criteria for approval are consistent with the terms of the ESA and has submitted the Development Ordinances for consideration for a "4(d)" programmatic limitation. However, the analysis included in this decision does not include an evaluation by the County of the applications for consistency with the ESA nor does the decision reach any conclusions concerning that federal law. The applicant are responsible for designing, constructing, operating and maintaining the activities allowed by an approval of this application in a manner that ensures compliance with the ESA. Any question concerning this issue should be directed to the applicant, their consultants and the federal agencies responsible for administration and enforcement of the ESA for the affected species.

APPEAL RIGHTS

ZDO 1307.10(F) provides that, with the exception of an application for an Interpretation, the Land Use Hearings Officer's decision constitutes the County's final decision for purposes of any appeal to the Land Use Board of Appeals (LUBA). State law and associated administrative rules promulgated by LUBA prescribe the period within which any appeal must be filed and the manner in which such an appeal must be commenced. Presently, ORS 197.830(9) requires that any appeal to LUBA "shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final." This decision will be "final" for purposes of a LUBA appeal as of the date of mailing (which date appears on the last page herein).