

**BEFORE the HEARING EXAMINER for the
CITY of GOLD BAR**

DECISION

FILE NUMBER: 00-14-01

APPLICANTS: Daniel Thompson Tony Ho
9829 63rd Drive NE 12726 SE 276th Place
Marysville, WA 98270 Kent, WA 98030

TYPE OF CASE: Conditional Use Permit to use two buildings on a portion of the former Loth Lumber site for the production and processing of recreational marijuana

STAFF RECOMMENDATION: Approve subject to conditions

EXAMINER DECISION: GRANT subject to substantially revised conditions

DATE OF DECISION: February 24, 2015

INTRODUCTION ¹

Daniel Thompson (Thompson) and Tony Ho (Ho) seek a Conditional Use Permit (CUP) to use two buildings on a portion of the former Loth Lumber site for the production and processing of recreational marijuana.

Thompson filed an application for a CUP on October 29, 2014. (Exhibit 2 ²) Ho filed a separate application for a CUP on November 19, 2014. The Gold Bar Public Works Director (Director ³) advised Thompson and Ho that since both applications were for the same site, they would be processed concurrently as one. (Exhibit

¹ Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.
² Exhibit citations are provided for the reader's benefit and indicate: 1) The source of a quote or specific fact; and/or 2) The major document(s) upon which a stated fact is based. While the Examiner considers all relevant documents in the record, typically only major documents are cited. The Examiner's Decision is based upon all documents in the record.
³ The City retained a consultant to process these applications on its behalf. Therefore, references herein to the Director refer to either the Director or the consultant acting on his behalf.

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1, p. 2; and Exhibit 9) The Director deemed the applications to be complete as of December 11, 2014.⁴ (Exhibits 6 and 9)

The subject property is located at 16810 415th Avenue SE (aka Pickle Farm Road).

The Gold Bar Hearing Examiner (Examiner) viewed the subject property on February 17, 2015.

The Examiner held an open record hearing on February 17, 2015.⁵ The Director gave notice of the hearing as required by the GBMC. (Exhibit 11)

The following exhibits were entered into the hearing record during the hearing:

- Exhibits 1 - 11: As enumerated in Exhibit 1, the Staff Report
- Exhibit 12: Letter from an anonymous writer, received February 9, 2015⁶
- Exhibit 13: E-mail, Rory Foos to John Light, February 13, 2015
- Exhibit 14: E-mail, Sarah Hale to John Light, February 15, 2015
- Exhibit 15: E-mail, Nancy Foos to John Light, February 16, 2015
- Exhibit 16: Letter, Ho to Hearing Examiner, dated February 16, 2015

The action taken herein and the requirements, limitations and/or conditions imposed by this decision are, to the best of the Examiner's knowledge or belief, only such as are lawful and within the authority of the Examiner to take pursuant to applicable law and policy.

FINDINGS OF FACT

1. Thompson and Ho have each rented/leased portions of buildings on the former Loth Lumber site to operate separate businesses growing and processing recreational marijuana. The parcel containing the buildings Thompson and Ho have rented/leased (the subject property) is on the west side of 415th Avenue SE and bears Assessor's Account Number 00534400201100. The subject property is a triangular-shaped parcel containing 6.46 acres. The subject property contains three buildings. The subject property is owned by John Craig who has authorized Thompson and Ho to pursue the requested CUP. (Exhibits 1, 1.C, 2, 2.A, 7, and 7.A, and testimony)
2. The Loth Lumber site is at the southeastern end of the City along the north side of US 2. Most of the mill site lies west of 415th Avenue SE, although two large parcels lie east of 415th Avenue SE. The subject parcel borders 415th Avenue SE on its east, but is bordered by other former mill parcels to its

⁴ The Director has the lead City staff responsibility for processing land use applications. [Gold Bar Municipal Code (GBMC) 19.05.020]

⁵ Ho was unable to attend the open record hearing: "my girlfriend is going into labor with my newborn daughter today [February 16, 2015]." (Exhibit 16)

⁶ The Examiner accords no weight to anonymous submittals.

