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DRAFT Memorandum

TO: County Council
FROM: Cliff Strong, Senior Planner, Planning and Development Services
THROUGH: Steve Roberge, Asst. Director
DATE: October 13, 2023
SUBJECT: Home-Based Businesses v. Agritourism

On September 12, 2023, Council held a public hearing on the proposed Home-Based Business (HBB) regulations. However, Council remanded the issue to the Planning & Development Committee, as Councilmembers had concerns that the proposed regulations, in particular those for Type IV HBBs (event facilities) could limit farmers’ ability to conduct agritourism activities, such as farm stands, corn mazes, etc. This memo explores the differences between event facilities and agritourism activities, and explains additional proposed amendments to clarify those differences and how the County might regulate them differently.

Existing Whatcom County Rules (see Attachment A)

Home Occupations and Cottage Industries – Whatcom County has rules for Home Occupations and Cottage Industries, and the proposed rules for HBB Types I – III are the same, just renamed, consolidated, and standardized. Staff has heard no concerns from Council on these.

Agritourism – Whatcom County has no specific rules for agritourism in general, except that under current code farm stands are expressly allowed as an accessory use (no permits required) in the Rural, Agriculture, and Rural Forestry districts with only a few performance standards addressing size, setbacks, and parking. In general, the County has not enforced any rules to those providing small, limited agritourism activities, and originally when working on these HBB amendments, there was no intent to address agritourism activities. However, Council was concerned that the proposed HBB regulations could be interpreted to include agritourism activities, so the proposed code has been revised to make a clear distinction between the two.

Concerts – For large, live music events (i.e., concerts), the County has regulations in WCC Title 5 (Business Licenses and Regulations), Chapter 5.4 (Outdoor Musical Entertainment, Amusements, and Assemblies) (also shown in Attachment A). Such events would not be considered an HBB, and would be, in fact, administered through the County Executive’s office. To PDS’s knowledge no one has ever applied for such a license.

Unanticipated Events – It should also be acknowledged that occasionally there may be a large, non-recurring community event that cannot be anticipated, such as a wake for a beloved community member. It is not PDS' intent to regulate these, as they are very infrequent and generally self-policed.

Purpose of the Proposed HBB Type IV Rules

For large, recurring commercial events on residential or resource lands, Whatcom County has no rules, which is why Council placed on the docket:

“Amend the Whatcom County Zoning Ordinance to allow “Weddings and Special Events” in specific zone districts through a conditional use permit. Amend WCC 20.97 to define “Special Events” and amend the parking space requirements in WCC 20.80.580.”

The introduction of HBB Type IV is an attempt to add regulations *to allow* event venues at one's home as a way for people to use their resource or residential property to generate income, while making sure health and safety issues and impacts to neighbors are addressed.

How PDS Has Addressed Event Facilities So Far

Absent any specific rules, PDS has been interpreting the code to require those who wish to operate an event facility obtain a Conditional Use Permit (CUP) so that the proposed activities are reviewed, impacts mitigated, and health and safety requirements addressed. If hundreds, or even thousands of people are coming to a property numerous times a year, it is incumbent on the County to make sure that adequate toilets and water are available, that traffic congestion is kept to a minimum, that fire prevention measures are in place, that neighbors aren't being disturbed by loud music at 1 AM, etc.

For background, attached are four such CUP decisions issued by the Hearing Examiner; Table 1 provides a synopsis of the parameters of these permits and some of the conditions applied (though there are many others covering water, sewer, fire, traffic, screening, lighting, signage, etc.)

