

BEFORE THE BOARD OF COMMISSIONERS OF THE STATE OF OREGON  
FOR THE COUNTY OF YAMHILL  
SITTING FOR THE TRANSACTION OF COUNTY BUSINESS

In the Matter of the Denial of Planning Docket            )  
SU-02-16, Overturning on Appeal the Planning            )  
Commission’s Approval of a Request to Allow            )        Board Order 16-440  
a Recreational Marijuana Dispensary as a Similar        )  
Use in the HC Highway/Tourist Commercial Zone        )

THE BOARD OF COMMISSIONERS OF YAMHILL COUNTY, OREGON (the Board) sat for the transaction of county business on October 27, 2016, Commissioners Mary Starrett, Stan Primozich, and Allen Springer being present.

IT APPEARING TO THE BOARD as follows:

A. Application was made to the Yamhill County Planning Department, requesting that the county interpret its zoning ordinance as allowing the operation of a marijuana dispensary (recreational and medical) as a use that is similar to, and therefore allowed, in the county’s Highway/Tourist Commercial zone. The request was specific to property identified as tax lot 4303-1100, located at 18825 Highway 99W and 4270 NE Blanchard Lane but, if granted, the request would have applied county-wide, to all property zoned Highway/Tourist Commercial;

B. The Planning Commission held a hearing on the application on June 2, 2016. Following a request to keep the record open for additional written testimony and evidence, the record remained open for a specified period, and the hearing reconvened on July 7, 2016, for staff recommendation and deliberation;

C. Following deliberation, the Commission voted 6-2 to approve the sale of marijuana (subject to conditional use approval) as a similar use in the Highway/Tourist Commercial zone; and

D. The Planning Commission’s decision was appealed to the Board, which held a hearing on September 8, 2016. The record remained open for a specified period, to allow submittal of additional written testimony and evidence, and the hearing was reconvened on October 6, 2016 for staff recommendation and deliberation. At that time, the Board voted 2-0 (Commissioner Starrett excused) to uphold the appeal and deny the application. NOW, THEREFORE,

IT IS HEREBY ORDERED BY THE BOARD AS FOLLOWS:

Section 1. The Planning Commission's decision to approve Docket SU-02-16 is hereby overturned, and the application is denied.

Section 2. The findings attached as Exhibit A, and incorporated herein by reference, are hereby adopted in support of this order.

DONE this 27<sup>th</sup> day of October, 2016 at McMinnville, Oregon.

ATTEST:

YAMHILL COUNTY BOARD OF COMMISSIONERS

BRIAN VAN BERGEN  
County Clerk

By: Keri Hinton  
Deputy Lucy Flores Mendez  
KERI HINTON

FORM APPROVED BY:

T. Sadlo  
Timothy S. Sadlo  
Senior Assistant County Counsel

Mary Starrett  
Chair MARY STARRETT  
Stan Primozych  
Commissioner STAN PRIMOZICH  
Allen Springer  
Commissioner ALLEN SPRINGER

Accepted by Yamhill County  
Board of Commissioners on  
10-27-16 by Board Order  
# 16-440

**Exhibit A – Board Order 16-440**  
**Findings in Support of the Board’s Decision,**  
**on Appeal, to Overturn the Planning Commission’s**  
**Approval of Planning Docket SU-02-16,**  
**and to Deny a Request to Allow**  
**a Recreational Marijuana Dispensary as a**  
**Similar Use in the Highway Commercial Zone**

**DOCKET:** SU-02-16

**APPLICANT:** Larry D. Brock, then Linda F. McGrew

**REQUEST:** An interpretation of the *Yamhill County Zoning Ordinance* (YCZO) to allow a marijuana dispensary (both recreational and medical marijuana), wine sales and a tobacco shop as similar uses in the HC Highway/Tourist Commercial zoning district

**TAX LOT:** 4303-1100

**LOCATION:** The building in which marijuana sales were proposed to take place is located at 18825 Highway 99W and 4270 NE Blanchard Lane, Dayton. The similar use request would apply to all HC Highway/Tourist Commercial Zones in the unincorporated areas of Yamhill County