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north and southwest. The City limits, north of US 2, follow the south, east, and north edges of the former mill parcels on the east side of 415th Avenue SE and then follow 415th Avenue SE northerly. Approximately the south half of the subject property is opposite incorporated City land (the former mill property on the east side of 415th Avenue SE); approximately the north half of the subject property is opposite unincorporated Snohomish County land. (Exhibits 1.A, 1.C, and 17)

The subject property has three vehicular entrances to 415th Avenue SE: One immediately north of the 415th Avenue SE/US 2 intersection, one near the mid-point of the subject property's frontage, and one near the north end of the subject property. (Exhibit 1.C) The site fence along 415th Avenue SE has actively used gates at the north and south entrances; the middle entrance is currently blocked by the fence. (Testimony)

3. The entirety of the former Loth Lumber site, including the subject property, is zoned General Commercial (GC). To the north of the Loth Lumber site (several hundred feet north of the subject property) within the City is a substantially sized residential neighborhood zoned R12500. The unincorporated county area east of the City limits is zoned Rural-5 Acre (R-5). (Exhibits 1.A and 17)
4. "Marijuana related businesses" are listed Conditional Uses in the GC zone provided they "meet[] the Washington State location restriction provisions for recreational marijuana businesses and [are] not adjacent to a tax parcel zoned as residential (R-7200, R-9600, R-12500, R-5) or neighborhood business (NB) or community business (CB)." [GBMC 17.48.040(O)] Subsection 17.48.040(O) GBMC was added to the municipal code by Ordinance 648 in 2013. (Official notice)
5. Recreational marijuana businesses are regulated under Chapter 69.50 RCW. Recreational marijuana producers are regulated by the Washington State Liquor Control Board (WSLCB) and may sell only at wholesale to other producers and processors. [RCW 69.50.325(1)] Marijuana processors, also regulated by the WSLCB, may sell only to other processors and retailers. [RCW 69.50.325(2)]

The WSLCB has adopted extensive regulations to control the recreational marijuana business. Marijuana producers are divided into "tiers" based upon the area of growing plant canopy that they are allowed to cultivate: Tier 1 allows less than 2,000 square feet (SF) of plant canopy, Tier 2 allows between 2,000 SF and 10,000 SF, and Tier 3 allows between 10,000 SF and 30,000 SF. [WAC 314-55-075(6)] All marijuana "premises must have a security alarm system on all perimeter entry points and perimeter windows. Motion detectors, pressure switches, duress, panic, and hold-up alarms may also be utilized." [WAC 314-55-083(2)] Video security systems are required "for controlled areas within the licensed premises and entire perimeter fencing and gates enclosing an outdoor grow operation, to ensure control of the area." [WAC 314-55-083(3)]

All perimeter fencing and gates enclosing an outdoor grow operation must have full video surveillance capable of clearly identifying any activities occurring within twenty feet of the exterior of the perimeter. Any gate or other entry point that is part of the enclosure for an outdoor growing operation must have fixed camera coverage

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capable of identifying activity occurring within a minimum of twenty feet of the exterior, twenty-four hours a day. A motion detection lighting system may be employed to illuminate the gate area in low light conditions.

[WAC 314-55-083(3)(d)]

Areas where marijuana is grown, cured or manufactured including destroying waste, shall have a camera placement in the room facing the primary entry door, and in adequate fixed positions, at a height which will provide a clear, unobstructed view of the regular activity without a sight blockage from lighting hoods, fixtures, or other equipment, allowing for the clear and certain identification of persons and activities at all times.

[WAC 314-55-083(3)(e)]

All camera recordings must be continuously recorded twenty-four hours a day. All surveillance recordings must be kept for a minimum of forty-five days on the licensee's recording device. All videos are subject to inspection by any liquor control board employee or law enforcement officer, and must be copied and provided to the board or law enforcement officer upon request.

[WAC 314-55-083(3)(g)] "To prevent diversion and to promote public safety, marijuana licensees must track marijuana from seed to sale." [WAC 314-55-083(4)] The tracking includes notification to the WSLCB and waiting periods before a producer/processor may transfer product to a wholesaler, etc. [*Ibid.*]

Only specific fertilizers and plant chemicals may be used in the production of marijuana. [WAC 314-55-084] Producers and processors must notify the WSLCB before transporting any product from their facilities; product must be transported in a locked compartment. [WAC 314-55-085] Each entry to a marijuana facility must display a sign stating that persons under the age of 21 are not permitted within the facility. [WAC 314-55-086] Detailed WSLCB regulations control the disposal of all types of liquid and solid waste associated with marijuana businesses. [WAC 314-55-097]

Marijuana producers and processors located in this part of the state are regulated by the Puget Sound Clean Air Agency (PSCAA) for odor control. Producers/processors must file a pre-construction Notice of Construction with PSCAA identifying with specificity the odor control equipment that they propose to use. Once PSCAA issues a permit, the producer/processor is subject to on-site inspections. PSCAA's regulations are designed to prevent nuisances to nearby properties. [<http://www.pscleanair.org/business/marijuana/Pages/default.aspx>, last visited February 18, 2015]

6. Thompson has been licensed by the WSLCB as a Tier 2 producer. He has leased/rented the central portion of the largest building on the subject property, labeled on hearing exhibits as Building 1.

