Skagit County
Planning & Development Services
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Supplemental Staff Report

From: Dale Pernula, AICP, Director

Re: Proposed Permanent Regulations on Marijuana Facilities

Date: April 16, 2015

This memo addresses public comments received during the written comment period between March 12 and April 9 and testimony received at the public hearing on April 7, and questions the Department has subsequently received from individual Planning Commissioners. For more information, the Department recommends reading the Staff Report on Proposed Permanent Rules for Marijuana Facilities (March 24, 2015) and reviewing the related materials on the Skagit County I-502 Marijuana webpage.

Contents

Responses to Public Comments and Planning Commissioner Questions

Written comments below were received at the public hearing or during the public comment period and are available on the proposal website at www.skagitcounty.net/planning (click on I-502). Staff have made best efforts to reply to almost all the Planning Commissioner questions and most of the public comments.

ⓘ Request for general information about the state's marijuana regulatory scheme.

Washington State's Initiative 502 legalized the recreational use and possession of marijuana in specified amounts and created a three-tiered licensing scheme and designated the state Liquor Control Board ("WSLCB") to manage it. The scheme includes three new marijuana licenses: producer, processor, and retailer.

- **Marijuana Producer**: produces marijuana for sale at wholesale to marijuana processors and allows for production, possession, delivery, distribution.
- **Marijuana Processor**: processes, packages, and labels marijuana/marijuana-infused product for sale at wholesale to marijuana retailers and allows for processing, packaging, possession, delivery, distribution.

- **Marijuana Retailer**: allows for sale of usable marijuana/marijuana-infused products at retail outlets regulated by the WSLCB.

A single entity can hold both a producer and processor license, but not also a retail license.

Producer Tiers
The maximum amount of space for marijuana production is limited to two million square feet. Applicants must designate on their operating plan the size category of the production premises and the actual square footage in their premises that will be designated as plant canopy. There are three categories:

- Tier 1: Less than 2,000 square feet;
- Tier 2: 2,000 square feet to 10,000 square feet;
- Tier 3: 10,000 square feet to 30,000 square feet.

Producer Facilities
Under state law and rules, growing can occur:

- *Indoors/Greenhouse:* Fully enclosed secure indoor facility or greenhouse with rigid walls, a roof, and doors.
- *Outdoor:* Outdoor production may take place in non-rigid greenhouses, other structures, or an expanse of open or cleared ground fully enclosed by a physical barrier. To obscure public view of the premises, outdoor production must be enclosed by a sight-obscure wall or fence at least eight feet high. Outdoor producers must meet security requirements described in WAC 314-55-083, including security cameras "capable of clearly identifying any activities occurring within twenty feet of the exterior of the perimeter." When an opaque structure is used, security cameras and fences are not required.

Retail Outlets
The WSLCB set the number of retail outlets by city and county based on population. Only 334 are allowed statewide. The initiative provides for additional rules for retail outlets:

- Retail outlets may not employ anyone under the age of 21, nor allow anyone under the age of 21 to enter the premises.
- Retail outlets are only authorized to sell marijuana/marijuana products or paraphernalia.
- Retailers are allowed one sign identifying the outlet's business or trade name, not to exceed 1600 square inches.
- They are not allowed to display marijuana or marijuana related products in a manner that is visible to the general public.

Possession
Individuals twenty-one years of age or older are legally authorized to possess and use:

- One ounce of usable marijuana.
- 16 ounces of marijuana-infused product in solid form; or
- 72 ounces of marijuana-infused product in liquid form.
- Marijuana-related drug paraphernalia.

Individuals are still subject to criminal prosecution for:

- Possession in amounts greater than what is listed above.
- Possession of any quantity or kind of marijuana/marijuana-infused product by a person under 21 years of age.

For additional general information, please see the Washington State Liquor Control Board page on I-502. We have also added some general resources to the Skagit County webpage on marijuana implementation.

ⓘ What are Skagit County's current rules for marijuana facilities? How do they differ from what is proposed?

The current interim rules, adopted by the Board of Commissioners as an interim ordinance, are the same as the proposed permanent rules. The Board adopted interim ordinances to prevent new marijuana facilities from locating in areas that were clearly undesirable and incompatible with neighboring land uses, while providing new marijuana facilities with the ability to proceed to develop their businesses in areas that would be appropriate.

