



Land Development Code Revision

TITLE: **AMENDMENT TO THE PHOENIX LAND DEVELOPMENT CODE REGARDING THE CULTIVATION OF CANNABIS.**

FILE NUMBER: LDC 15-01

APPLICANT: City of Phoenix

STAFF REPORT: June 1, 2015 at the City of Phoenix, 112 West 2nd Street, Phoenix, Oregon 97535, M-F, 8:00am – 5:00pm, or on the Planning & Building Department website (<http://www.phoenixoregon.gov>).

DATE OF PLANNING COMMISSION HEARING: June 8, 2015

STAFF RECOMMENDATION: Staff recommends that the Planning Commission accept the findings of this report and forward the proposed amendment to the City Council for its review and approval of the amendment after taking public testimony and deliberating at a duly noticed and conducted public hearing.

Note: Text excerpted from the PLDC appears below in italics.

I. PROJECT INFORMATION: The Planning Commission of the City of Phoenix has discussed the issue of cannabis cultivation at several work sessions beginning on March 23, 2015. The issue was originally brought to the City's attention during public comment at several City Council meetings during 2014. Members of the community expressed concern and dissatisfaction with the presence of outdoor cannabis cultivation operations in residential neighborhoods. These operations appear, at least from eyewitness accounts, to be intensive cultivation operations that consume entire backyards on residential lots. Smaller cultivation operations where the intended final consumer of cannabis is someone who lives on the premises (a resident grower), likely exist throughout the City but have not been identified in complaints.

Intensive, outdoor cannabis cultivation within and adjacent to residential neighborhoods creates land use conflicts between established residential uses and the new nonresidential, agricultural uses of these more intensive cultivation operations. The primary complaint received by the City has been the odor generated by mature cannabis plants at or around harvest time, lasting from late August through the end of September. Such complaints have been documented in communities throughout the Rogue Valley including Ashland. In Phoenix, complainants indicated that for several months during the summer growing season they were unable to open windows due to the pervasiveness of the odor. They further stated that the inability to enjoy their own outdoor space and open windows in their own homes significantly impairs their quality of life.

Aside from the most noticeable offsite impact (odor), cannabis cultivation can have other negative impacts on residential neighborhoods. Officials in other communities, most notably Arcata, California, have documented the phenomenon of conversion of



Land Development Code Revision

dwelling in established residential neighborhoods into cultivation facilities that no longer function as residential properties in any way. The presence of a commercial agricultural operation in the midst of a residential neighborhood is inconsistent with many residents' expectations of neighborhood character and function. Converted homes are, for all practical purposes, vacant and convey an image of disuse and abandonment—a problem that may in fact be exacerbated by the property owner's own negligence or unwillingness to maintain a property as a resident would. Even under the best of circumstances, where a cultivation operation is concealed within a well-maintained residential property, the property ceases to contribute to any sense of community or neighborliness.

Other documented impacts of conversion of residences to cultivation sites include a variety of environmental, community development, and public safety problems. An energy-hungry industry, residential properties have been targeted in California for acquisition by commercial cultivation operations because of the lower electrical utility rate payer status accorded to residential customers. A home converted for indoor cultivation can consume as much electricity as a 10,000 square foot retail commercial property. According to community development officials in Arcata, California, during the height of this phenomenon in their community very few of the estimated 600-700 converted residential cultivation sites legally upgraded electrical systems to meet the demands of such high consumption. As a result, building code violations were common and cultivation sites were not adequately protected from the threat of fire. Unpermitted and improvised electrical work poses a risk to the lives of public safety personnel and area residents while imposing an additional burden on local fiscal resources. Pesticides and nonorganic fertilizers are often used to enhance growth, and because residential sewer systems are not designed for industrial pretreatment many of these substances are sent downstream where wastewater management facilities are often unable to remove them from waste water before it is released into surface waters.

