

# Whatcom County Planning & Development Services Staff Report

## Proposed Amendments to WCC Title 20 (Zoning) Regulating the Production, Processing, and Retail Sales of Recreational Marijuana in Whatcom County and Repeal of Ordinance No. 2021-066 (Marijuana Moratorium)

### I. File Information

**File #:** PLN2021-00009

**File Name:** Marijuana Regulations

**Project Summary:** Proposed amendments to WCC Title 20 (Zoning) regulating the production, processing, and retail sales of recreational marijuana in Whatcom County.

**Applicant:** Whatcom County Planning and Development Services (PDS)

**Location:** Countywide.

**Recommendations:**

- Planning Commission – Approve
- Planning and Development Services – Approve

**Attachments:**

- Draft Ordinance
- Exhibit A – Proposed Amendments

### II. Background

On November 6, 2012, Initiative 502 was passed by the voters of the State of Washington, amending Chapter 69.50 RCW and providing the regulatory framework for marijuana producers, processors, and retailers to become licensed by the Washington State Liquor Control Board (“WSLCB”).

On November 16, 2013, the WSLCB adopted final marijuana licensing rules as codified in Chapter 314-55 WAC. During the period between November 18, 2013 and December 20, 2013, the WSLCB accepted marijuana license applications for marijuana production, processing and retail facilities. Whatcom County began receiving notifications of proposed marijuana facilities from the WSLCB in mid-December, 2013, and the WSLCB anticipated issuing marijuana producer, processor, and retail licenses to qualified applicants starting in late February or March, 2014.

On January 16, 2014, the Washington State Attorney General issued an opinion stating that Initiative 502 does not preempt counties from banning or placing additional regulatory requirements on marijuana related businesses within their jurisdictions.

During the licensing application window between November 18, 2013, and December 20, 2013, the WSLCB accepted approximately 228 recreational marijuana producer, processor and/or retail license applications for unincorporated Whatcom County. Whatcom County soon after began receiving notifications from the WSLCB of those applicants and applied to locations. The Prosecuting Attorney and

PDS had at the time implemented a zoning interpretation policy, which stated that PDS would regulate marijuana proposed uses, as allowed by Initiative 502 in the same way as any other commodity that is grown, processed, or sold in Whatcom County. However, it became evident that many of those proposed locations could conflict with other surrounding uses.

On February 11, 2014, the Whatcom County Council adopted Ordinance 2014-011, an emergency ordinance imposing a moratorium on the acceptance of all building and/or land use applications that pertain to marijuana producers, processors, retailers and medical marijuana collective gardens.

On March 31, 2015, the Whatcom County Council adopted Ordinance 2015-006, which contains the current County zoning regulations for recreational marijuana type uses. The regulations allowed for the production (as a permitted use) and processing (as an administrative approval use) of marijuana in the Rural, Rural Forestry, Agriculture, Rural Industrial and Manufacturing, Light Impact Industrial, and Heavy Impact Industrial districts, subject to a proposed facility meeting several stated use standards. Such standards include odor controls (for indoor grows), lighting, traffic and parking control measures, as well as setbacks of 1,000 feet from community centers and 300 feet from residences not located on the same property.

When Whatcom County's regulations were first adopted, the County Council chose to treat marijuana production like any other agricultural endeavor, as most of the applicants were small businesses. However, as no new state licenses are being issued it seems that more recently larger operators (with more capital) are buying up the earlier licenses and expanding operations or changing locations.

Earlier this year both the Commission and the Council received numerous complaints from citizens neighboring certain of the marijuana production and processing facilities. Issues raised included odor, lighting, and excessive water usage. As of 4/27/2021, there were 2 licensed (only) producers, 4 licensed (only) processors, 29 licensed (combo) producers/processors, and 12 licensed retailers of marijuana in unincorporated Whatcom County (see attached map, which also indicates how many are in each zoning district). (For a comparison of the numbers of producers in other counties, see Figure 1, below.) It should be noted that the majority of complaints arise from only a couple of Whatcom County producers; the majority of the operations are complying with the regulations and not causing problems.

Based on those citizen complaints, the Planning Commission recommended, and the Council adopted, an interim 6-month moratorium on accepting applications for outdoor marijuana production and/or processing facilities (Ord. 2021-018, 4/6/21). On April 20th the Council expanded that moratorium to further clarify that "outdoors" for purposes of the moratorium includes production on open land; in non-rigid greenhouses (i.e., hoop houses); in greenhouses with rigid walls, a roof, and doors; and similar type greenhouse structures (Ord 2021-023). That moratorium would have expired on November 7, 2021. However, on October 26, 2021, the Council extended that moratorium for another six months.

The Council also placed on the County's annual docket PLN2021-00009, directing Planning and Development Services (PDS) to:

"Review and revised Whatcom County Code relating to marijuana growing and processing in rural areas. Consider impacts of marijuana growing and processing facilities in rural areas, and evaluate growing and processing facilities as an agricultural or non-agricultural use. Consider compatibility with GMA and County Comprehensive Plan."

