



# CASCADE COUNTY PLANNING DEPARTMENT

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## **STAFF REPORT FOR APPEAL OF ZONING ADMINISTRATOR’S DECISIONS DENYING A LOCATION/CONFORMANCE PERMIT AND ORDERING A CEASE & DESIST FOR CULTIVATION OF MARIJUANA IN THE MIXED-USE 20 DISTRICT**

**Presented By:** Charity N. Yonker, Planning Director/Zoning Administrator

**Presented For:** Public Hearing before the Cascade County Zoning Board of Adjustment to hear the appeal of the Zoning Administrator’s decision ordering a cease and desist to stop cultivation of marijuana in the Mixed Use 20 District

**Date:** June 16, 2022

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The purpose of this Staff Report is to provide the issues presented on appeal, along with any additional information, findings, and recommendations from the Cascade County Planning Department (Department).

Subject property is described as having address 72 Open Buckle Road, Vaughn, MT, 59487 with Parcel #6158410, and Geocode 02-3135-22-3-02-12-0000 located in the Mixed Use 20 (MU-20) Zoning District. Property is owned by Sharon Klundt, and the appeal has been submitted by Shawn Brass, d.b.a. Great Northern Naturals, LLC.

### **PROCEDURAL BACKGROUND**

- On December 1, 2021, Shawn Brass submitted a Determination Request to the Planning Department requesting the following: “See if there is a prior Location/Conformance Permit for 72 Open Buckle Rd Vaughn MT 59487.” See *Exhibit A*.
- On December 10, 2021, the Planning Department responded to Mr. Brass’ Determination Request informing him that no Location/Conformance Permits were located for the 72 Open Buckle property and that Location/Conformance Permits are required per CCZR § 9.2. See *Exhibit B*.
- On January 3, 2022, the Planning Department received a Location/Conformance Permit Application from Shawn Brass without payment, but with signatures dated November 30, 2021, for 72 Open Buckle Road with the use type checked “Other: Growing Cannabis.” The project was described as “Continue to use the property as a cannabis grow as I was advised by the Planning department in 2010 also again in 2015/2016 as a conforming allowable use. See attached document.” See *Exhibit C*.
- On January 4, 2022, the Planning Department informed Mr. Brass that his Location/Conformance Permit Application could not be processed until he paid the require \$200 fee. See *Exhibit D*.
- Payment was remitted by check by property owner, Sharon Klundt, on February 15, 2022. See *Exhibit E*.



# CASCADE COUNTY PLANNING DEPARTMENT

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- On March 8, 2022, the Planning Department requested Mr. Brass complete and submit a Use Statement Form since the cultivation of marijuana is a commercial use on the property and that his Location/Conformance Permit Application was insufficient. See *Exhibit F*.
- On March 23, 2022, Mr. Brass asked for a status update on the Application. The Planning Department responded the same day, telling Mr. Brass that the Use Statement he provided was for a different pending Location/Conformance Permit Application and asked him to answer number 15 of the Application and clarify his comment about the outdoor lighting comment on the Use Statement Form. See *Exhibit G*.
- On March 24, 2022, Mr. Brass provided the Use Statement Form to the Planning Department for 72 Open Buckle Road, Vaughn MT 59487 for the first time with signatures date from January 6, 2022. See *Exhibit H*.
- In a letter dated March 28, 2022 via Certified Mail, the Planning Department issued a formal Notice of Violation of Cascade County Zoning Regulations (hereinafter “CCZR” or “Regulations”) § 13.1 for failure to comply with CCZR §§ 7.6 and 9.2.1 and ordered the marijuana business on the subject property to cease and desist on the grounds that marijuana cultivation operation is not allowed in the Mixed-Use 20 District and only permitted in the Heavy Industrial (I-2) District. The Planning Department gave Mr. Brass thirty (30) days to cease and desist operations and gave him the option that if more than thirty (30) day was needed to cease and desist the illegal operation, he could contact the Department within seven (7) days to develop an approved Compliance Plan. See *Exhibit I*.
- On April 26, 2022, the Planning Department received an Appeal from Mr. Brass’ attorney, Christopher Young. See *Exhibit J*. Payment was received the following day for the appeal.
- Notice of the Public Hearing of the appeal in front of the Zoning Board of Adjustment was published in the Great Falls Tribune on May 29, 2022, and June 5, 2022, for the regularly scheduled Board hearing on June 16, 2022. See *Exhibit K*.
- Notice of the Public Hearing on the appeal was also sent to parties of interest on May 24, 2022, namely the property owner Sharon Klundt and Mr. Brass’ attorney, Christopher Young. See *Exhibit L*.
- Additional argument was submitted by Mr. Brass’ attorney on June 9, 2022. See *Exhibit M*.

