

TO: City of Castle Rock Planning Commission

FROM: TJ Keiran, City Planner

DATE: October 16, 2011 for the October 26, 2011 Public Hearing

SUBJECT: STAFF REPORT AND RECOMMENDATION FOR AN ORDINANCE AMENDING THE CITY OF CASTLE ROCK'S COMPREHENSIVE PLAN LAND USE ELEMENT AND CHAPTER 17.40, C-2, HIGHWAY BUSINESS DISTRICT, TO ALLOW MEDICAL MARIJUANA COLLECTIVE GARDENS ON CERTAIN PROPERTIES SUBJECT TO SATISFYING SITING AND PERMIT CRITERIA

INTRODUCTION: In April, 2011, Washington State's legislators approved Engrossed Second Substitute Senate Bill 5073 (ESSSB 5073), an act related to the medical use of cannabis, with the stated intent of ensuring "qualifying patients will have access to an adequate, safe, consistent, and secure source of medical quality cannabis". On April 29, 2011, Washington State's Governor partially vetoed ESSSB 5073, in great part due to concerns regarding conflict with federal drug laws, while amending state law to legalize medical marijuana collective gardens, effective July 22, 2011, upon satisfying specific requirements. The new state law allows a city to enact local zoning requirements for siting and permitting medical marijuana collective gardens, and the City of Castle Rock adopted an emergency ordinance No. 2011-08, putting in place temporary interim zoning for a period of six months. City Council has directed staff and the Planning Commission to draft, consider, and hold hearings on amendments to the city's Comprehensive Plan and Zoning Code to provide policies and regulations to implement the new state law.

PURPOSE OF HEARING: Procedures for amending the Comprehensive Plan and Zoning Code are provided in Castle Rock Municipal Code (CRMC) Chapter 17.72, Amendments and Review Procedures. A Public Hearing before the Planning Commission is a required step in amendment procedures.

STAFF RECOMMENDATION: Staff recommends the Planning Commission hold a Public Hearing to receive public testimony and establish a record of findings of fact based on amendment procedures of CRMC 17.72 and approval criteria provided on page I-5 of the Comprehensive Plan (included below in this report). Staff has provided a range of amendment options for the Planning Commission to consider, and recommends the Planning Commission forwards to City Council **Option 2**, a draft ordinance based on the interim zoning but adjusted to address concerns raised since July 11th.

Included in the options is an opportunity to forward the issue to City Council without a formal recommendation.

PREFACE: Prior to engaging in the discussion of amending the Comprehensive Plan and Zoning Code, a few things need to be explained:

1. For the purposes of this report, “staff” means the City Planner and City Attorney. No staff from other departments participated in drafting the proposed amendments, nor provided comments with how to proceed.
2. Staff has attempted to draft the report and code language in laymen’s terms, to the best extent possible. While establishing findings of fact, it may be necessary to be repeat information. Please indulge the redundancies as necessary formality.
3. Staff has attempted to identify a full range of amendment options. The Planning Commission and public are invited to introduce additional options during the hearing comment period.
4. CRMC Chapter 17.72, Amendments and Review Procedures, requires the Planning Commission hold a Public Hearing to receive public testimony and establish a record of findings of fact. The amendment procedures do not require the Planning Commission make a formal recommendation to City Council.

BACKGROUND: When it adopted the Federal Controlled Substance Act (CSA) in 1970, the United States Congress assigned a “Schedule I” drug classification for marijuana. “Schedule I” drugs are those that have:

- High potential for abuse
- Lack of any accepted medical use
- Lack of accepted safety for use in medically supervised treatment

This is still the Federal law.

In 1998 the voters of the State of Washington approved Initiative 692, the Washington State Medical Marijuana Act, which was then codified as RCW 69.51A. The intent of Initiative 692 was that qualifying “patients with terminal or debilitating illnesses who, in the judgment of their physicians, would benefit from the medical use of marijuana, shall not be found guilty of a crime under state law,” (RCW 69.51A.005).

- Much debate
- Passed with 59% of vote
- 30 counties supported
- 9 counties opposed (including Cowlitz)
- Did not change federal law
- Created ambiguities/conflicts in state law

Background (continued): The 1998 act, Initiative 692, changed how certain people—doctors, medical patients and their “primary caregivers”— are treated by the state’s court systems. It did not legalize marijuana for recreational use. It did provide patients with a qualifying diagnosis and a physician’s recommendation for the medical use of marijuana with a legal defense against criminal prosecution in Washington State. If arrested by state or local authorities on marijuana charges, a qualified patient could claim immunity from prosecution under state law if he or she is using the marijuana for certain medical purposes.