Based on its experience over the past year and recent public comments and complaints, the Department believes that production/processing facilities are much more likely to have significant impacts on neighboring properties than retail facilities. We also believe that production or processing in transparent facilities has larger impacts than that in opaque structures because of nighttime lighting impacts, LCB-required security fencing, and LCB-required security cameras. Because the LCB allows combination production/processing licenses, we propose treating production and processing facilities the same. Otherwise, the Department believes the general direction the County has taken from the beginning— that marijuana production and processing should be treated as an industrial operation, not agricultural—is largely sound.

ⓘ Is medical marijuana legal?

Washington State has allowed the limited use of marijuana for medicinal purposes since voters approved Initiative 692 in 1998. In 2011, the Legislature adopted a bill expanding the use of

medical marijuana and allowing the establishment and cultivation of "collective gardens" for growing marijuana for medicinal purposes.[1]

At the time, the U.S. Department of Justice took the position that state and local officials that enabled distribution of medical marijuana could be subject to federal criminal prosecution. Consequently, then-Governor Gregoire vetoed several sections of the bill. The effect of those vetoes was not immediately apparent; most cities and counties believed that the bill legalized medical marijuana and collective gardens, but it left them unregulated by state authorities.

In April 2012, the Board of County Commissioners adopted a complete moratorium on cannabis dispensaries and medical marijuana collective gardens. The moratorium lasted for a year, but then expired without the County taking action to adopt permanent regulations. It was not renewed, and collective gardens were not prohibited from locating in Skagit County, although none applied for permits.

In March 2014, the Division 1 Court of Appeals, in *Cannabis Action Coalition v. City of Kent*, interpreting the effects of then-Governor Gregoire's line-item vetoes of portions of the 2011 bill, held that neither medical marijuana nor collective gardens have been legalized under state law. After the decision, the Department modified the Guidance Memo to remove any reference to medical marijuana facilities.

ⓘ If medical marijuana facilities are illegal, why are they allowed to exist?

Medical marijuana remains obtainable at a few facilities around the county. Most law enforcement agencies in the state have taken the position that, because of the quickly evolving rules on marijuana and despite the Court of Appeals ruling, they will allocate their enforcement resources to other matters so long as a medical marijuana collective garden stays under the maximum number of plants specified in the legislation.

With respect to facilities that are not compliant with the land use code, Department policy is to not enforce the land use code except in response to complaints.

ⓘ Under current law, what can a recreational user buy, own, and consume?

Recreational marijuana sales to the public began July 8, 2014. Individuals may possess one ounce of marijuana at a time for recreational use.

ⓘ Does the proposed ordinance apply only to recreational marijuana, medical marijuana or both? If there are different rules, what are they?

The proposed permanent regulations apply to all marijuana facilities. No facility would be allowed that is not regulated by the Liquor Control Board. Under current state law, that would preclude the unregulated (and illegal) medical marijuana facilities.

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[1] More precisely, the law provides an affirmative defense to qualifying patients and their designated providers, post-arrest, in state criminal prosecutions for violations of the Uniform Controlled Substances Act. It does not "legalize" medical marijuana, although it may be said to have had that effect. Seattle City Attorney Pete Holmes recently issued a memo, "Moving Marijuana Policy Forward," that clearly articulates this point.

Senate Bill 5052, which passed out of the Legislature on Tuesday and is expected to be signed by the Governor, eliminates collective gardens and only allows wholesale or retail marijuana facilities via license issued by the WSLCB (which will be renamed the Liquor and Cannabis Board). SB 5052 also allows four-patient "cooperatives" to grow up to 60 plants for medical use. Please see the recommended changes section at the end of this document.

ⓘ Can a homeowner grow marijuana for self-consumption? If so, does that homeowner fall under production and/or processing guidelines?

No, recreational marijuana cannot be legally grown at home. The WSLCB will not issue licenses to grow marijuana in a residence:

> Growing can NOT occur in a personal residence. The rules state that "the Board will not approve a license for any location where law enforcement access, without notice or cause, is limited. This includes personal residences." Private residences are afforded a degree of privacy under the Fourth Amendment of the U.S. Constitution that is incompatible with the regulatory requirements of I-502.