In addition to unregistered cultivation sites in residential neighborhoods, registered medical marijuana grow sites that are regulated under the OMMP operate within the City. These operations are purposefully commercial in nature, providing cannabis to individual OMMP registrants or "cardholders" and dispensaries. They are located on properties within nonresidential land use districts, more specifically the C-C City Center.

Though they share some commonalities with cultivation sites in residential neighborhoods, cannabis cultivation operations in nonresidential land use districts present a unique set of problems. One of the registered grow sites located in Phoenix is outdoor and, according to neighboring property owners, has been subject to several thefts that have occurred at night after standard business hours. Whereas cultivation by resident growers in residential neighborhoods may be particularly vulnerable to theft during the day when many residents are away at work, cultivation sites in nonresidential land use districts may be particularly vulnerable to theft at night when activity at surrounding properties decreases. Unlike most other agricultural operations, cannabis



Land Development Code Revision

is a high value crop, very transportable, and requires very little processing prior to sale. All of these characteristics make it a target for theft relative to other agricultural crops.

It should also be noted that given Phoenix's relatively small size and compact development pattern, problems created by or associated with a particular type of land use may be experienced beyond the limits of that particular land use district. In the case of the commercial cultivation operations in Phoenix, all of them are located directly adjacent to established residential neighborhoods. Odors generated by cultivation operations and the increased likelihood of criminal activity are examples of land use conflicts that are, in instances like this, embedded within the interface between residential and nonresidential land uses.

The negative impacts of cannabis cultivation manifest directly through the trespass of odors onto adjacent properties, the increased risk of fire attributable to building code violations, and the increased incidence of criminal acts. These impacts can be managed through operational performance standards and facility design standards (for example the requirement that cultivation occur in secured, enclosed areas). But they can also impact communities indirectly through their influence on real estate markets.

Emerging from decades of prohibition, the cannabis industry is poised for very fast growth to meet pent up demand. That means demand for land for retail distribution, processing, and cultivation will likely match consumer demand and rapid business development. This puts cannabis industry land uses in a unique position within local real estate markets, because they both need land very quickly and they are positioned to pay a premium for suitable land as supplies become more and more limited. Compared to other nonresidential land uses, cannabis cultivation operations are able to pay much higher rents due to larger profit margins. The Denver Post reported that industrial vacancy throughout the Denver metropolitan region reached an historic low of 3% two years after cannabis was legalized for recreational use. These low vacancy rates were attributed to the burgeoning commercial cannabis cultivation industry. Local industrial real estate brokers identified cannabis cultivation operations as the reason for the declining availability of industrial space and rising rents. In the Rogue Valley, the impending legalization of cannabis for non-medical consumption has drawn the attention of property owners and developers. In one case, a local developer has built 1,500 square foot "grow condos" that sell for \$100/square foot under land contract that costs the purchaser an additional 10.7%/year in interest. The 15,000 building is 100% occupied. The per square foot cost of \$100 (not including debt service) is \$25 over average industrial asking prices for existing industrial space.

Reduced vacancy and higher rents alone are not necessarily a problem. But placed in the context of a constrained real estate market environment and Oregon's growth management system that restricts access to developable land, these factors have unintended consequences for community economic development. Many industries that use industrial and commercial land will compete with cannabis cultivation operations for



Land Development Code Revision

a limited supply of available space. These industries, a small woodworking shop for example or artisanal food producer, operate on much tighter margins than do cannabis cultivation operations. Their business models do not allow them to commit more operating income to real estate costs, putting them at a competitive disadvantage.

This may very well change over time as the cannabis industry achieves greater stability and profit margins decline as competition weighs on retail prices and gross revenues. But until that time, it is reasonable to assume that cannabis businesses will compete with—and especially in the case of industrial land out-compete-- existing businesses for limited real estate. This should be a consideration when designing land use regulations for cannabis industry land uses if a community wishes to provide opportunities for a variety of commercial and industrial land users and encourage an economically diverse local economy.