## BACKGROUND & ARGUMENT

Appellant, Mr. Brass, contends his marijuana cultivation operation started in 2010 on the subject property. At this time, the CCZRs revised on August 25, 2009 by Resolution #09-82 were in effect and applicable to establishing this use. See *Exhibit N*. Based on the 2009 Zoning Map Book, the subject property was within the Agricultural District. See *Exhibit O*. CCZR Section 6 “Application of Regulations” provided: “No building shall hereafter be used or occupied and no building or part thereof shall be erected, moved, or altered; or no future uses



# CASCADE COUNTY PLANNING DEPARTMENT

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of the land shall be made unless in conformity with the regulations herein specified for the district in which it is located." Emphasis added. See CCZR 6.1 (eff. August 25, 2009). Section 7.2, "AGRICULTURAL (A) DISTRICTS", lists types of permitted land uses within the District: "(1) Permitted Principal Uses; (2) Permitted Accessory Uses located on the same lot with the permitted Principal Use" and (3) Uses Permitted Upon Issuance of a Special Permit as Provided in Section 8". It does not explicitly mention any marijuana-related land uses as permitted. See CCZR § 7.2 (eff. August 25, 2009).

Specifically, a "PERMITTED USE" was defined by the CCZR at the time as: "A use which may be lawfully established in a particular district or districts, provided it conforms with all requirements, regulations, regulations and standard of such district." See CCZR 2 "DEFINITIONS". "PERMIT" is further defined as: "A written authorization allowing the holder to take action not otherwise allowed." See CCZR 2 "DEFINITIONS" (eff. August 25, 2009). Section 11 of the CCZR provided for "PERMIT REQUIREMENTS" which stated "LOCATION OR CONFORMANCE PERMIT *No future change of land use may be made*; or no building, structure, sign or foundation therefore shall be erected, added to, or structurally altered until: 1) a permit therefore has been issued by the Zoning Administrator; and, 2) a site plan meeting the requirements of Section 9.7 of these regulations and based on the property boundaries in accordance with the legal description, as filed on record, has been filed by the Zoning Administrator..." Emphasis added. See also MCA § 76-2-207. No Location/Conformance Permit was ever issued to establish an "agricultural use" or to grow marijuana at 72 Open Buckle Road in 2010. Failure to obtain a Location/Conformance Permit in 2010 was as violation of CCZR § 13, and continues to be a violation of CCZR § 13.

## **I. Marijuana Cultivation at the Subject Property is not a Prior Nonconforming Use.**

Appellant contends that his marijuana cultivation that began in 2010, as stated through his own admission, is a prior nonconforming use. First, it is important to understand what a nonconforming use is. A "nonconforming use or structure" as defined by the CCZR is: "The *lawful use* of any buildings or *land existing at the time of the enactment of these regulations* may be continued although such use does not conform to the provision of these regulations, except as hereinafter provided." See CCZR § 11 "Non-Conforming Uses and Structures," emphasis added. Cascade County Zoning Regulations were first enacted at least five (5) years prior to the Appellant establishing his marijuana cultivation operation on the property. See also MCA § 76-2-208.