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Ultimately he wants to occupy about 22,650 SF in and adjacent to Building 1. The portion of Building 1 that he will initially occupy has partially open sides. Thompson proposes to enclose the area where the plants will be grown with an eight (8) foot chain link fence, wrapped with green fabric to hide the activity within the fenced area. The fence will initially enclose an area of approximately 80 feet by 90 feet (7,200 SF). Part of the fenced area will be “inside” (under the roof of) Building 1, part will be outside the building. He will grow his plants in soil in pots in greenhouses which he will erect inside the fenced area. The greenhouses will be equipped with ionizers to eliminate odors. In addition to the security measures required by WSLCB regulation, Thompson plans to hire a full-time security guard. (Exhibits 1.C, 2, 2.B, 2.C, and 2.D and testimony)

7. Ho has been licensed by the WSLCB as a Tier 1 producer. He has leased/rented approximately the south 2,800 SF of the northerly building paralleling 415th Avenue SE, labeled on hearing exhibits as Building 2 (aka Building D). The west side of the portion of Building 2 that he will occupy is open. Ho proposes to wall-in that side of the building and conduct all of his operations within the enclosed building. He also plans to construct a mezzanine within a portion of the building. Carbon filters will be used to eliminate odors. (Exhibit 1.C, 7, 7.B, 7.C, and 7.D) Thompson testified that he would be willing to discuss sharing costs of the security guard with Ho if he were interested. (Testimony)

8. The February 17th open record hearing was well attended. Witnesses were passionate about their views.

Those in support (Bynum and Ball) mentioned the extensive WSLCB regulatory system that applies to marijuana producers and processors. They also said that the businesses would not attract much traffic as retail sales from the businesses are not allowed. They noted that the businesses would provide employment and that the City should receive revenue from the operations. (Testimony)

Those opposed (Witnesses Elliott, Turner, Okeson, Boll, L. King, and Wilson; written commenters R. Foos, Hale, N. Foos) were worried that the businesses would attract more criminals to the area. Some felt that Thompson’s fence proposal was not adequate to deter criminals. (Thompson offered to top his fence with razor wire, but the Director stated that he didn’t believe razor wire could be used within City limits.) Some opposed the entire concept of recreational marijuana; some opposed allowing recreational marijuana businesses anywhere in the City. Some felt the City did not have adequate police staffing to control criminal activity around the businesses. Some said there currently was too much traffic in the vicinity of the 415th Avenue SE/US 2 intersection. Some said the site was too close to residential areas. Some said the businesses would likely depress residential property values in the surrounding area, both inside and outside City limits. Some noted the number of children who live in the area and the existence of a school bus stop a few hundred feet north of the subject property. One argued that the subject property, being directly across 415th Avenue SE from R-5 zoned land in unincorporated Snohomish County, was disqualified from housing a marijuana business under the language of GBMC 17.48.040(O). (Exhibits 13 – 15 and testimony)

Some witnesses (Fitzer, R. King, Ballard, and Simpson) raised issues of concern, but expressed neither overt support nor opposition. One concern was the dangerous nature of the southern site entrance because of its proximity to US 2; the suggestion was made that the middle entrance would be safest. Some were concerned with the effect that runoff from the grow operations might have on the area's groundwater resource. Some said the area needed more law enforcement with or without the proposed businesses. One agreed with the opponents that Thompson's fence was not adequate security. Some suggested that technical errors existed in the hearing notification process. (Testimony)

9. Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

LEGAL FRAMEWORK ⁷

The Examiner is legally required to decide this case within the framework created by the following principles:

Authority

A CUP is a Type III application which is subject to an open record hearing before the Examiner. The Examiner makes a final decision on the application which is subject to the right of reconsideration and appeal to Superior Court. [GBMC 2.26.120, 1125, and .140; GBMC 19.01.030; and GBMC 19.06.060]

The examiner's decision may

grant, deny, or grant with such conditions, modifications, and restrictions as the examiner finds reasonable to make the application or appeal compatible with its environment, the Gold Bar Municipal Code, the Gold Bar Comprehensive Plan, other official policies and objectives, and land use regulatory enactments. Examples of the kinds of conditions, modifications, and restrictions that may be imposed include, but are not limited to, additional setbacks, screenings in the form of fencing or landscaping, easements, dedications, or additional right-of-way and performance bonds[.]