Table 1. Example CUPs Issued for Event Facilities

CUP #	Zone	Parcel Size (ac)	Use (in addition to the farm)	No.	No. of participants	Hours	Max. Vehicles/ No. of Parking Spaces	Noise
2011-0007	AG	37.6	Event Facility for:					Comply with WAC 173-60-040 (Class A Residential Source to Residential Receiving Property Standards)
			• Weddings	12/yr and no more than 3/mo. or 1/wk.	150	11 AM – 10 PM	50/1 stall per 3 guests	
			• Special Events	2	350	12 PM – 10 PM	117/1 stall per 3 guests	
2013-0003	R-5A	19.5	Ag Educational Center w/					
			• Farm Worker Internship Program	Year-round	10	Fulltime	1 sp./intern	
			• Outdoor Farm Workshops	24/yr.	25	2 hrs.		
			• Fall Festival	1/yr	1,500	1 Weekend during day-light hrs.	1 sp./3 participants present	Live music allowed for 3 hrs. each of 2 days
2016-0014	R-10A	40	• Event Facility for weddings, receptions, and other special events	10/yr, max 2/wk	120	• F/S – 10 AM-9 PM • Sun – 11 AM-7 PM		Comply with WAC 173-60-040; Amplified music allowed for 1 hr. during wedding ceremony; recorded music for 2 add'l hrs.
2017-0005	R-5A	7.37	• Event Facility for weddings, receptions, and other special events	1/wknd May 1 – Sept 30	200	• F/S – 10 AM-9 PM • Sun – 11 AM-7 PM		Comply with WAC 173-60-040; Amplified music allowed for 1 hr. during wedding ceremony;

State Agritourism Rules (see Attachment B)

Attachment B contains the RCWs regarding agritourism. These are the only state laws covering these activities; staff finds no WACs on the subject. These laws are embodied in the state’s rules on civil matters, specifically those regarding special immunities. Succinctly, these rules limit those farmers providing agritourism activities from liability for injury, loss, damage, or death of a participant resulting exclusively from any of the inherent risks of agritourism activities. These rules do not address land use or regulate how farmers conduct these activities. Most jurisdictions can (and generally do) have rules so as to minimize the impacts of these activities on neighbors and the general public, at least if they get too big or too frequent or jeopardize the viability of long-term agriculture.

Nonetheless, the state’s definition of agritourism activities is a good starting point to understanding what might fall under the umbrella of “agritourism activities:”

"Agritourism activity" means any activity carried out on a farm or ranch whose primary business activity is agriculture or ranching and that allows members of the general public, for recreational, entertainment, or educational purposes, to view or enjoy rural activities including, but not limited to: Farming; ranching; historic, cultural, and on-site educational programs; recreational farming programs that may include on-site hospitality services; guided and self-guided tours; petting zoos; farm festivals; corn mazes; harvest-your-own operations; hayrides; barn parties; horseback riding; fishing; and camping.

Distinctions Between Event Facilities and Agritourism Activities

Councilmembers had concerns that the proposed regulations could limit farmers’ ability to conduct agritourism activities, as the proposed Type IV HBB regulations could be interpreted to include some of the activities listed in the state’s definition, even though the original intent was to address only event facilities. This has led staff to think about the differences between these uses so that they can be addressed differently in code (Table 2 shows the most notable of those distinctions).

Table 2. Differences in Characteristics between Event Facilities & Agritourism Activities

Characteristic	Event Facilities	Agritourism Activities
Frequency/Duration	Operate most of the year, and generally every weekend (at least from May to Oct), lasting until 10 PM	Usually limited to 1 month, and primarily during daylight hours, e.g., <ul style="list-style-type: none"> • Christmas tree sales in Nov/Dec • Pumpkin patches/corn mazes in Oct • U-pick operations and farm stands, with times related to the produce being sold but still rather limited in duration
No. of Guests/Customers	100 – 1,500, arriving and leaving at roughly the same time	Maybe up to 200/day, but generally no more than 20-30 at any given 30-minute period
Noise	usually have amplified music	usually no amplified music
Parking/Traffic	<ul style="list-style-type: none"> • Need parking for all guests all at once (est. 1 vehicle/3 guests) • Need traffic control for entering/leaving public road 	People come and go all day, so only a few (7-10) parking spaces needed, which easily can be accommodated on a typical farm
Sanitation/Water	Enough facilities to accommodate a large group of people	For small-scale operations, generally not needed, though for larger operations, they may be (further addressed below).
Indoor/Outdoor	Often a mix, though generally have structures in which large groups of people congregate.	Generally outdoors, though some uses might have structures in which large groups of people congregate (further addressed below).