Growing marijuana in the Agricultural District beginning in 2010 was not a lawfully permitted use of the subject property at that time. Appellant argues that marijuana cultivation is an agricultural use of the land. While this argument will be discussed in detail below, let us assume for argument's sake only that marijuana cultivation could be considered an agricultural use under the CCZR. The problem is, no evidence has ever been provided that shows the subject property was used for agricultural purposes before the enactment of the CCZR in 2005 and did not cease for a period of more than 12 months after zoning went into effect, which



# CASCADE COUNTY PLANNING DEPARTMENT

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would explain why no zoning permit was ever obtained for “agricultural use” on the property. To the contrary, Appellant admits that he began his operations in 2010, at which time a Location/Conformance Permit would have been required to establish the land use on the property. If marijuana cultivation was permitted under the CCZR as an agricultural use, Appellant *still* failed to obtain the basic zoning permit to establish the agricultural use on the property, a violation of the CCZR in effect in 2010. Therefore, his marijuana cultivation that started in 2010 was never a legal use of the subject property and therefore, is not considered a nonconforming use. To be clear, cultivation of marijuana on the property was not a legally established use and it was not in existence prior to the enactment of the CCZR.

Appellant has conflated that marijuana cultivation was legal by state law to support that marijuana cultivation is a “legal use” in Cascade County. However, going back to the Montana Medical Marijuana Act, the legislature gave local governments authority to regulate medical marijuana providers that operated within their jurisdiction. See MCA § 50-46-328 (2017). More importantly, state law grants local government authority to regulate land uses through zoning. See MCA § 76-2-201, *et seq.* Despite whatever business model Mr. Brass is operating under, he was unquestionably using the property to cultivate marijuana for commercial purposes. The “land use” is what Cascade County is attempting to regulate through the zoning ordinance. Cascade County has little to no concern with what medical marijuana provider license(s) Mr. Brass has obtained from the State. Knowing the State Inspectors must check to ensure providers are in compliance with local government regulations based on previous conversations with the State, it is concerning that Mr. Brass misled and misrepresented to the State Inspector(s) that he was in compliance with local government regulations/ordinances since he started his marijuana operations. Hopefully, this type of blindsiding will cease to happen now that information can more freely be shared between local governments and the Montana Department of Revenue under the Marijuana Regulations and Taxation Act. To reiterate again, while Mr. Brass may have been compliant with State requirements based on the information he was giving the State, he was not compliant with Cascade County and therefore, has been operating illegally within the County of Cascade.

## **II. Marijuana Cultivation was not a Conforming Land Use in 2010.**

Appellant argues that the property conformed to existing zoning regulations at the time that he started his cultivation efforts. Appellant says the CCZR was silent to marijuana and marijuana business and cultivation of marijuana was not, in and of itself, a use of the land. Appellant is correct that the CCZR was silent as to marijuana land uses. An amendment process was outlined in the CCZR under Section 14, whereby a citizen of Cascade County could petition for an amendment to the Zoning Regulations to add “marijuana cultivation” or other land uses as a permitted use within the Agricultural District. See CCZR § 14 (eff. August 25, 2009). No such petition was ever submitted to the Planning Board for study and recommendation by Mr. Brass for cultivation of marijuana in the Agricultural District. Not having a land use listed as permitted in the Regulations is not a pass on having to comply with zoning; if it is not listed as



# CASCADE COUNTY PLANNING DEPARTMENT

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permitted, then it is not allowed. See CCZR § 2.<sup>1</sup> The Heavy Industrial (I-2) District provided that “[p]ermitted principal uses” included, “All uses not otherwise prohibited by laws...” This language is not found in the Agricultural District that would have allowed medical marijuana cultivation anywhere other than the I-2 District. Compare CCZR § 7.4.2 with CCZR § 7.2 (eff. Aug. 25, 2009).