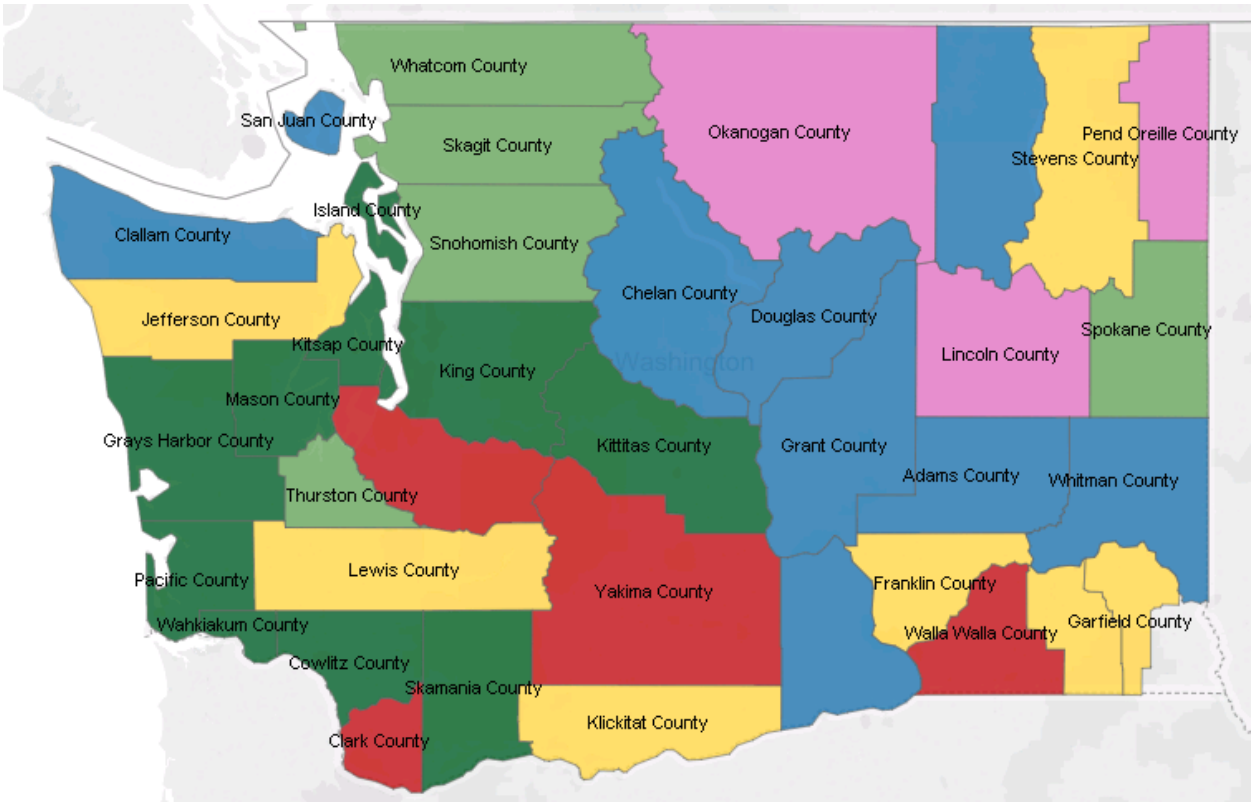
Under SB 5052, under certain circumstances qualifying patients may grow a limited number of marijuana plants at home for medical use without a WSLCB license.

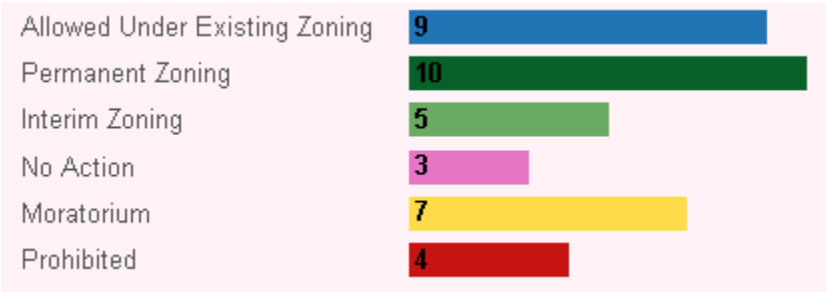
ⓘ How do the proposed County regulations compare to other jurisdictions?

Based on information obtained from MRSC, the other jurisdictions in the County address marijuana in the following ways.

Jurisdiction	*Retail*	*Production/Processing*	*Outdoor Growing*	*Medical*
Anacortes	Industrial areas	Industrial areas	Prohibited	Moratorium
Burlington	M-1 industrial zone	M-1 industrial zone	Prohibited	M-1 industrial zone
Concrete	Prohibited	Prohibited	Prohibited	Prohibited
Mount Vernon	Commercial-Limited Industrial (C-L) zone	C-L zone	Prohibited, including greenhouses	C-L zone
Sedro-Woolley	Central Business District and Mixed Commercial	Industrial areas and R-5	Prohibited	Prohibited in all residential districts, public zone, open space zone, all commercial districts

MRSC has prepared useful infographics that compare land use regulations across the state. Please see the MRSC Recreational Marijuana page for more details.