Vagueness in the law, including how much marijuana an individual may possess and the relationship between an individual and his/her provider of marijuana, meant issues were resolved and precedents set by state court decisions.

In April, 2011, Washington State’s legislators approved Engrossed Second Substitute Senate Bill 5073 (ESSSB 5073), an act related to the medical use of cannabis, with the stated intent of ensuring “qualifying patients will have access to an adequate, safe, consistent, and secure source of medical quality cannabis”. On April 29, 2011, Washington State’s Governor partially vetoed ESSSB 5073, in great part due to concerns regarding conflict with federal drug laws, while amending state law to legalize medical marijuana collective gardens, effective July 22, 2011, upon satisfying specific requirements. According to the new law, medical marijuana collective gardens include:

- Up to 10 qualifying patients per collective that may partner for the purpose of “Producing, processing, transporting & delivering”;
- Up to 45 plants & 72 oz (4.5 lbs) usable cannabis total;
- Up to 15 plants & 24 oz (1.5 lb) usable cannabis per patient; and
- Qualifying patients share in responsibility/cost for growing, processing and distributing marijuana for own use.

Furthermore, Section 1102 of the new law provides that cities, towns and counties may adopt and enforce zoning requirements, business licensing requirements, health and safety requirements, and business taxes. All such regulations could prohibit collective gardens from being sited next to or within a certain designated distance of other collective gardens, thus prohibiting large scale grow operations.

On July 11, 2011, prior to the new state law becoming effective, the City of Castle Rock was concerned about the potential for large scale grow operations to locate within city limits and requested advice from the city’s insurance provider. Specifically, the city asked to be advised of its range of regulatory options and was told that since the State of Washington legalized medical marijuana collective gardens, prohibiting the use was not an option the insurance provider would protect. If the city were to prohibit medical marijuana collective gardens, it would not have the protection of the insurance provider in the event that a lawsuit was brought on by a property owner claiming his or her rights were violated under state law.

After evaluating its risks, the city took steps to ensure prohibition of large scale grow operations by adopted emergency ordinance No. 2011-08, putting in place temporary interim zoning for a period of six months. The interim ordinance provides that medical marijuana collective gardens are:

- Allowed in C-2, Highway Business District;
- Not within 300 feet of schools, churches, youth-oriented facilities, libraries or residential treatment facility;
- If outdoors, not within 100 feet of occupied legal residence parcel and enclosed by 6' fence;
- Not visible from a public place;
- No more than one garden/parcel;
- Parcel must be owned or leased to one of the members;
- Qualifying patient may not be a member of more than one garden;
- Must be member for at least 30 days before changing; and
- Maintain membership records for three years

City Council performed all steps necessary under RCW 35A.63.220 to complete the emergency ordinance procedures, including holding a Public Hearing on June 1, 2011 and another on August 24. Testimony was provided by both proponents and opponents, and it was obvious this is a polarizing issue among city residents.

Proponents provided compelling testimony regarding the medical benefits of marijuana, ingested or applied in various forms, as an alternative to expensive or ineffective pharmaceutical drugs. Some contended that limiting their access to medical marijuana put their health in jeopardy and violated their rights.

Opponents countered with concerns that many people use marijuana for recreational purposes under the guise of medical need. (This misapplication of medical marijuana is referred to as “diversion”). Testimony was received that there is concern the high street value of marijuana will lead to an increase in criminal activity, specifically burglary. Opponents were particularly concerned with the potential of collective gardens to be located near schools, parks, churches and other youth-oriented facilities. Finally, some opponents are confused by the state’s legalizing marijuana’s medicinal use when it is still illegal under federal law and are upset that the city is being put in the middle.

People from both sides of the issue agreed that children should not be exposed to marijuana usage and that the relatively new accepted medical use of medicinal marijuana may be confusing to children being taught the drug’s recreational use is wrong and illegal.

The minutes of the hearings, including testimony, are available on the city’s website at <http://ci.castle-rock.wa.us/government.htm>

With the interim zoning controls set to expire on January 10, 2011, the City Council has directed staff and the Planning Commission to draft, consider, and hold hearings on amendments to the city's Comprehensive Plan and Zoning Code to provide policies and regulations to control medical marijuana collective gardens.

Including the joint meeting with the City Council on August 24, 2011, the Planning Commission has met and discussed this issue five times and is struggling with providing zoning controls at the local level for a use that is illegal on the federal level. The Planning Commission is also concerned with increasing availability of the drug and higher potential of diversion to recreational users, specifically youths.