The challenge before the Planning Commission, therefore, is to balance individuals' rights that have been established through statute, the rights of neighbors to quiet enjoyment of their private property, and broader community development and economic development goals. It is the opinion of staff that conflict between these goals can be managed through an approach that allows for the cultivation of cannabis with specific time, place, and manner regulations.

State Regulation of Cultivation

Oregon Medical Marijuana Act or OMMA

The State does not require proof of compliance with local land use regulations when a cannabis cultivation operation is registered; nor does the OMMA release properties owners from local land use regulations (OAR 333-008-0025). In other words, the OMMA does not preempt local land use regulations.

Measure 91

Final rules for this ballot initiative have not been approved by the State Legislature as of this writing, and are not anticipated. Regarding cultivation of cannabis by a resident grower for consumption not related to a medical condition and therapeutic course of treatment, Ballot Measure 91 clearly conveys the right to produce, keep, and store eight (8) ounces of "homegrown marijuana" and no more than 4 plants per household (Section 6). As proposed by Ballot Measure 91, "commercial" cannabis production would be licensed by the Oregon Liquor Control Commission (Section 19). The language does not, however, specifically state or otherwise imply that this license pre-empts local land use controls that may directly or indirectly regulate the cannabis cultivation. Section 58, which describes the "authority of cities and counties over establishments that serve marijuana", explicitly states that BM-91 authorizes local jurisdictions to adopt "reasonable, time, place, and manner regulations of the nuisance



Land Development Code Revision

aspects of establishments that sell marijuana to consumers [...]”. This section does not discuss local regulation of cannabis cultivation or any other form of urban agriculture through land use controls.

Other Communities

Ashland

The City of Ashland began looking at the issue of cannabis cultivation in residential neighborhoods in early 2015, but has yet to take any decisive action. Many of the same concerns discussed above were raised during at least one City Council meeting.

Grants Pass

Grants Pass is considering a total ban on outdoor cultivation of cannabis in all land use districts. The matter is under deliberation by the City Council.

Central Point

Central Point’s City Council adopted regulations prohibiting all outdoor cannabis cultivation, whether for medical or non-medical purposes, whether for personal or offsite (commercial) consumption on May 14, 2015 (Ordinance 2007). It also requires that cultivation “must not be perceptible from the exterior of the household”; limits indoor cultivation to permanent structures with solid walls and foundation; prohibits cultivation in “multifamily or attached residential development such as townhomes and condominiums” (Section 8.45.030); and prohibits “licensed commercial grows, as defined in M. 91” from all residential zones.

Medford

Medford is contemplating the use of fencing to mitigate impacts of grows within residential neighborhoods. The effectiveness of fencing to manage a problem that is not primarily visual in nature is doubtful.

Arcata, CA

Many communities in California, where medical cannabis has been legal since 1996, have enacted regulations that restrict outdoor growing and establish other performance standards. The City of Arcata limits the size of grows and prohibits outdoor growing altogether. Speaking with the Director of the Community Development Department, staff learned that prior to these regulations Arcata experienced widespread code violations related to the operation of medical marijuana cultivation operations. In addition to noxious odors, the City often discovered serious building code violations when investigating grow operations. In 2012, voters in Arcata overwhelmingly approved an initiative taxing commercial marijuana cultivation operations through special electricity rates. The tax reportedly amounts to a tripling of the cost of electricity for residential properties that consume.



Land Development Code Revision

Indoor cannabis cultivation requires energy intensive artificial lighting (roughly 15 – 30 watts/square foot). These systems often exceed the design capacities of typical single and multifamily dwellings. Electrical and HVAC work is often completed without permits and inspections.

The City also encountered problems with the widespread conversion of homes into indoor grow operations in residential neighborhoods. The dwellings no longer provided housing for residents in a tight housing market and degraded the residential character of established neighborhoods by introducing commercial or industrial agricultural operation into their midst. Consequently, the City prohibits cultivation as home occupation and limits cultivation to dwellings where the resident actually lives.