[GBMC 2.26.120(B)]

Review Criteria

The GBMC does not specify review criteria for CUPs. However, several code sections provide guidance. In addition to GBMC 2.26.120(B), quoted immediately above, and GBMC 19.04.010(B), quoted below, GBMC 17.72.060, is particularly relevant:

When considering an application for a conditional use permit or special use permit, the [Examiner] shall consider the applicable standards, criteria, and policies established by this

⁷ Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

title as they pertain to the proposed use and may impose specific conditions precedent to establishing the use in order to satisfy the criteria of this chapter. The conditions may:

- A. Increase requirements in the standards, criteria, or policies established by this title;
- B. Stipulate the exact locations and means of minimizing hazards to life, limb, property damage, erosion, landslides, or traffic;
- C. Require structural features or equipment essential to serve the same purpose set forth in subsection (B) of this section,
- D. Impose conditions similar to those set forth in subsections (B) and (C) of this section as deemed necessary to establish parity with uses permitted in the same zone and their freedom from nuisance generating features and matters of noise, odors, air pollution, wastes, vibration, traffic, physical hazards, and similar matters; provided, the [Examiner] may not, in connection with action on a conditional use permit or special use permit, reduce the requirements specified by this title as pertaining to any use nor otherwise reduce the requirements of this title in matters for which a variance is the remedy provided;
- E. Assure that the degree of compatibility with the purpose of this title shall be maintained with respect to the particular use on the particular site and in consideration of other existing and potential uses within the general area in which the use is proposed to be located;
- F. Recognize and compensate for variations and degree of technological processes and equipment as related to the factors of noise, smoke, dust, fumes, vibrations, odors, and hazards or public need;
- G. Require the posting of construction and maintenance bonds or other securities sufficient to secure to the city the estimated costs of construction and/or installation and/or maintenance of required improvements.

A “consistency determination” is also required for every project permit application.

During project permit application review, [Gold Bar] shall determine whether the items listed in this subsection are defined in the development regulations applicable to the proposed project. In the absence of applicable development regulations, [Gold Bar] shall determine whether the items listed in this subsection are defined in [Gold Bar’s] adopted comprehensive plan. This determination of consistency shall include the following:

- 1. The type of land use permitted at the site, including uses that may be allowed under certain circumstances, if the criteria for their approval have been satisfied;
- 2. The level of development, such as units per acre, density of residential development in urban growth areas, or other measures of density; and
- 3. Availability and adequacy of infrastructure and public facilities identified in the comprehensive plan, if the plan or development regulations provide for funding of these facilities as required by RCW Chapter 36.70A; and
- 4. Character of the development, such as development standards.

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[GBMC 19.04.010(B)]

Vested Rights

The City has no vesting regulations. “Vesting” serves to “fix” the regulations against which a development application is judged. [*Potala Village Kirkland, LLC v. City of Kirkland*, __ Wn. App. __ (Div. I, 2014)]

In the 1950s, the [state] supreme court first adopted the common law vested rights doctrine [for building permit applications]. ... In cases that followed, Washington courts applied the vested rights doctrine to permit applications other than building permit applications. They included conditional use permit applications, grading permit applications, shoreline substantial development permit applications, and septic permit applications.

In 1987, the legislature enacted legislation regarding the vested rights doctrine. The session laws added ... RCW 19.27.095(1) and RCW 58.17.033(1) respectively ... [which] only refer to building permit applications and subdivision applications. ...

Most recently, in *Town of Woodway v. Snohomish County*, the [state] supreme court reiterated that "[w]hile it originated at common law, the vested rights doctrine is now statutory."

[*Potala*, Slip Opinion 6 – 8 and 11] “With these points in mind, [the *Potala* court held] that the filing of [an] application for [a] shoreline substantial development permit, without filing an application for a building permit, [does] not vest rights to zoning or other land use control ordinances.” [*Potala*, Slip Opinion at 12] The *Potala* court “express[ed] no opinion on whether or to what extent the vested rights doctrine applies to permits other than shoreline substantial development permits. These questions [were] not before [it].” [*Potala*, Slip Opinion at 25] Therefore, whether the vested rights doctrine still applies to CUPs is debatable.

Vesting is not particularly important in this case as the City has made no development regulations changes between the time the application was filed and this date.