PROPOSED COMPREHENSIVE PLAN TEXT AMENDMENT: A city's development regulations, including its zoning code, must implement the goals, policies and objectives of its Comprehensive Plan. Not surprisingly, because this is such a new issue, the city's Comprehensive Plan "Land Use Element" does not discuss allowing medical marijuana collective gardens. Staff does not believe consensus has been reached regarding this issue sufficient to support an amendment specific to medical marijuana collective gardens, and so recommends a more overreaching policy of complying with new laws adopted by the state.

Staff recommends amending the Comprehensive Plan's "Land Use Element" to include the following new policy:

"The City of Castle Rock shall attempt to comply with new laws adopted by the State of Washington."

COMPREHENSIVE PLAN AMENDMENT APPROVAL CRITERIA:

In reviewing proposed changes to the Castle Rock Comprehensive Plan, the Planning Commission and City Council shall place substantial weight on the following approval criteria: (Staff's findings are provided in *bold italic font*)

1. The proposal is consistent with the provisions of state planning statutes and will not result in comprehensive plan or regulatory conflicts;

The proposed policy amendment, to attempt to comply with new state laws, will not result in regulatory conflicts.

2. The proposal will change the development or use potential of a site or area without creating significant adverse impacts on existing uses and critical areas;

The proposed policy amendment, to attempt to comply with new state laws, will not in itself create significant adverse impact on existing uses and critical areas.

3. The proposed amendment will be adequately served by applicable services, facilities, and utilities, including transportation;

The proposed policy amendment, to attempt to comply with new state laws, will not in itself impact city services.

4. The proposal will help implement city goals and/or policies contained within the plan;

The proposed policy amendment, to attempt to comply with new state laws, should help implement city goals and/or policies within the plan.

5. If the proposal could have substantial impacts beyond incorporated city limits, it has been distributed to all appropriate bodies and agencies for review and comment including Cowlitz County.

The proposed policy amendment, to attempt to comply with new state laws, will not in itself impact Cowlitz County.

OPTIONS FOR AMENDING CHAPTER 17.40, C-2, HIGHWAY BUSINESS DISTRICT

The City Council directed staff and the Planning Commission to draft, consider and hold hearings to adopt detailed collective garden zoning regulations. When approaching the task, staff worked with attorneys from the Association of Washington Cities (AWC) to understand how the laws are being interpreted. Information from the Municipal Research and Services Center (MRSC) <http://www.mrsc.org/subjects/legal/medmarireg.aspx> was also evaluated.

Based on public testimony received at the Public Hearings, information provided by the legal resources mentioned above, and, most importantly, direction received by City Council, staff drafted amendments to the zoning code meant to ensure medical marijuana collective gardens would be:

1. Allowed somewhere in the city in order to comply with new state law;
2. Located at a sufficient distance away from churches, parks, schools, libraries and other youth-oriented facilities;
3. Located at a sufficient distance away from neighboring residential uses so as not to become a nuisance;
4. Not visible from a public place;
5. Limited in the number of collective gardens per property in order to prohibit collective garden warehouses;
6. Accountable of its membership in order to prohibit illegal dispensary use; and
7. Accountable of its product to minimize potential for diversion;

During the course of discussing the appropriateness of the interim regulations, additional concerns came to light, including:

1. The desire to prohibit medical marijuana collective gardens within city limits. This position is based, in great part, on the desire to comply with federal drug laws.
2. The concern that proposed buffers from neighboring residential properties is only being evaluated for nuisance-related issues and that the proposed one hundred foot buffers are insufficient distance to protect against stray bullets flying off-premises during a drug bust. This concern was bolstered recently when, on October 14, 2011, local, state and federal police officers, marshals and agents arrested forty three people and seized 6,800 marijuana plants in neighboring Clark County. Additionally, during the first week of October, federal agents raided a medical marijuana collective garden commune in Columbia County, OR when it became known the property owner was specifically recruiting renters with medical marijuana referrals. While gunfire was not reported with either event, a Castle Rock citizen who resides adjacent to properties where collective gardens are now permitted expressed a deep fear of the prospect of stray gunfire during a police raid.
3. The concern that city staff, Planning Commission Members and City Council Members may be charged with a crime for participating in providing a permit procedure for medical marijuana collective gardens. When she signed the partial veto of ESSSB 5073, Governor Gregoire raised the same concern regarding potential liability of state employees. Again, with the historic raids in neighboring Clark County two days ago, some believe the City of Castle Rock will be targeted by federal agencies if it condones breaking federal laws by issuing local permits.
4. It is important to note that these proposed regulations pertain to medical marijuana collective gardens only and will not effect an individual qualifying patient's protections from state prosecution provided by RCW 69.51A for growing and possessing individual quantities of medical marijuana.
5. It is important to note that the City of Castle Rock has not received any application for a medical marijuana collective garden during the interim zoning period.