Current Land Development Code & Proposed Amendment

With the passage of Measure 91 in November, 2014, land use conflicts arising from the cultivation of cannabis in urban and rural areas, in residential and nonresidential land use districts, are only likely to increase in number and intensity. The substantial profit involved in cannabis cultivation and the availability of vacant properties in a City like Phoenix make it very susceptible to an influx in the number of operations. The City of Phoenix is already home to at least two cultivation operations in one of its commercial land use districts; anecdotal evidence suggests that several more are operating in residential land use districts. The Land Development Code does not currently allow urban agricultural operations other than “nurseries”, and only then with a Conditional Use Permit.

Key Features of Proposed Time, Place, and Manner Regulations

As of June 8, 2015, the proposed PLDC regulations are as follows:

- The proposed PLDC regulations make an allowance for outdoor cultivation of 35 square feet in every land use district for “resident growers” who are registered as OMMP patients. This area is counted against a total maximum cultivation area of 100 square feet. They must reside at the cultivation site. A resident grower who is NOT registered as an OMMP patient can cultivate up to 100 square feet indoors in any land use district. The resident grower must actually reside at the cultivation site. Cultivation sites in residential districts would be required to get Type I Zoning Clearance.
- Commercial cultivation is expressly prohibited in all residential land use districts and may not be a home occupation. Commercial cultivation is also expressly prohibited in the City Center land use district.
- Outdoor cultivation areas must be surrounded by a six foot fence that is “secured at all times to prevent unauthorized access”; must be at least 10 feet from any property line and at least 30 feet from any dwelling on any contiguous property.



Land Development Code Revision

- Wattage for lighting is limited in to 1200 watts/50 square feet of cultivation area in every land use district.
- Commercial cultivation would be prohibited within the City Center district.
- Commercial cultivation would be allowed in the Commercial Highway land use district, but limited to a maximum of 5,000 square feet for each site; sites in General and Light Industrial land use districts could have a maximum of 40,000 and 10,000 square feet, respectively.
- Commercial cultivation in C-H, G-I, and L-I land use districts will need to obtain a special business license that would be a part of the current "Cannabis Facility License" program. Operations over certain sizes may also need a Conditional Use Permit.

II. PROPOSED AMENDMENTS: see Exhibit A in the attached draft Planning Commission Recommendation.

III. COMPLIANCE WITH DEVELOPMENT CODE PROVISIONS: Amendments to the Phoenix Land Development Code must comply with Section 4.7.2 of the Phoenix Land Development Code, which states that legislative amendments are policy decisions made by City Council. They are reviewed using the Type IV Procedure in Chapter 4.1.6 – Type IV Procedure (Legislative) and shall conform to Section 4.7.2.B and 4.7.6, as applicable.

Demonstration of compliance with section 4.7.2.

1. The proposed amendment is consistent with the purpose of the subject section and article.

FINDING: The proposed amendment addresses issues arising from a certain use of land, its consistencies and inconsistencies with the purpose of each land use district, and establishes measures to mitigate or eliminate the undesirable secondary effects of that land use.

CONCLUSIONS OF LAW: Placing the proposed additions to the PLDC within this Chapter should provide for ease of use. Someone interested in knowing about permitted uses of land and any applicable standards would expect to find that information within this Chapter. **Proposed amendment is consistent with the purpose of the subject section and article.**

2. The proposed amendment is consistent with other Provisions of this Code.

FINDING: The proposed amendment is supportive of other provisions within the PLDC, particularly Chapter 2. Chapter 2 primarily addresses the orderly and systematic



Land Development Code Revision

development of land within the City. Each land use district is considered individually below.