**ZONE:** HC Highway/Tourist Commercial District

**CRITERIA:** Sections 603 and 1206 of the *Yamhill County Zoning Ordinance* (YCZO).

**FINDINGS:**

***A. Background Facts***

1. Property size: The parcel is listed as 1.27 acres.
2. Access: The property has access from both Blanchard Lane and Highway 99W.
3. On-site Land Use: The property contains a retail shop addressed as 18825 NE Highway 99W and a residence located northeast of the shop addressed as 4270 NE Blanchard Lane, Dayton. The retail shop was previously used as an antique shop.
4. Surrounding Land Use and Zoning: All of the adjacent property is zoned for Exclusive Farm use. Property to the north, east and west is zoned EF-20 Exclusive Farm use and is predominantly planted to vineyards and orchards. Property to the south of Highway 99W is zoned EF-80 Exclusive Farm use. This area contains farm uses, which includes grass, grain, pasture and livestock.

5. Soils: The Yamhill County Soil Survey shows the entire parcel is composed of agricultural Class II and III Woodburn silt loam soils (WuB and WuC).
6. Water: The property contains an on-site well.
7. Sewage Disposal: On-site septic systems.
8. Fire Protection: Dayton Rural Fire District.
9. Previous Actions: Two nonconforming use applications were applied for in 1982 and one was applied for in 1983. All were to alter the existing business on the property. In 1984 approval was granted for a plan amendment/zone change to rezone the property from Agriculture/Forestry Large Holding/EF-40 Exclusive Farm use to Commercial/HC Highway Commercial.
10. Floodplain: The entire property is outside of the floodplain overlay district as indicated on FIRM Map 41071C0435D.
11. Request: The application states: "Our goal is to get similar use approval before we purchase, divide the building into three units and make improvements and updates to the current building. We currently have parties that are interested in renting 2 units. I feel that the uses of recreational and medical marijuana sales, wine sales and a tabaco (sic) shop would be similar in character, scale and traffic use as other permitted uses." The applicant then abandoned his plans, and the new purchaser continued to promote an application for sale of marijuana as a similar use in the HC zone and at the Blanchard Lane/Highway 99W location as the matter was considered on appeal.
12. Related "Similar Use" request: In 2015 a request was made to allow a medical marijuana dispensary and medical marijuana grow operation as a similar use in the LI Light Industrial zone. At the hearing for this request it was reported that there were 12,000 medical marijuana cardholders in Yamhill County. The Planning Commission decided to include medical marijuana dispensary and grow operation as a conditional use in the LI Light Industrial zone, partially due to the limited number of customers. At the time, the Planning Commission noted concern with the potential for large traffic volumes if recreational sales were allowed and a condition was placed which prohibited recreational sales. Based on this understanding the applicant was informed that a traffic study would be needed to justify this type of request. However, due to the expense, the applicant decided to forego the traffic study.

**B. Ordinance Provisions and Analysis**

1. The purpose of Section 1206 of the YCZO is to provide for those uses not specifically listed in a particular zoning district but that are similar in character, scale and performance to the permitted uses specified in zoning districts in which a similar use may be authorized.

Subsection 603.04 in the HC Highway/Tourist Commercial zoning district states that “Any use not specifically listed as a permitted or conditional use in this district, that is similar in character, scale and performance to the permitted uses specified in subsection 603.02, may be allowed as a similar use subject to the provisions of Section 1206 . . .”. The application is a similar use request to allow a marijuana dispensary (both recreational and medical marijuana), wine sales and a tobacco shop in the HC Highway/Tourist Commercial zoning district. If these uses are allowed, once a similar use is approved in the HC zone, they are allowed in all HC Highway/Tourist Commercial zones within the County. Therefore, the character of the use is not only compared against the appropriateness at the applicant’s site, but rather the permitted uses in the HC zone.