Based on these distinctions, agritourism could be addressed differently than event facilities. To do so, staff proposes to add a definition of agritourism activities to Title 20, and to more specifically list agritourism activities (not just farm stands) as a specific use in certain zones, as described below.

Distinctions Between Different Types of Agritourism Activities

The state's definition of agritourism activities is fairly broad, crafted to apply to many types of farms and ranches across the state, many in very low-density areas. While many of the activities listed in the definition are fairly low-impact and/or limited in duration (i.e., only occur for a month once a year, and/or only attract a limited number of people at any one time), others might attract a large number of people numerous times a year, or have need for health and safety measures to be in place. Of note are farm festivals, barn parties, and camping: Were these occurring frequently they have the potential to cause negative impacts to a neighborhood.

Thus, staff is proposing to include in WCC Title 20 a modified definition, wherein we limit the three mentioned activities to twice a year (more than that and they'd been considered a Type IV HBB (event facility)), and further where we distinguish between small- and large-scale activities, as follows:

"Agritourism Activities." In general, agritourism activities are any activities carried out on a farm or ranch whose primary business activity is agriculture or ranching and that allows members of the general public, for recreational, entertainment, or educational purposes, to view or enjoy rural activities including, but not limited to: farming; ranching; historic, cultural, and on-site educational programs; recreational farming programs; guided and self-guided tours; petting zoos; corn mazes; harvest-your-own operations; hayrides; and horseback riding. Activities such as farm festivals, barn parties, and camping¹ may be considered agritourism activities only if limited to two weekends per year; otherwise it is a Type IV Home-Based Business.

For purposes of permitting, agritourism activities are split into two categories: Type I and Type II:

- Type I agritourism activities are those that: (1) are primarily outdoors, having no more than 500 square feet of building space used for the activity in the Rural or Rural Forestry districts or 1,000 square feet in the Agriculture district, and (2) cater to no more than 100 people at any one time.
- Type II agritourism activities are those that exceed the Type I thresholds.

We then propose that in the Rural, Rural Forestry, and Agriculture districts, Type 1 activities be classified as an accessory use (no permits needed) and Type II activities be classified as an Administrative Approval Use (requiring an administrative use permit that gets reviewed for code compliance and provides neighbors the opportunity to submit comments). We make the distinction of being primarily outdoors and limiting building size due to the fact that if numerous people are entertained in structures, those structures need to meet certain building and fire code requirements (the size limits shown are the existing ones for farm stands). Likewise, we propose to limit the number of guests at any one time to 100 (or roughly 30 vehicles), as any more and parking and traffic control become an issue.

¹ Note that Whatcom County already has regulations for permanent campgrounds, and we don't want to allow them just anywhere as there are sanitation and other issues that need to be addressed. However, allowing small-scale camping on someone's farm twice a year shouldn't pose a problem.

This schema would allow farmers or wood product producers to conduct small-scale agritourism activities without a permit; or larger, non-recurring agritourism activities with a less expensive² permit while assuring the public's health and safety and providing neighbors an opportunity to raise concerns.

Additional Proposed Amendments to Type IV HBBs (Event Facilities)

A few other issues have come up while preparing this memo:

Minimum Parcel Size for Event Facilities – During discussion with the Planning & Development Committee, CM Elenbaas raised a potential issue with the proposed 10-acre minimum parcel size for Type IV HBBs, his point being that agritourism activities such as farm stands often occur on multiple properties, some of which might be smaller, farmstead parcels, that are owned by different family members. By separately addressing agritourism activities we think that is no longer an issue, and recommend sticking with 10-acres as a minimum parcel size for event facilities. (Having read the Hearing Examiner decisions on those CUPs he issued, noise (or the potential for it) was the most raised concern from neighbors.)