Now, we address whether “marijuana cultivation” is an “agricultural use” under the Regulations at the time. Appellant is correct that “[a]gricultural uses of land; usual agricultural buildings and structures” was a *permitted principal use* within the A District. However, Appellant fails to understand a Location/Conformance Permit would have been required to establish such use. An “AGRICULTURAL USE” was defined at the time as: “The use of land for periodic livestock sales and the like, tree farming or growing or producing *field crops*, livestock, and livestock products for the production of income, excluding feedlots. *Field crops include, among others, barley, soy beans, corn, hay, oats, potatoes, rye, sorghum, and sunflowers...*” Emphasis added. See CCZR § 2 (eff. August 25, 2009). Field crop is not defined in the CCZR. The CCZR at the time, instructed to interpret words not defined in the regulation with the meaning they have in common usage and that gives the regulation its most reasonable application. See CCZR § 2 “DEFINITIONS”(eff. August 25, 2009). Even today, the definition of “field crop” is “an agricultural crop (such as hay, grain, or cotton) grown on large areas”<sup>2</sup> and “a crop (other than fruits or vegetables) that is grown for agricultural purposes; ‘cotton, hay, and grain are field crops.’”<sup>3</sup> Therefore, marijuana is clearly not considered a “field crop” nor is it analogous to “agricultural use” as defined under CCZR § 2 “Definitions” (eff. August 25, 2009).

With marijuana being a hot button topic, the USDA still does not list it as a field crop and the Montana Department of Agricultural also does not regulate it as a crop, unlike hemp. Today, the Montana Marijuana Regulations and Taxation Act makes clear that marijuana is not an agricultural use. See MCA § 16-12-101(3).

In summation, marijuana cultivation that started in 2010 is not analogous to “agricultural use” under the Regulations at the time and even if it was, the Appellant never obtained the required Zoning Permit to make it a legal use of the property. Appellant’s Location/Conformance Permit Application was submitted under the current CCZR provisions and is reviewed for conformance with those standards and requirements which make clear that no marijuana business is allowed outside of the Heavy Industrial (I-2) District. Appellant makes references to his compliance with State law, but disregards local government zoning authority over the regulatory control of marijuana land uses within Cascade County. The email to the State Inspector also gives pause

<sup>1</sup> CCZR § 2: “ZONING DISTRICT” – *A portion of the county within which certain uses of land and buildings are permitted, and certain other uses of land and buildings are prohibited, or within which certain yards and other open spaces are required, or within which certain lot areas are established, or within which certain height limits are required for buildings, or within which a combination of such aforesaid regulations are applied, all as set forth and specified in these regulations, or any of the districts with which any combining regulations are combined.*

<sup>2</sup> <https://www.merriam-webster.com/dictionary/field%20crop> (accessed June 9, 2022).

<sup>3</sup> <https://www.thefreedictionary.com/field+crop> (accessed June 9, 2022).



# CASCADE COUNTY PLANNING DEPARTMENT

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since Mr. Brass misrepresents to the State that he is in compliance with local government regulations when he has not been in compliance since the start of his operation in 2010.

The Appellant does not explain the rationale to support the statement that marijuana cultivation was allowed in 2010 in A, RR-5, SR-1, SR-2, and RR-6 Districts other than an email attachment for a meeting in November of 2018 that was not a public meeting and did not involve Mr. Brass or the subject property with the Cascade County Attorney’s Office, approximately eight (8) years after he started cultivating marijuana in the Agricultural District. This was during a period when the revisions to the CCZR were being discussed. Those revisions took effect on February 23, 2021 and another set of revisions took effect subsequently on December 21, 2021. Considering the meeting agenda is a public document, Mr. Brass is entitled to have a copy of it, but its applicability to Mr. Brass’ property use is non-existent. Mr. Brass did not have a nonconforming use as defined by the CCZR, a Location/Conformance Permit, nor did he apply for a Location/Conformance Permit during this time. Nowhere in the agenda was there an exemption from zoning permitting requirements.

Appellant also argues that Planning Department correspondence confirmed he did not need a zoning permit. Mr. Hopkins told him: “You need to get a change of use Location/Conformance Permit for your grow operation both as a way to shield yourself from any future changes to the regulations and just as a matter of general compliance.” Mr. Hopkins pointedly advised Mr. Brass that his use of the property to cultivate marijuana was not in compliance with the CCZR and in order to be in compliance, he needed to obtain a Location/Conformance Permit. Then Mr. Hopkins states, “Doing so when you started the operation would have been the appropriate way to ensure your compliance with Zoning and thus avoid any of the recent issues that have cropped up.” Again, Mr. Hopkins advised Mr. Brass that the reason Mr. Brass was experiencing compliance problems was because he did not have the required zoning permit and was thus out of compliance with the CCZR. Yet, Mr. Brass brazenly incorrectly represented to the State permit inspector that he was allowed to grow cannabis at 72 Open Buckle Road, despite the fact that he knew he needed to get a Location/Conformance Permit and did not have one.