Following are options for amending Chapter 17.40, C-2, HIGHWAY BUSINESS DISTRICT, to comply with the new state laws regarding medical marijuana collective gardens as provided in the portions of ESSSB 5073 passed into law:

◆ **Option 1: Adopt the exact language from the interim zoning controls adopted by City of Castle Rock Ordinance No. 2011-08.**

PROS: This ordinance achieves the city's stated goals listed above. It has been vetted by the insurance provider's attorney and the city has every reason to believe it will be protected in the event of a lawsuit.

CONS: Some people believe this ordinance does not provide enough protection for residential property owners and want to see more stringent regulations. Those requests have been addressed in Option 2.

Some people believe this ordinance is too limiting and that regulating medical marijuana collective gardens prohibits access to their legitimate use of the drug, thus violating their rights. Their concerns are addressed by Option 3.

◆ **Option 2: Adopt language from the interim zoning controls, adjusted to address specific concerns.**

Using the interim zoning adopted by Ordinance No. 2011-08 as a basis for beginning, staff proposes amendments to address specific concerns, including:

- Section 2 – Definitions – (W) “Youth-oriented facility”. As proposed in Option 2, this definition will be expanded to be more consistent with that definition already codified in the CRMC 17.16.751. The definition will be expanded to include that “a business utilizing a permanent building or facility where children under the age of 18 years are invited onto the business premises in conjunction with such business activity and at least 50 percent of the business revenue is generated from their patronage.”

Application of this definition will result in the property where a youth-oriented restaurant/arcade exists at Exit 49, and portions of properties within three hundred feet thereof, will be prohibited from siting a medical marijuana collective garden.

- The responsibility to maintain proof of qualifying status and personal identification rests with the property owner.
- The medical marijuana collective garden land use permit expires after 364 days and continued operation requires an annual permit.
- The property owner must allow the building official, or his designee, permission to enter the property at any time to inspect to ensure compliance with permit conditions of approval.

- Medical marijuana collective gardens will only be permitted on certain properties within the C-2 zoning district at Exit 49. Concerns were raised that since the Commercially zoned properties at Exit 48 are vacant, if a medical marijuana collective garden were to locate on one of the vacant properties, it would become a prime target for criminal behavior. Additionally, because of the great efforts the City of Castle Rock has made to market properties at Exit 48 for prime regional industrial development, allowing this use will conflict with stated goals, policies and objectives.

PROS: Option 2 addresses issues raised by the public during the period of interim zoning.

CONS: Those people opposed to the issue may believe it is too permissive. Proponents may say it is too restrictive.

◆ **Option 3: Recommend City Council NOT amend the Zoning Code**

If this option were followed there would be no local control of medical marijuana collective gardens and the minimal requirements of the new state law will dictate how collective gardens will be allowed.

PROS: Proponents of medical marijuana collective gardens will have greater opportunities to enjoy the use, subject to state siting requirements.

This option will help satisfy those people who believe the city should not participate in adopting an ordinance that provides a permit procedure for medical marijuana collective gardens because it violates Federal law.

CON: Opponents of medical marijuana collective gardens may say the city lost an opportunity to provide *some* control over their perceived undesired use.

◆ **Option 4: Forward to City Council without a recommendation**

Some Planning Commission members have expressed concern about participating in drafting local laws that violate federal laws. Staff understands and respects that position. If this option is selected, staff recommends the Planning Commission allow the hearing to occur, but then not discuss the matter during the general meeting.

◆ **Option 5: Recommend City Council extend the Emergency Interim Zoning for an additional six months because the Planning Commission needs additional time**

If the Planning Commission does decide to engage itself in this issue, but finds it needs additional time to resolve specific issues, a recommendation to continue the interim zoning for another six months may be forwarded to City Council. Staff request the Planning Commission identify specific questions and/or concerns into its findings so the City Council may fully understand what additional work needs to be completed.

PROS: This option is consistent with procedural allowances of RCW 35A.63.220, which states, in part, “interim zoning ordinance may be renewed for one or more six-month periods if a subsequent public hearing is held and findings of fact are made prior to each renewal.”

CONS: This option would not be appropriate to avoid making a decision.

STAFF RECOMMENDATION: Staff recommends forwarding to City Council a recommendation to follow Option 2 with findings that the interim zoning ordinance has been adjusted to address concerns raised during the interim period.