While YCZO Section 603.02 lists specific uses permitted in a HC Highway/Tourist Commercial Zone, YCZO Section 1206.01 provides for other uses that are similar in character, scale and performance to the permitted uses specified in the Zoning Ordinance. The zoning ordinance states:

“The purpose of the HC District is to provide limited small-scale highway and tourist commercial services for the traveling public in specially designated highway-service centers where access, traffic-turning movements and off-street parking can be provided in a safe, convenient, economic and attractive manner. The establishment of an HC District shall be based on present foreseeable demand for limited services to the traveling public. In areas adjacent to Highways 99W and 18, the size, spacing, layout and design of such centers shall ensure that the view from the highway and the rural atmosphere of the county are not impaired; and that the scale and service requirements of the facilities do not have an adverse impact on, unduly compete with, or place any unusual service demands on nearby urban centers.”

The permitted uses in the HC Highway/Tourist Commercial one include:

- “A. Automobile service station;
- B. Drive-in restaurant, restaurant, or refreshment stand;
- C. Food store, maximum floor area of two thousand (2,000) square feet;
- D. Fruit or vegetable stand, commercial;
- E. Gift, souvenir or antique shop;
- F. Motel;

...

- J. Community or municipal water supply system;
- K. Community or municipal sewer system;”

In addition to the above list, *RV Sales* has been reviewed and approved as a similar use within the zone. Once approved as a similar use, the use is then added to the list of permitted uses within the zone.

The conditional uses listed in the HC Highway/Tourist Commercial zone are found in 603.02 which include:

- “A. Home occupation, subject to the standards and limitations set forth in Section 1004;
  - B. Operations conducted for the exploration of oil, natural gas or geothermal resources, subject to the requirements of subsection 404.10;
  - C. Utility facility, subject to Section 1101 for site design review.”
2. Subsection 1206.02 of the YCZO lists the review criteria that must be met before a similar use may be authorized pursuant to subsection 1206.01 above and subject to the application procedure set forth in Section 1301 and provided that the applicant demonstrates that the proposed use satisfies the following standards:
- “A. The use is consistent with the purpose and scope set forth in subsection 1206.01 and with the purpose of the underlying zoning district;”
3. Similar in character, scale and performance: YCZO Section 1206.01 permits uses in a HC Highway/Tourist Commercial Zone that are similar in character, scale and performance to those listed in YCZO Section 603.02. The applicant has proposed a marijuana dispensary (both recreational and medical marijuana), wine sales and a tobacco shop. He has asserted that these three uses are similar to a food store and fruit-vegetable stand.<sup>1</sup> A food store is a permitted use within the zone, with a maximum floor area of 2,000 square feet. The county agrees that it would be customary for a food store to sell tobacco. Similarly, the county agrees that it is customary for a food store to sell wine. The difference is that these items would be part of the items sold in the 2,000 square foot store allowed under the present zoning, and not the sole purpose of the store. The applicant did not submit any evidence, statements or comments related to the anticipated traffic from a smoke shop to show that it would be of a similar scale and performance. Related to wine sales, the applicant submitted some anecdotal information that Cliff Creek Cellars (wine sales) has “. . . 3 to 20 customers on weekdays and up to 150 customers on weekends.” No source

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<sup>1</sup> It is notable that Section 34(2)(b) states that a farm stand used in conjunction with a marijuana crop as described in ORS 215.283(1)(o), is not allowed in the farm zone.

for these numbers was indicated and no evidence was submitted to support these numbers. On appeal, the request for a similar use focused almost entirely on the request to sell marijuana, and opposition to that request.

With regard to medical and recreational marijuana sales: The applicant indicated this should be considered similar to a fruit and vegetable stand. As indicated elsewhere in these findings, previous review of a medical marijuana facility to be located in the LI Light Industrial zone led the Planning Commission to state that a future applicant would need to submit a traffic study to address and analyze the anticipated traffic from recreational marijuana sales. The applicant chose not to provide an engineered traffic study, but instead submitted some anecdotal information citing no source for the numbers provided. The application referred to Canna Bros. in Newberg, with medical marijuana sales at 12 customers per day, and to Chalice in Dundee with medical and recreational sales at 150 customers per day. The application also noted “. . . over 1,000 customers daily at the Sheridan Dairy Queen.” Subsequently on appeal, the new purchaser of the Blanchard Lane site also failed to provide any expert or other testimony to support a conclusion that the traffic likely to be associated with a marijuana dispensary would be similar to traffic associated with other uses allowed outright or conditionally in the HC zone.