ⓘ Why are we treating marijuana production and processing as industrial rather than agricultural?

The Department has considered indoor marijuana production and processing to be an industrial use since it first issued the guidance memo for marijuana permitting in December 2013. Indoor marijuana production—which requires buildings, significant energy use, fans, and security systems—has potential impacts on the surroundings that may not be compatible with the purpose and character of the land use zones where agriculture is allowed, or the expectations of the people who live in those zones.

Agriculture is outright permitted in most zones, and it fits into those zones based on an expectation that the agricultural activities are traditional agriculture that uses the land and soil to produce

crops. The purpose of many of the County's rural zones is to preserve the open space character of the landscape, and traditional agriculture fulfills that purpose.[2]

Skagit County prides itself on preserving and maintaining its rich agricultural land base. Consistent with that principle and state statutes requiring the conservation of agricultural land, the County has developed Comprehensive Plan policies and development regulations that promote agriculture where land supports it, and prioritizes keeping agricultural lands in production for the long-term future. Lands with highly-productive agricultural soils are zoned "Agricultural-Natural Resource" (Ag-NRL). The uses allowed in the Ag-NRL zone reflect the prioritization of keeping prime agricultural lands available for production. The adopted purpose of the zone is to "conserve agricultural land," especially with respect to the highly productive soil that characterizes the zone:

> Provide land for continued farming activities, conserve agricultural land, and reaffirm agricultural use, activities and operations as the primary use of the district. Nonagricultural uses are allowed only as accessory uses to the primary use of the land for agricultural purposes. The district is composed mainly of low flat land with highly productive soil and is the very essence of the County's farming heritage and character.[3]

The related definitions of "agriculture" and other terms emphasize agriculture as the "use of land" and require its use "for on-site soil-dependent agriculture" [emphasis added].7 Indoor marijuana production is not soil-dependent, and therefore does not need to be located on, or even near, prime agricultural land.

ⓘ How is it possible for the state to issue a permit for a marijuana facility bypassing the county? What can Skagit County do to retain its jurisdictional authority regarding this issue?

Marijuana facilities, like any business or even individuals, have to comply with many sets of regulations, each of which attempt to manage a certain set of impacts. The State Liquor Control Board is responsible for ensuring that a facility complies with I-502, and a facility must obtain a license from the WSLCB for that purpose. The County has a different set of obligations as the land use authority—that is to regulate incompatible land uses. A marijuana facility cannot legitimately operate until it has satisfied its obligations to each agency with jurisdiction.

ⓘ How can the County ensure that the marijuana businesses pre-2014 be regulated under the same the new regulations?

As a general matter, land use applications vest to the regulations in place at the time they are submitted and land uses are allowed to continue after they are permitted even if the regulations subsequently change. There are very few marijuana facilities in the County that have vested to regulations that are substantially different from what is currently proposed. Most of the facilities that we have received complaints about are not vested or did not develop consistent with existing code, and are currently subject to the code enforcement process.

[2] See e.g. SCC 14.16.320(1).
[3] SCC 14.16.400(1).

ⓘ How is the marijuana code enforcement procedure being handled now (in general terms)? Will the code violation enforcement procedure be the same as it is now after a new ordinance is passed?

Land use code violations are all handled per SCC Chapter 14.44. The Department opens cases and investigates based on complaints, and then issues administrative orders to correct the violations, which in some cases may require the marijuana facility to shut down operations at its location. The Department has been fairly successful with those code enforcement actions so far, although several are pending.

ⓘ How much water does marijuana growing use? Several commenters expressed concerns about water usage, especially on Guemes Island.

I-502 regulates marijuana subject to the same water use regulations as any other commercial crop in Washington State. Well use in most of Skagit County is subject to the Skagit Instream Flow Rule, which is beyond the scope of this memo. The Department of Ecology estimates that water use by production tier (described above) for indoor growing as follows, in gallons per day:

- Tier 1— 2,000 sf; 260 gpd
- Tier 2 – 10,000 sf; 1,300 gpd
- Tier 3 – 30,000 sf: 3,900 gpd

Water needs for outdoor grow operations, where environmental conditions cannot be controlled, are likely much higher.

The proposed rules would not prohibit growing in each of the zones on Guemes Island except Rural Resource, which is a small area of Guemes, and by special provision would prohibit growing on Guemes in that zone as well.