Standard of Review

The standard of review is preponderance of the evidence. The applicant has the burden of proof. [GBMC 19.05.060]

Scope of Consideration

The Examiner has considered: all of the evidence and testimony; applicable adopted laws, ordinances, plans, and policies; and the pleadings, positions, and arguments of the parties of record.

CONCLUSIONS OF LAW

1. Consideration of whether or not Gold Bar should allow marijuana production and processing businesses within its borders is beyond the scope of the present proceeding. Policy decisions are the province of the legislative branch. [*Cazzanigi v. General Electric Credit*, 132 Wn.2d 433, 449, 938 P.2d 819 (1997)] The City's legislative branch, the City Council, exercised its legislative authority in November, 2013, when it adopted Ordinance 648 to specifically allow marijuana businesses as a Conditional Use in the City's GC-zoned areas (subject to certain limitations).

That action cannot be collaterally challenged or questioned in the context of this CUP proceeding. "During project review, the local government or any subsequent reviewing body shall not reexamine alternatives to or hear appeals on the items identified in subsection (2) of this section," one of which is "Type of land use permitted at the site, including uses that may be allowed under certain circumstances, such as planned unit developments and conditional and special uses, if the criteria for their approval have been satisfied". [RCW 36.70B.030(3) and (2)(a), respectively]

2. The foundational question that must be initially answered is: Does the subject property meet the locational requirements of GBMC 17.48.040(O) for consideration of a CUP for marijuana businesses? The answer to that question requires interpretation of the code language.
3. City ordinances are subject to the same rules of interpretation and construction as apply to statutes. [*Tahoma Audubon Soc. v. Park Junction Partners*, 128 Wn. App. 671, 116 P.3d 1046 (2005); *Neighbors v. King County*, 88 Wn. App. 773, 778, 946 P.2d 1188 (1997)] Courts, and by extension quasi-judicial decision makers, "do not construe a statute that is clear and unambiguous on its face. We assume that the legislature means exactly what it says, and we give words their plain and ordinary meaning. Statutes are construed as a whole, to give effect to all language and to harmonize all provisions." [*Ockerman v. King Cy.*, 102 Wn. App. 212, ___ P.2nd ___ (Div. I, 2000); see also: *Western Petroleum v. Freidt*, 127 Wn.2d 420, 424, 899 P.2d 792 (1995), holding that intent is relevant only if ambiguity exists in the language of the code; *State v. Azpitarte*, 140 Wn.2d 138, 141, 995 P.2d 31 (2000), holding that clear and unambiguous codes are not subject to judicial construction] Legislative history cannot override an unambiguous code provision. [*Kirtley v. State*, 49 Wn. App. 894, 898, 748 P.2d 1148 (1987)]
4. Subsection 17.48.040(O) GBMC contains ambiguity in two areas. First, what does the word "adjacent" mean? And second, does the list of zones which a marijuana business may not be located next to include only zones within the City?

In legal usage, the words "adjacent" and "adjoining" are typically accorded slightly different meanings. "The difference between adjacent and adjoining seems to be that the former implies that the two objects are not widely separated, though they may not actually touch, while adjoining imports that they are so joined or united to each other that no third object intervenes." [Official notice from "The Law Dictionary" featuring Black's Law Dictionary Free Online Legal Dictionary,

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2nd Edition, found at <http://thelawdictionary.org/adjacent/>, last visited February 17, 2015] That interpretation would suggest that the subject property is adjacent to the R-5 zoned land across 415th Avenue SE in unincorporated Snohomish County and thus marijuana businesses would not be allowed on the subject property if the R-5 zone prohibition included unincorporated lands as well as lands in the City.

The code section is completely silent as to whether the list of zones in GBMC 17.48.040(O) applies to zones only within the City or to zones both within and outside of the City. As written, it could be interpreted either way. City staff argued that it applies only to lands within the City. (Exhibit 1, p. 6) One witness argued to the contrary. (Testimony) The code provision is ambiguous.

5. Ordinance 648, the ordinance which added GBMC 17.48.040(O) to the City code, provides helpful legislative history. The ordinance contains a number of recitals (the “whereas” statements in an ordinance or resolution). Among them are the following three recitals:

WHEREAS, restricted areas for I-502 businesses have been evaluated at a previous Council meeting; and

WHEREAS, the Council has determined that residential zones are not appropriate places for marijuana related businesses; and

WHEREAS, there are available locations in the GC (General Commercial) Zones for such businesses.