The November 14, 2022 email correspondence and Opinion concerning Section 8.19 is also irrelevant as to Mr. Brass, as it pertains exclusively to setback requirements from residences, residential districts, education, and worship facilities. The only relevancy as to Mr. Brass’ situation is that Mr. Hopkins noted the Opinion does not preclude any future amendments to the zoning regulations. This provision was addressed with the CCZR revision that was finalized on February 23, 2021. Again, the discussion regarding setbacks is wholly irrelevant to Mr. Brass, who does not have a Location/Conformance Permit authorizing any marijuana operations at 72 Open Buckle Road. In fact, what is clear and obvious upon review of the listed Location/Conformance Permits is that Mr. Brass was not a Permit holder and that he needed a Zoning Permit. The list also erroneously included that Permit #121-017 as being in the RR5 District. This property is actually in the Heavy Industrial (I-2) District. See *Exhibit P*. Permit



# CASCADE COUNTY PLANNING DEPARTMENT

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#203-017 was for a property in the Rural Residential 5 District, but the permit was for a shed, not for marijuana purposes. See *Exhibit Q*. Interestingly, the County was made aware that that property was performing medical marijuana operations on the property and a Notice of Violation was issued and the violation remedied by ceasing the marijuana use of this property. See *Exhibit R*. The Appellant frames the Mr. Hopkins’ correspondence to be acquiescence rather than what it was—nicely telling Mr. Brass he was not in compliance with the Zoning Regulations, and he needed to get a Location/Conformance Permit. The email correspondence between Appellant and Mr. Hopkins never once said a Zoning Permit was not required.

Mr. Brass did not submit a Location/Conformance Permit Application to the Department when he started cultivating marijuana in 2010 as required at that time. Even after being told in 2018 by the Planning Department that he needed to submit a Location/Conformance Permit Application Mr. Brass did not. Instead, Mr. Brass waited until January 2022 to submit an application, which was after the CCZR had gone through two (2) different revisions with the Planning Board and Commission both involving marijuana land uses in the County. The December 28, 2021 revision focused heavily on the changing marijuana laws as it pertained to zoning. Now, Mr. Brass wants an unlawful land use, namely cultivating marijuana, established by his own admissions back in 2010 to be permitted under the current December 28, 2021 revised CCZR that clearly prohibits marijuana businesses, including but not limited to, marijuana cultivation in every zoning district, except the Heavy Industrial (I-2) District.

Appellant’s argument concerning interpretation of the zoning regulation in 2018 is irrelevant given that he never submitted a Location/Conformance Permit Application to be reviewed and processed under those regulations at the time. Rather, he finally applied in January of 2022 and the CCZR version that is in effect is what applies to that application. The Appellant does not get to pick and choose what version of the CCZR applies to his situation.

### **III. Current CCZR Prohibits Marijuana Cultivation in the Mixed Use-20 District.**

On February 23, 2021, the Commissioners revised the CCZR by Resolution #21-13. See *Exhibit S*. These revisions had been in the works since the fall of 2018. There was much talk and consideration about expanding medical marijuana uses to more than the Heavy Industrial (I-2) District in the County. The Planning Board actually recommended a vast expansion of medical marijuana land uses into several zoning districts, but the Commissioners did not adopt the Planning Board’s recommendation for such an expansion and instead reaffirmed that medical marijuana land uses would remain permitted only within the Heavy Industrial (I-2) District. The Commissioners did adopt the recommendation of the Planning Board to reduce the 1000-foot set back from schools and worship facilities to 500 feet in accordance with the state requirement for medical marijuana at the time. Mr. Brass was present and participated in this process at the time.<sup>4</sup>

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<sup>4</sup> Audio of meetings are available online at: <https://www.cascadecountymt.gov/agendacenter>. Minutes are recorded with the Cascade County Clerk & Recorder’s Office.