The “purpose” clause of the HC zone specifically mentions traffic safety. It states, in part: “The purpose of the HC District is to provide limited small-scale highway and tourist commercial services for the traveling public in specially designated highway-service centers where access, traffic-turning movements and off-street parking can be provided in a safe, convenient, economic and attractive manner” (emphasis added). To demonstrate that a use is similar, the applicant must demonstrate how the proposed use is similar in character, scale and performance to uses permitted in the zone.

It is the applicant’s burden to support his or her application. The use “marijuana dispensary” has only recently become common, due to recent legalization of recreational marijuana. Uncontroverted evidence in the record indicates that traffic associate with a recreational marijuana dispensary is expected to be large. An internet article identified in a search to find trip generation data for a marijuana dispensary resulted in an article that began: “Per square foot, Marijuana Dispensaries are proving to be one of the biggest retail generators in the United States.” Although better evidence is likely available regarding the potential traffic impacts of a recreational marijuana dispensary, none was submitted into the record in these proceedings. There is not sufficient evidence in the record to support a conclusion that a recreational marijuana dispensary would be similar in character, scale and performance to other uses permitted in the zone, especially when considering potential traffic impacts associated with the use.

4. Subsection 1206.02(B) requires a finding that:

“B. The use conforms with the applicable standards and limitations of the underlying zoning district;”

Again:

“The purpose of the HC District is to provide limited small-scale highway and tourist commercial services for the traveling public in specially designated highway-service centers where access, traffic-turning movements and off-street parking can be provided in a safe, convenient, economic and attractive manner \* \* \*” (emphasis added)

As noted above, the existing on-site structure was found to be in compliance with the standards and limitations of the HC zone. Based on these past actions the building setbacks and access to the site satisfy the standards and limitations applicable to a HC Highway/Tourist Commercial Zone. It is not known if there is a need for other on-site improvements in order to establish the requested use on the property.

The sale of recreational marijuana, from a store that only sells marijuana and marijuana-laced food products is not consistent with this limitation. As cited by one of the parties, marijuana-related traffic fatalities in Washington increased from 8% to 17% after legalization, which would appear to pose a significant safety risk to the traveling public. In any event, the standard requires that the applicant demonstrate that the proposed use is consistent with the purpose of the HC District and neither the applicant nor the applicant’s apparent successor has met that burden.

Therefore, on this record, the Board is unable to conclude that the proposed use is “similar” and is consistent with the purpose of the HC zone. Such an outlet would facilitate the sale and consumption, at often remote locations, of an intoxicant that is now sold and regulated in the state much like liquor—and neither of those products is recommended for consumption by a person driving a motor vehicle—the “traveling public.” The proposed use is not consistent with the purpose of the HC zone; is at odds with, and inconsistent with, the purpose of catering to the “traveling public;” and is therefore not similar to other uses allowed in the HC zone.

Marijuana sales have been compared to beer and wine sales. However, that is not the way they are treated by the State or by the OLCC. Marijuana cannot be sold in a grocery or convenience store. Dispensaries are presently required to be in a stand-alone store, much like liquor stores. The Board does not believe that liquor stores were envisioned to be an allowed “similar use” in the HC zone, and it has not been demonstrated to the board that a recreational marijuana dispensary is appropriate in that zone as a similar use.

Because the proposed use is inconsistent with the purpose and scope of the HC District, the application is denied. For all of the above reasons, the Board cannot add the use as a “permitted” similar use, or as a “conditional” use, as recommended by the Planning Commission. The appeal of the Planning Commission’s decision is therefore accepted, the decision is overruled, and a recreational marijuana dispensary is not an allowed use in the Highway/Tourist Commercial zone.

[END]