Accessing Off a Private Driveway/Road – Another concern is allowing an event facility on property that is accessed off a shared private driveway/road. Whatcom County has no limits on the of homes that can access off a shared private driveway/road³, which is generally co-owned and maintained by all residents, through a road agreement. Were an event facility to use such a shared driveway/road, with hundreds of vehicles driving on it every weekend for 6-7 months of the year, it would pose traffic problems and degrade the road faster. Yet every homeowner sharing that road would be equally paying for its upkeep. To address this, staff has added to §20.80.970(5) a new subsection (i) “If access to the event facility is from a private, shared road or driveway, the applicant shall submit letters from all owners in interest stating that they approve of the use of the road for this purpose.”

Parking Plans – In each of the CUPs the Hearing Examiner issued, he included a condition that a parking and traffic control plan, including ADA compliance, be submitted so as to ensure parking is adequate and in some cases, leading to ingress/egress improvements. Staff thinks this a good idea, and has added to §20.80.970(5) a new subsection (j) A parking and traffic control plan shall be submitted for approval.”

Sanitation and Potable Water Facilities – Similarly, the Hearing Examiner included conditions requiring the applicant to address how adequate sanitation and potable water facilities are to be provided, so staff has added to §20.80.970(5) a new subsection (k) “Applicants shall submit plans describing how adequate sanitation and potable water facilities will be provided.”

Amplified Music Hours – Lastly, regarding the allowable hours for amplified music in §20.80.970(5)(d), Council changed the proposed hours from the originally proposed 12 PM to 9 PM to 9 AM to 10 PM. In his CUP decisions, the Hearing Examiner limited amplified music to 1 – 3 hours (slightly different for different permits). Staff still suggests that these hours be 12 PM to 9 PM. The proposed code still

² ADM permits cost roughly \$3,000 while CUPs cost roughly \$5,500.

³ Though above 12 and it has to be built to public road standards.

requires compliance with the Class A Residential Source to Residential Receiving Property Standards of WAC 173-60-040, but the cut-off time for louder noises under those rules is 10 PM, and we know that there is often a wind-down period to parties. Cutting the music off at 9 PM allows guests to say their congratulations and goodbyes and still vacate by 10 PM, greatly improving the odds of complying with WAC 173-60-040 (and avoiding calls to the Sheriff).

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Attachment A: Whatcom County Code

TITLE 20 ZONING

Chapter 20.36 RURAL (R) DISTRICT

20.36.100 Accessory uses.

- .105** (1) The usual wholesale marketing activities associated with the agricultural, aquacultural, forestry, and mineral resource uses permitted in this district.
- (2) Retail marketing, by the operator, of Whatcom County products which originate from the permitted uses stated in WCC 20.36.052 and 20.36.055 provided:
- (a) Only one stand containing not more than 500 square feet of floor area shall be permitted;
 - (b) Such stand shall be subject to the setback requirements of WCC 20.80.200; and
 - (c) Such stand shall be provided with a sufficient area to permit at least five automobiles to park safely off the road right-of-way and to re-enter the traffic in a forward motion.

Chapter 20.40 AGRICULTURE (AG) DISTRICT

20.40.100 Accessory uses.

- .102** (1) Wholesale marketing activities provided the activity is accessory to the provisions of WCC 20.40.051.
- (2) Retail marketing, by the operator, of Whatcom County products which originate from the permitted uses stated in WCC 20.40.050 provided:
- (a) Only one retail sales facility containing not more than 1,000 square feet of floor area shall be permitted.
 - (b) Such retail sales facility shall be subject to the setback requirements of WCC 20.80.200.
 - (c) Such retail sales facility shall be provided with a sufficient area to permit at least five automobiles to park safely off the road right-of-way and to re-enter the traffic in a forward direction.

Chapter 20.42 RURAL FORESTRY (RF) DISTRICT

20.42.100 Accessory uses.

- .103** (1) The usual wholesale marketing activities associated with the agricultural, aquacultural, forestry, and mineral resource uses permitted in this district.
- (2) Retail marketing, by the operator, of Whatcom County products which originate from the permitted uses stated in WCC 20.42.050; provided:
- (a) Only one stand containing not more than 500 square feet of floor area shall be permitted;
 - (b) Such stand shall be subject to the setback requirements of WCC 20.80.200; and

- (c) Such stand shall be provided with a sufficient area to permit at least five automobiles to park safely off the road right-of-way and to re-enter the traffic in a forward direction.