R-1, 2, 3 Residential

The stated purpose of Chapter 2.2.1 (residential districts) is the promotion of livable and stable neighborhoods within the City, and their improvement. As discussed above, commercial cultivation of cannabis is not consistent with the residential character and function of property located within residential land use districts. Therefore, the proposed amendment to the Code would establish the following special standards for cannabis cultivation in all residential land use districts that limit the extent to which a residential property could be used for cultivation:

- Commercial cultivation, that being cultivation for consumption by anyone other than a resident grower or care provider for offsite distribution would be prohibited.
- Outdoor cultivation is limited to 35 square feet, and only then for cannabis cultivated for use by an OMMP registered resident. This allowance was designed to provide access to an affordable supply of cannabis for therapeutic use. According to Robert Bergman, author of "The Marijuana Grow Bible", a 35 square foot outdoor cultivation area could accommodate 3-4 plants at 9 square feet/plant with a yield of 500 grams or 17.50 ounces of usable cannabis per plant for a total of 3.30 pounds per growing season.
- An outdoor "cultivation area" would need to be at least 10 feet from any property line, and 30 feet from any dwelling on an adjacent lot. This standard is consistent with current standards for the raising of livestock, beekeeping, and other small scale agricultural uses within residential land use districts.
- So called "recreational marijuana" would not be permitted to be grown outdoors; it would need to be grown within the residence or other type of secured outbuilding.

C-C City Center

The stated purpose of Chapter 2.3.10 is to "strengthen the City Center District as the 'heart' of the community and as the logical place for people to gather and create a business center." The City Center district is intended to accommodate mixed land uses that support a vibrant walkable, urban environment. Auto-oriented land uses, and those that do not promote or contribute to an active downtown environment are not permitted. Urban agriculture uses, except for small outdoor gardens, are not currently permitted within this district.



Land Development Code Revision

Due to their need for secured space, commercial cannabis cultivation facilities would not be consistent with the policy goals of the City Center district. Stringent design guidelines which strongly encourage street level retail and service uses are highly incompatible with any operation that is closed to the general public. This should also be understood in the context of the physical characteristics of Phoenix's city center which is quite small and provides limited opportunities to develop the types of land uses that would be supportive of an active downtown. Commercial cultivation of cannabis operations would compete for space with land uses that directly support the goal of creating a downtown area where residents and visitors can shop, dine, and recreate. Commercial cannabis cultivation operations would not, therefore, be appropriate in this land use district.

Allowances are made for personal cultivation for resident growers and registered care providers, just as in residential land use districts.

C-H Commercial Highway

The stated purpose of the C-H Commercial Highway land use district is to "provide for the development of easily accessible commercial areas that are intended to accommodate a mixture of retail businesses, services, and professional offices to serve the commercial and retail needs of the community and surrounding areas".

Of the two commercial districts, Commercial Highway is the only district that currently allows for a land use that is similar to the commercial cultivation. "Nurseries", which in contrast to a commercial cultivation facility are retail operations serving the general public, are permitted in the C-H land use district with a Conditional Use Permit. Large-scale outdoor cultivation similar to farming is not permitted in this land use district. (Oregon land use regulations, in fact, make a clear distinction between urban and rural "resource" lands. Hence, active farms are not often found within the political boundaries of cities in Oregon.)

With locations on the periphery of C-C districts, along major arterials, and (usually) with some spatial separation from adjacent residential neighborhoods, the C-H district can accommodate more intensive commercial and light industrial land uses that are known to generate offsite impacts that are incompatible with residential land uses. Therefore, commercial cannabis cultivation operations may be reasonably located within this district provided that they conform to special standards designed to mitigate offsite impacts unique to them. These standards include a maximum total permitted size of 5,000 square feet and a maximum business frontage of 150 feet for each cannabis cultivation site. These standards are designed 1) to prevent development of massive buildings that would be more industrial than commercial in character and 2) reduce the likelihood that large amounts of the City's limited commercial properties could be converted to commercial cultivation operations.



Land Development Code Revision

Allowances are made for personal cultivation for resident growers and registered care providers in instances where such individuals may live in legally nonconforming dwellings.

G-I General and L-I Light Industrial

These industrial land use districts are at once the most suitable locations for commercial cultivation operations, the most easily converted to such operations, and some of the most important lands to the City for economic development. Industrially zoned land, and land designated as industrial by the comprehensive plan are currently quite limited. However, with current design standards and additional special standards for cannabis cultivation that are proposed herein, locating commercial cultivation operations within G-I and L-I land use districts offers the greatest opportunity to accommodate such operations while managing potential land use conflicts.