# CASCADE COUNTY PLANNING DEPARTMENT

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One of the big revisions adopted on February 23, 2021, was a zoning map amendment. The County had large amounts of land in the then Agricultural District. A new Zoning District was established called Mixed-Use 20. The subject property at 72 Open Buckle Road, Vaughn MT 59487 was rezoned at this time from a part of the Agricultural District to now being a part of the Mixed-Use 20 District. The Appellant contends that he was allowed to cultivate marijuana in the previous Agricultural District and is not arguing marijuana cultivation is prohibited in the Mixed-Use 20 District even though the Mixed-Use 20 District permits agricultural uses. Had his marijuana cultivation use been legally permitted through an issued Location/Conformance Permit, this would be true, but again, Mr. Brass never applied for the Location/Conformance Permit until 2022, making his marijuana cultivation unquestionably illegal.

Then on December 28, 2021, the CCZR was revised, to ensure the zoning regulations were prepared for the Montana Marijuana Regulation and Taxation Act going into effect on January 1, 2022. See *Exhibit T*. Through the public hearing process with the Planning Board and Commission, the Boards reiterated that the public welfare, health and safety concerns, and the importance of keeping recreational marijuana operations only in the Heavy Industrial (I-2) District were consistent with medical marijuana operations. Definitions were changed based on state law changes and for what would be in the best interest of the County. No zoning district boundaries were changed nor were zoning district uses changed. Marijuana definitions in Section 2 changed and the Supplemental Regulations in Section 8.22 changed for wording purposes.

Mr. Brass submitted a complete Location/Conformance Permit Application in February of 2022 (reference L/C Permit Application #026-2022). This Application was reviewed under the current CCZR revised on December 28, 2021, which are effective today.

The MU-20 District does not allow for a marijuana business, including but not limited to cultivation and sales as a (1) permitted principal use, (2) permitted accessory use, or (3) use permitted upon issuance of a Special Use Permit. Section 9.1 makes it clear that the Zoning Administrator must enforce the regulations and that "[n]o Location/Conformance Permit shall be issued by such Administrator except where all provisions of these regulations have been met." Because cultivation of marijuana is not allowed in the MU-20 District, the Zoning Administrator correctly denied the Location/Conformance Permit. Because an impermissible and unpermitted land use was admittedly occurring, the Planning Department properly issued a cease and desist with compliance ordered within 30 days unless an approved Compliance Plan was entered into within seven (7) days. No request for a Compliance Plan was ever received by the Planning Department requesting additional time to cease and desist the marijuana cultivation operation on the subject property.

## **Recommendation:**

The Planning Department recommends the ZBOA affirm the decision of the Zoning Administrator and determine that the Zoning Administrator in the enforcement of the CCZR did



# CASCADE COUNTY PLANNING DEPARTMENT

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not err in (1) denying the Location/Conformance Permit #026-2022 to allow cultivation of marijuana in the Mixed Use 20 District; or (2) ordering a cease and desist within 30 days of the letter or alternatively entering into an approved Compliance Plan.

## **Appeal of Zoning Board of Adjustment Decision:**

An appeal of today's ZBOA final decision may be appealed in accordance with CCZR § 12.3.5 to the Board of County Commissioners or a court of record by any aggrieved party.

## **Motions for the Board's Consideration:**

I move the Zoning Board of Adjustment **grant** the appeal finding that the Zoning Administrator erred in denying Location/Conformance Permit Application #026-2022 and issuing the order to cease and desist within 30 days of receipt of the letter dated March 28, 2022. *(The specific findings supporting the Appellant's appeal will need to be determined by the ZBOA and put on the record).*

**OR**

I move the Zoning Board of Adjustment **deny** the Appellant's appeal finding that the Zoning Administrator correctly denied Location/Conformance Permit Application #026-2022 and appropriately ordered the marijuana cultivation operation cease and desist within 30 days unless an approved Compliance Plan was entered into within seven (7) days of receipt of the letter dated March 28, 2022.

## **Attachments:**

1. Exhibit List