WCC TITLE 5 BUSINESS LICENSES AND REGULATIONS

Chapter 5.4 Outdoor Musical Entertainment, Amusements and Assemblies

5.40.010 Permit required.

It is unlawful for any person, persons, organization, landowner, or lessor to allow, encourage, organize, promote, conduct, permit or cause to be advertised an entertainment, amusement, or assembly of persons wherein one of the primary purposes will be the presentation of outdoor, live, or recorded musical entertainment, which said person, persons, or corporation, organization, landowner or lessor believes or has reason to believe will attract 1,000 or more persons, and where a charge or contribution is required for admission, unless a valid county permit has been obtained for the operation of the assembly pursuant to RCW Chapter 70.108, Outdoor Music Festivals. (Prior code § 4.12.010).

5.40.020 Cash bond and indemnification required.

After the application for permit has been approved, the promoter shall deposit with the issuing authority, a cash deposit or surety bond in accordance with RCW 70.108.70. In addition to the uses for the bond or deposit listed in RCW 70.108.70 there shall be the following added uses:

- A. To save and protect the streets, pavements and bridges;
- B. Repair road signs;
- C. Repair all other property in the county from any and all damage that may be caused by vehicles, employees, or participants in such outdoor musical assembly. (Prior code § 4.12.020).

5.40.030 Right to limit further admissions.

If at any time during said event the size of the crowd exceeds by 20 percent the number of persons represented by the sponsors to be expected to be in attendance, the Whatcom County sheriff shall have the discretion to require the sponsor to limit further admissions. (Prior code § 4.12.030).

5.40.040 Parking facilities.

Application for a permit under this chapter shall be accompanied by a scale drawing showing adequate parking facilities have been made available within or adjacent to the location for which the permit is requested. Such parking facilities shall provide parking space for one vehicle for every four persons expected or reasonably to be expected. Adequate ingress and egress shall be provided to or from such parking area to facilitate the movement of any vehicle at any time to or from the parking area; provided, that, if any nonadjacent parking facilities be approved, shuttle buses shall be used to transport the public to said event on a no-charge basis. (Prior code § 4.12.040)

5.40.050 Hours of operation.

No outdoor musical assembly shall be conducted in the unincorporated areas of Whatcom County during the hours of one minute after 12:00 midnight and 9:00 a.m.; provided, that no license shall be issued for more than one 24-hour period ending at midnight. The participants shall be required to have

cleared the licensed area and its immediate environs no later than 1:00 a.m. on the day following the licensed event. (Prior code § 4.12.050).

5.40.060 Violation a misdemeanor.

Any person who violates or fails to comply with any provision of this chapter, who, having obtained a permit under this chapter, willfully fails to continue to comply with the terms and conditions hereunder, or who counsels, aids or abets such a violation or failure to comply, shall be deemed guilty of a misdemeanor.

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Attachment B: Washington State Code

RCW Title 4 CIVIL PROCEDURE

Chapter 4.24 RCW SPECIAL RIGHTS OF ACTION AND SPECIAL IMMUNITIES

RCW 4.24.830 Agritourism—Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

- (1) "Agritourism activity" means any activity carried out on a farm or ranch whose primary business activity is agriculture or ranching and that allows members of the general public, for recreational, entertainment, or educational purposes, to view or enjoy rural activities including, but not limited to: Farming; ranching; historic, cultural, and on-site educational programs; recreational farming programs that may include on-site hospitality services; guided and self-guided tours; petting zoos; farm festivals; corn mazes; harvest-your-own operations; hayrides; barn parties; horseback riding; fishing; and camping.
- (2) "Agritourism professional" means any person in the business of providing one or more agritourism activities, whether or not for compensation.
- (3) "Inherent risks of agritourism activity" means those dangers or conditions that are an integral part of an agritourism activity including certain hazards, such as surface and subsurface conditions, natural conditions of land, vegetation, waters, the behavior of wild or domestic animals, and ordinary dangers of structures or equipment ordinarily used in farming and ranching operations. Inherent risks of agritourism activity also include the potential of a participant to act in a negligent manner that may contribute to injury to the participant or others, including failing to follow instructions given by the agritourism professional or failing to exercise reasonable caution while engaging in the agritourism activity, unless the participant acting in a negligent manner is a minor or is under the influence of alcohol or drugs.
- (4) "Participant" means any person, other than the agritourism professional, who engages in an agritourism activity.
- (5) "Person" means an individual, fiduciary, firm, association, partnership, limited liability company, corporation, unit of government, or any other group acting as a unit.