[<http://mrsc.org/getmedia/11FF6DA5-C53A-47F2-A45C-5951AB42C4AC/g65o648.aspx>, last visited February 19, 2015]

Those recitals tell us that the City Council had discussed possible marijuana business locations prior to the meeting at which the ordinance was adopted and that the Council felt that such businesses should not be located in residential zones. But those recitals do not answer the questions posed at the outset of Conclusion of Law 4, above.

Ordinance 648 (at least as found on the MRSC web site) contains five numbered pages: Two pages of text plus three pages of attachments. The ordinance text is on Pages 1 and 2. Page 3 is a zoning map of the entire City. Page 4 is an annotated aerial photograph titled “East End Zoning.” That page shows the former Loth Lumber properties zoned GC. It also depicts the City limits. Page 5 is another annotated aerial photograph titled “Available Parcels.” (Reproduced on page 16, below.) That photograph has a red dot on all GC-zoned parcels in the “East End” which are “available” for occupancy by marijuana businesses. Since we are not concerned in this case with parcels south of US 2, they will be ignored in the following description of Page 5. Each of the eight small GC-zoned parcels along the north edge of US 2 together with the subject property are marked with a red dot. The large GC-zoned parcel north of the subject property and the two GC-zoned parcels on the east side of 415th Avenue SE inside the City limits are not marked with a red dot.

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[<http://mrsc.org/getmedia/11FF6DA5-C53A-47F2-A45C-5951AB42C4AC/g65o648.aspx>, last visited February 19, 2015]

The clear intent of the City Council as evidenced by the “Available Parcels” figure on Page 5 of Ordinance 648 was that 415th Avenue SE created a separation which made GC-zoned property in the City on the west side of the street not “adjacent” to R-5-zoned property east of that street, whereas GC-zoned property within the City east of 415th Avenue SE was considered “adjacent” to the R-5-zoned property in unincorporated Snohomish County and, thus, was not “available” for marijuana businesses.⁸ The Council’s graphical depiction of GC-zoned parcels which are “available” for marijuana businesses controls over a dictionary definition.

The subject property qualifies under GBMC 17.48.040(O) for location of marijuana businesses if such businesses can meet the requirements for issuance of a CUP.

6. Quasi-judicial decisions (which a CUP decision is) must be based upon applicable statutes, ordinances, policies, and facts contained within the record of the open record hearing. Neighborhood opposition alone may not justify denial of an application. [*Sunderland Services v. Pasco*, 127 Wn.2d 782, 797, 903 P.2d 986 (1995)] Such decisions must also be based upon facts, not fears. [*Dept. of Corrections v. Kennewick*, 86 Wn. App. 521, 937 P.2d 1119 (1997)] Much of the opposition in this proceeding was based on fear; no evidence was submitted to support most of the stated concerns.
7. In the absence of specifically listed approval criteria for CUPs, we first look to the definition of Conditional Use:

a use listed among those classified in any given use zone but permitted to locate only after review by the [Examiner] and the granting of a conditional use permit imposing such performance standards as will make the use compatible with other permitted uses in the same vicinity and zone and assure against imposing excessive demands upon public utilities.

[GBMC 17.08.480] By definition, a Conditional Use is a legislatively listed use which is permitted in a given zone, but only if it can be conditioned so as to be “compatible with other permitted uses in the same vicinity and zone and assure against imposing excessive demands upon public utilities.” (Emphasis added)

“Compatible” does not mean “same as.” It embodies the concept of getting along with something, not being the same as something. By way of analogy, the partners in a successful marriage are rarely the same as one another, but they are compatible.

⁸ City staff’s current position is at odds with the intent of the Council as divined by the attachment to Ordinance 648: The Council was concerned about adjacency to all R-5 zoned land, whether in the City or outside the City, but believed that 415th Avenue SE created a break which made properties on either side of it not “adjacent.”

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Further, a Conditional Use is to be evaluated for compatibility with “other permitted uses in the same vicinity and zone,” not with uses in other zoning districts.