ⓘ Where are all of the currently permitted marijuana facilities and their zoning?

The following table describes the marijuana facilities that are licensed by the WSLCB, their zoning, and their land use approval status:

Facility	*WSLCB License Type*	*Zoning*	*County Land Use Approval Status*
Flower of Life Farms	Producer-3 Processor	RI	Permitted for outdoor grow; code enforcement for non-compliance with outdoor growing
Miller Marijuana Farms	Producer-3 Processor	RRv	No County permits obtained; code enforcement
221	Retailer	RVC	Permitted
Dank Dynasty	Producer-1 Processor	Ag-NRL	No County permits obtained
Duke's Hill Canna	Producer-2 Processor	RRv	No County permits obtained
Glen's Plant Farm	Producer-2 Processor	Ag-NRL	Building permits applied
Northwest Grown Products	Producer-2 Processor	RRc-NRL	Obtained change of use
Oracle Acres	Producer-1 Processor	RB	Change of use within same classification
Sugarleaf Farm	Producer-3 Processor	Ag-NRL	No County permits obtained

There are also other facilities that have obtained County permits but not yet obtained LCB licenses.

ⓘ Why does the current proposal not include setbacks or lot size requirements?

The Department included large minimum setbacks (250 ft) and lot size requirements (no lot smaller than 5 acres) in the first two interim ordinances, but in response to public comments on the interim ordinances and upon further consideration found those one-size-fits-all setbacks to be unworkable. Facilities would be prohibited on small parcels even where no land use conflicts are likely to occur. Facilities would also be prohibited from locating in existing underutilized buildings because few if any existing buildings comply with large setback requirements.

Instead, the Department recommends requiring a Special Use Permit where those conflicts are likely to occur, as that process allows for individualized consideration of properties and special conditions to ensure that they will avoid negative effects on surrounding properties.

ⓘ Why the special restriction on hazardous chemical processing?

Some marijuana processors use butane or other hazardous chemicals to process marijuana into extracts or oils. Butane is an odorless, colorless gas; extraction using that gas can result in significant explosions when the gas is not contained. See, e.g., this story about such an explosion in a Mount Vernon apartment and this New York Times article about the nationwide trend. An alternative processing method using CO_2 is available, but may not produce the same quality of product. The proposed regulation has been reviewed and recommended by the County Fire Marshal.

Key Issues for Planning Commission Deliberations

The initial staff report summarized the proposal in seven points that we believe make sense as an outline for Planning Commission discussion as it formulates its recommendation:

1. **Should outdoor growing of marijuana be prohibited countywide?** Outdoor growing is unlikely to be desirable for serious producers, and introduces additional security and odor concerns.
2. **Should the County allow only those marijuana facilities that are licensed by the Liquor Control Board?** Medical marijuana facilities, which are illegal under existing law, are likely to be rolled up into the recreational system during the current legislative session.
3. **Should the County prohibit the use of flammable or combustible liquids or gases for marijuana extraction in Ag-NRL?** Butane and propane extraction processes have potential for explosions. Non-flammable CO_2 systems are available alternatives. This special rule for Ag-NRL would limit the impact on those Ag-NRL areas that are characterized by significant residential development. In the other zones where processing is allowed, only closed-loop processing systems would be allowed.
4. **Should all marijuana production or processing facilities be required to employ ventilation systems such that no odors from the production or processing are detectable off the premises?** This has been a frequently cited neighborhood concern, but was not one that the Department could address without new regulation.
5. **Should any LCB-required security cameras be required to be aimed so as to view only the facility property, not public rights-of-way or neighboring properties?** This has been a frequently cited neighborhood concern.
6. **What impacts on surrounding properties should Special Use Permits address?** The proposal includes, but is not limited to, the appropriate distance of the facility from residences, schools, daycare facilities, public parks, other public facilities, and other marijuana facilities, and includes appropriate controls on odor; screening or other requirements to avoid lighting impacts; protections against security cameras infringing on neighbors' privacy; controls on hazardous processing methods; and mitigation of other impacts. The Special Use Permit process provides the ability to review projects on a case-by-case basis.
7. **What zones, by type, should I-502 facilities be allowed in?** Zones not listed would not allow any I-502 facilities. Zones within municipal UGAs where municipalities' development regulations apply (i.e., A-UD, MV-UD, and L-UD) would continue to apply the municipalities' regulations.