Allowances are made for personal cultivation for resident growers and registered care providers in instances where such individuals may live in legally nonconforming dwellings.

FINDING: According to Section 4.1.6.D – *Notice of Hearing*, amendments to the PLDC must undergo a public hearing before the Planning Commission and the City Council. The Planning Commission will conduct a public hearing on the proposed amendment on June 8, 2015. If the Planning Commission affirmatively recommends the amendment to the City Council, a subsequent public hearing will be conducted 2015 before the City Council.

FINDING: According to Section 4.1.6.D.2, all Type IV decisions must be noticed in the following manner: 1) DLCD shall be notice at least 35 days before the 1st evidentiary hearing; 2) notices mailed to certain recipients at least 20 days and no more than 40 days before the 1st evidentiary hearing; 3) notice shall be posted on the City's website, at City Hall, and in other locations as deemed appropriate.

All of these notice requirements have been met (or were not applicable given the nature of this action), and an affidavit of notice will be included in the official record once it has been closed.

Demonstration of compliance with Section 4.7.6 – Transportation Planning Rule Compliance.

FINDING: subsection 4.7.6.B states "Amendments [...] land use standards which significantly affect a transportation facility shall assure that allowed land uses are consistent with the function, capacity, and level of service of the facility identified in the Transportation System Plan." The proposed amendment is not anticipated to



Land Development Code Revision

“significantly affect a transportation facility”. **Standard is not applicable to the land use action under consideration.**

CONCLUSIONS OF LAW: Proposed amendment is consistent with other Provisions of this Code.

3. *The proposed amendment is consistent with the goals and policies of the Comprehensive Plan, and most effectively carries out those goals and policies of all alternatives considered.*

FINDING: The proposed amendment is supportive of existing provisions of the PLDC which have previously been found to be consistent with the Comprehensive Plan.

FINDING: The Land Use element describes the C-C district as having “an emphasis on general and specialty retail, service, and professional office” (p. 9). It continues stating that design standards within this district shall include “Providing for the construction of a streetscape and thus providing a clear pedestrian orientation”. For reasons discussed in greater detail above, indoor cultivation operations are incompatible with these objectives.

Other commercial and “interchange business” designated lands are intended to provide opportunities for convenience retail and service commercial that is more likely to be dependent on automobile traffic for business. Lands in this designation may be conducive to commercial cultivation operations, but these lands are of limited supply and commitment of some portion of them for non-commercial uses should be carefully managed. This is why light industrial is allowed by right in the C-H district when accompanied by a retail use; light industrial uses otherwise require a Conditional Use Permit.

Land designated industrial by the Comprehensive Plan has been so identified to facilitate the development of employment opportunities served by public transportation and in close proximity to residential centers. These areas are, furthermore, intended to accommodate businesses that cannot be located within the City Center district. But as the plan recognizes, there are only 54 acres of industrial land within the City’s UGB and a majority it is practically unbuildable at this time due to access issues. Allowing managed development of commercial cultivation on industrial lands, pursuant to design and performance standards, attempts to balance competing goals to both encourage new businesses in the City while ensuring that a supply of industrial land that can support a diversified local economic base that is not dependent on a single, dominant industry.

FINDING: Goals #1 of the Energy Conservation element states that the City will “work toward optimum levels of energy efficiency and conservation in structures of all types



Land Development Code Revision

throughout the Community” and that the City will “promote energy efficient design in all new development that maximizes the use of nat (p. 10).

CONCLUSIONS OF LAW: Proposed amendment is consistent with the Comprehensive Plan.

III. STAFF RECOMMENDATION: Staff recommends that the Planning Commission accept these findings and, upon closure of the public hearing and after all due deliberation, move to approve the attached Planning Commission Recommendation, and forward the matter to the Phoenix City Council for review and ratification.