8. The Thompson and Ho marijuana production and processing businesses will generate virtually no traffic (no retail sales of their product is allowed from the site under state regulations). The evidence indicates that they will create virtually no noise: Once the facilities are completed and operational, the major activity will be plants growing. PSCAA regulations will eliminate odor as a nuisance. The businesses should be compatible with other uses in the GC zone.
9. Section 17.72.060 GBMC contains a lengthy list of topics for which the Examiner may impose conditions on a CUP. To do so, however, the record must contain evidence of an impact that would be created or exacerbated by the proposed Conditional Use which could be reduced or eliminated by a condition.
10. The list of items in GBMC 17.72.060(B) and (D) includes traffic hazards and traffic nuisances.⁹ The southern entrance to the subject property is very poorly located: It is right on top of the 415th Avenue SE/US 2 intersection. Turning movements into or out of that entrance could easily cause a hazard. Given that the subject property has two other entrances (only one of which is presently open for use) and given that both of those entrances are well removed from the intersection, traffic associated with the Thompson and Ho businesses should not use the southern entrance.¹⁰
11. The list of nuisances in GBMC 17.72.060(D) (and (F)) includes “noise, odors, air pollution, wastes, [and] vibration”. Noise has previously been addressed; no evidence exists to support any conditions relating to noise. Odors and air pollution are regulated by PSCAA; the City need not and should not attempt to regulate something regulated by another agency. Wastes are extensively regulated by the WSLCB; the City need not and should not attempt to regulate something regulated by another agency. No evidence exists to support any conditions relating to vibration.
12. Safety falls within the ambit of GBMC 17.72.060(E)’s requirement for compatibility with the area. The Thompson and Ho business models present different safety considerations: Ho’s operation will be conducted entirely within an enclosed building; Thompson’s operation will be conducted inside a fenced area, part of which will be under the roof of Building 1. Given the security and alarm requirements of the WSLCB regulations, the Examiner concludes that the Ho operation does not present unusual safety concerns.

The Thompson operation is more problematic. It is not too difficult for an agile person to scale an eight foot chain link fence – especially if the reward on the other side is worth the effort. For

⁹ The other “hazards” listed in Subsection (B) simply do not apply to the subject property and proposed uses.

¹⁰ The Examiner cannot ban other users of the subject property from using the southern entrance as those users are not before the Examiner seeking a permit. As a matter of public safety, the land owner could voluntarily close off the southern entrance to all users.

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someone intent on stealing marijuana for sale on the black market, the reward would be worth the effort.

The GBMC limits fence height in commercial/industrial zones to eight (8) feet, including any barbed wire on top of the fence. [GBMC 15.06.010(B)(2) and .030] An argument could be made (admittedly perhaps rather weak) that since the fence Thompson will build is nowhere near a property line and since it will function as a wall to enclose a business activity, it could be considered as a wall. In that case, only the height limits of the GC zone (35 feet pursuant to GBMC 17.48.080) would limit the height of the fence/wall. The Examiner concludes that to best ensure public safety, the fence that Thompson will build should be 10 feet tall if allowed under the GBMC and should be topped with barbed wire or razor wire if allowed by City code. Further, the barbed wire/razor wire should extend above any gates within the fence.

13. Another safety consideration is whether the businesses will attract criminals. It is possible that they will. Their attractiveness can be reduced by not advertising their presence. Since marijuana producers and processors are not allowed to sell their product at retail, they do not need advertising signage. The Examiner can see no reason why either business would need any business identification signage that would be visible from US 2 or 415th Avenue SE.
14. Subsection 17.72.060(G) would allow the Examiner to require posting of a bond (or bonds) to assure completion of improvements. Given the extensive regulatory presence of the WSLCB and PSCAA, the Examiner concludes that bonding is not necessary.
15. The proposal passes the “consistency” determination required by GBMC 19.04.010(B): The proposed uses are allowed in the GC zone subject to issuance of the requested CUP; density is irrelevant as these are not residential uses; no evidence exists in the record of any inadequate public facilities; and the character of the development will be in keeping with the GC-zoned surroundings.
16. The recommended permit conditions (Exhibit 1, p. 7) are inadequate to address the issues discussed above. Therefore, a wholly different set of conditions will be crafted. Conditions will not be imposed which would only serve to duplicate matters regulated by other authorities.
17. The GBMC states that a CUP “runs with the land.” [GBMC 17.72.110] That expression means that a CUP is issued for a specific use on a specific parcel, not to a specific person. The owner of the subject property is ultimately responsible for compliance with the conditions imposed on the CUP. [*Ibid.*]
18. Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

DECISION

Based upon the preceding Findings of Fact and Conclusions of Law, the testimony and evidence submitted at the open record hearing, and the Examiner's site view, the Examiner **GRANTS** the requested Conditional Use Permit to use two buildings on a portion of the former Loth Lumber site for the production and processing of recreational marijuana **SUBJECT TO THE ATTACHED CONDITIONS.**

Decision issued February 24, 2015.