Zone	*Retail*	*Production/Processing in an **Opaque** Structure*	*Production/Processing in a **Transparent** Structure*
Agricultural—Natural Resource Lands (Ag-NRL)	X	P, only in structures existing as of 1/1/2014	HE, only in structures existing as of 1/1/2014
Bayview Ridge Light Industrial (BR-LI)	X	P	P; HE when within 1000 ft of a residential zone
Bayview Ridge Heavy Industrial (BR-HI)	X	P	P
Hamilton Industrial (H-I)	X	P	P
Natural Resource Industrial (NRI)	X	P	P
Rural Business (RB)	P	X	X
Rural Center (RC)	P	X	X
Rural Freeway Service (RFS)	P	X	X
Rural Resource—Natural Resource Lands (RRc-NRL)	X	P; except prohibited on Guemes Island	AD; except prohibited on Guemes Island
Rural Village Commercial (RVC)	P	AD	X
Urban Reserve Commercial-Industrial (URC-I)	P	P	HE

P = Permitted; AD= Administrative Special Use Permit; HE = Hearing Examiner Special Use Permit; X = Prohibited

State Law Changes Since Release of the Proposal

On Tuesday, April 14, the Legislature adopted 2SSB 5052, which we expect the Governor will sign, probably in its entirety. The legislation makes the following changes to the existing recreational/medical regulatory scheme:

- The Liquor Control Board is renamed the Liquor and Cannabis Board.
- Creates a database of medical marijuana patients to be operational by July 1, 2016.
- Patients who are in the database and hold an authorization card will be allowed to possess three times as much marijuana as is allowed under the recreational law: 3 ounces dry, 48 ounces of marijuana-infused solids, 216 ounces liquid, and 21 grams of concentrates.
- Patients without an authorization card have the same limit as recreational users—one ounce—but will also be allowed to grow up to six plants and possess up to six ounces from those plants (if authorized by a doctor, may grow up to 15 plants and possess 16 ounces). Alternatively, a patient can designate a provider to grow for them.
- Collective gardens are eliminated effective July 1, 2016.
- Creates "marijuana cooperatives" of up to four patients, limited to 60 plants. Locations must be registered with the WSLCB and can't be within one mile of a WSLCB-licensed retail facility. If a member leaves the cooperative, no new member may join for 60 days after LCB has been notified of the change in membership. This provision prohibits the unlimited rolling membership that characterized collective gardens. All members of the cooperative must provide labor; monetary assistance is not permitted.

- Creates a medical marijuana endorsement for the WSLCB retail facility license to allow those retail operations to also sell medical marijuana. The WSLCB will reopen the retail licensing period and issue additional retail licenses.

- Extractions involving butane or explosive gases by any person without a WSLCB license is prohibited. LCB must adopt rules on noncombustible methods of extractions that may be used by qualifying patients or designated providers.

Recommended Changes to the Proposal

Based on public comments, Planning Commissioner inquiries, and the new state legislation (SB 5052), the Department suggests that the Planning Commission recommend the following changes to the proposal, so as to not substantially interfere with the provisions for medical marijuana use contained in the new law.

1. Change the definition of Marijuana Production Facility to exclude Marijuana Cooperatives and marijuana grown at home for medical use consistent with state law.

2. Change the definition of Marijuana Processing Facility to exclude Marijuana Cooperatives and marijuana processed at home for medical use consistent with state law.

3. Change the definition of Marijuana Production/Processing Facility to mean any combination of a Marijuana Production Facility and a Marijuana Processing Facility.

4. Create a new definition of Marijuana Cooperative consistent with state law.

5. Rename new section SCC 14.16.855 to "Marijuana and Marijuana Facilities."

6. Add a paragraph to that section allowing the medical growing of marijuana at home and Marijuana Cooperatives in any zone when done consistent with state law but prohibiting any hazardous chemical processing anywhere other than a Marijuana Processing Facility.

7. Add a paragraph to that section prohibiting the "growing or processing of marijuana and keeping marijuana plants not in compliance with state law governing the growing of medical marijuana at home."

8. Add a paragraph to that section prohibiting "the storage or growing of plants if any portion of such activity can be readily seen by normal unaided vision or readily smelled from a public place or the private property of another housing unit."

9. Add a paragraph to that section requiring the Fire Marshal to notify the local fire district or other fire authority whenever the Department approves a permit for any Marijuana Production or Processing Facility.

These changes (or any others the Planning Commission wants to recommend instead of or in addition to this list) will require an additional public comment period before the Board of County Commissioners before the Board may adopt them. The Department and Board have already made arrangements to schedule such a comment period after the PC recommendation.