RCW 4.24.835 Agritourism—Warning notice.

- (2) Every agritourism professional must post and maintain signs that contain the warning notice specified in subsection (2) of this section. The sign must be placed in a clearly visible location at the entrance to the agritourism location and at the site of the agritourism activity. The warning notice must consist of a sign in black letters, with each letter to be a minimum of one inch in height. Every written contract entered into by an agritourism professional for the providing of professional services, instruction, or the rental of equipment to a participant, whether or not the contract involves agritourism activities on or off the location or at the site of the agritourism activity, must contain in clearly readable print the warning notice specified in subsection (2) of this section.

- (3) The sign and contracts described in subsection (1) of this section must contain the following notice of warning:

"WARNING

Under Washington state law, there is limited liability for an injury to or death of a participant in an agritourism activity conducted at this agritourism location if such an injury or death results exclusively from the inherent risks of the agritourism activity. Inherent risks of agritourism activities include, among others, risks of injury inherent to land, equipment, and animals, as well as the potential for you to act in a negligent manner that may contribute to your injury or death. We are required to ensure that in any activity involving minor children, only age-appropriate access to activities, equipment, and animals is permitted. You are assuming the risk of participating in this agritourism activity."

- (4) Failure to comply with the requirements concerning warning signs and notices provided in this section prohibits an agritourism professional from invoking the privilege of immunity provided by this section, section 1, chapter 227, Laws of 2017, and RCW 4.24.830 and 4.24.832 and may be introduced as evidence in any claim for damages.

RCW 4.24.832 Agritourism—Immunity.

- (1) (a) Except as provided in subsection (2) of this section, an agritourism professional is not liable for injury, loss, damage, or death of a participant resulting exclusively from any of the inherent risks of agritourism activities.
- (b) Except as provided in subsection (2) of this section, no participant or participant's representative may pursue an action or recover from an agritourism professional for injury, loss, damage, or death of the participant resulting exclusively from any of the inherent risks of agritourism activities.
- (c) In any action for damages against an agritourism professional for agritourism activity, the agritourism professional must plead the affirmative defense of assumption of the risk of agritourism activity by the participant.
- (2) Nothing in subsection (1) of this section prevents or limits the liability of an agritourism professional if the agritourism professional does any one or more of the following:
- (a) Commits an act or omission that is grossly negligent or constitutes willful or wanton disregard for the safety of the participant and that act or omission proximately causes injury, damage, or death to the participant.
- (b) Has actual knowledge or reasonably should have known of an existing dangerous condition on the land, facilities, or equipment used in the activity or the dangerous propensity of a particular animal used in such an activity and does not make the danger known to the participant and the danger proximately causes injury, damage, or death to the participant.
- (c) Permits minor participants to use facilities or engage in agritourism activities that are not reasonably appropriate for their age. This provision shall not be interpreted to relieve a parent or guardian of a minor participant of the duty to reasonably supervise the minor's participation in agritourism activities, including assessing whether the minor's participation in an agritourism activity is reasonably appropriate for his or her age.

- (d) Knowingly permits participants to use facilities or engage in agritourism activities while under the influence of alcohol or drugs.
 - (e) Fails to warn participants as required by RCW 4.24.835.
- (3) Any limitation on legal liability afforded by this section to an agritourism professional is in addition to any other limitations of legal liability otherwise provided by law.

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