\s\ John E. Galt (Signed original in official file)

John E. Galt
Hearing Examiner

HEARING PARTICIPANTS ¹¹

Daniel Thompson
Rosemary Fitzer
Ronald King
Colleen Okeson
Rebecca Boll
Eric Bynum
Joan Robinette Wilson
Lee Simpson

Abby Weber
Pam Elliott
Lonn Turner
Joe Beavers
Lauren King
Steve Ball
Tamara Ballard
John Light

¹¹ The official Parties of Record register is maintained by the City's Hearing Clerk.

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NOTICE of RIGHT of RECONSIDERATION

This Decision is final subject to the right of any party of record to file a written request for reconsideration within seven (7) calendar days of the date this Decision was mailed to the parties. See GBMC 2.26.125 for additional information and requirements regarding reconsideration.

NOTICE of RIGHT of APPEAL

This Decision is final subject to the right of a party of record with standing, as provided in RCW 36.70C.060, to file a land use petition in Superior Court in accordance with the procedures of GBMC 2.26.140 and 19.06.060. Any appeal must be filed within 21 days following the issuance of this Decision unless reconsideration has been requested. See GBMC 2.26.140 and 19.06.060 for additional information and requirements regarding judicial appeals.

<p>The following statement is provided pursuant to RCW 36.70B.130: “Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.”</p>

AVAILABLE PARCELS



CONDITIONS OF APPROVAL
00-14-01
THOMPSON/HO MARIJUANA PRODUCTION/PROCESSING

This Conditional Use Permit is subject to compliance with all applicable provisions, requirements, and standards of the Gold Bar Municipal Code, standards adopted pursuant thereto, and the following special conditions:

1. This Conditional Use Permit authorizes up to 22,650 square feet of Building 1 and its surrounding area (as identified and depicted on Exhibits 1.C, 2.B, and 2.C) to be occupied by a Tier 2 recreational marijuana producer/processor business and approximately the south half of Building 2 (as identified and depicted on Exhibits 1.C, 7.B, and 7.C) to be occupied by a Tier 1 recreational marijuana producer/processor business. This permit does not authorize marijuana producer/processor businesses on any other portion of the subject property nor in any other building or portion of building on the subject property.
2. Prior to occupancy of either Building 1 or Building 2 by a recreational marijuana producer/processor business, all derelict vehicles, debris, waste, garbage, etc. within and immediately adjacent to said buildings shall be removed from the site and disposed of in a legal fashion.
3. Prior to occupancy of Building 1 and its environs by a recreational marijuana producer/processor business, a sight-obscuring security chain link fence shall have been permanently erected around all that portion of the permitted area which is to be used initially for growing and processing marijuana; PROVIDED, that where a solid, full-height wall of Building 1 forms the boundary of the marijuana growing/processing area, no fence is required if the fence end is attached to the building wall such that no person can enter the production area between the fence end and the wall. "Permanently erected" means that all fence posts must be permanently placed into the ground, encased in concrete. The security fence shall be topped with barbed wire (razor wire if allowed by City code) and shall be at least eight (8) feet tall. (If the municipal code allows, the fence shall be 10 feet tall.) The barbed wire/razor wire shall extend above any and all gates in the fence.

If the business expands to encompass a larger portion of the permitted area, the perimeter security fence shall be moved outward to encompass the expanded area or additional fencing meeting the same standards shall be erected to encompass the expanded area. No occupancy by a recreational marijuana producer/processor business of an expanded area shall occur until the fence around the expanded area has been completed.

4. Prior to occupancy of Building 2 by a recreational marijuana producer/processor business, the currently open portion of the building's west wall shall have been fully walled in as depicted on Exhibits 7.B and 7.D.

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5. No business identification signage is allowed for either building; PROVIDED, that a small business identification sign, not visible from either 415th Avenue SE or US 2, may be placed near the primary entrance to each business.
6. No vehicles associated in any way with the marijuana producing/processing businesses shall use the southern entrance to the site. All vehicular access to the site for the marijuana businesses shall be via the middle (at the property owner's option) and north entrances.
7. This permit is valid as to the use of Buildings 1 and 2 by recreational marijuana producer/processor businesses only when the party(ies) occupying said buildings are currently licensed by the WSLCB as marijuana producers/processors and is (are) in good standing under any such license(s). Should the WSLCB suspend or revoke any such license, then this permit shall become null and void as to the particular building until such time, if ever, as the state permit is reinstated or a comparable, new state permit is issued for that building.