Thus, the Planning Commission held two public workshops and with staff assistance developed the proposed amendments to the County's recreational marijuana land use regulations discussed below. On October 14<sup>th</sup> they held a public hearing and voted 5-2-0 to approve the amendments shown in Exhibit A.

# Marijuana Producers in Washington

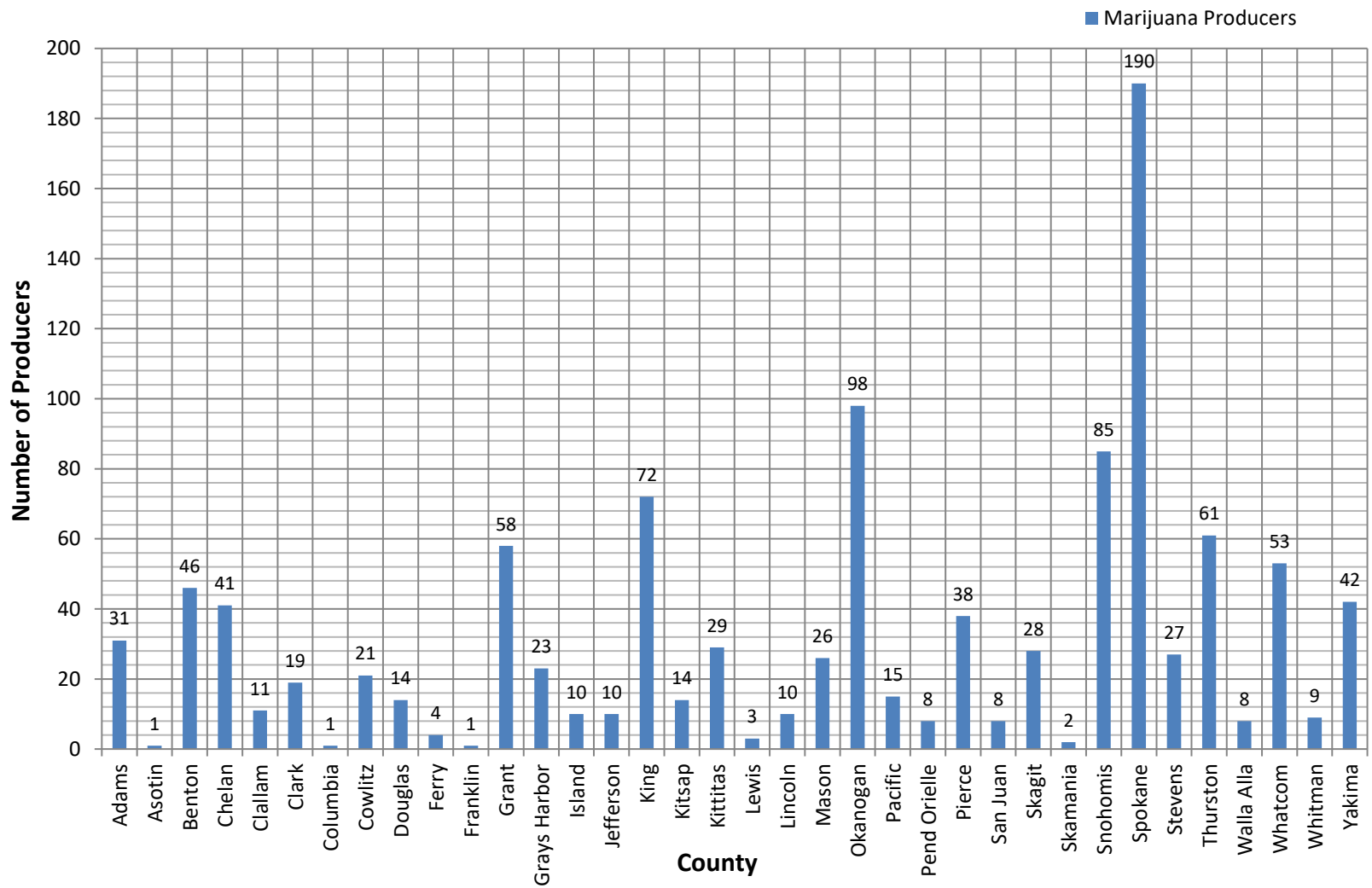


Figure 1. Number of marijuana producers in WA State counties (LCB data, Aug 2021).



Table 2, below, also provide summaries of the existing and proposed regulations, respectively. Following, however, is a list of proposed policy changes.

### **“Marijuana Production Facilities” Definition (§20.97.227)**

The terms “outdoor” and “indoor” production facilities are being relabeled as Type 1 and Type 2 Marijuana Production Facilities. The reason is that the difference between outdoor and indoor in terms of structure type is confusing, given that greenhouses and other such structures are a little of both. What seems to really matter—in terms of how many grow cycles one can obtain, and thus how often flowering marijuana produces the objectionable odor—is whether artificial lighting is used to aid in the growth cycle, as that extends growing and flowering cycles to several. Testimony from producers indicated that without artificial lighting a producer can only obtain one growth cycle here in Whatcom County.

One proviso is that producers have commented that even if they are small scale and don’t use artificial lighting for most production they still need at least one small structure (a.k.a, “headhouse” or “mother room”) in which they can overwinter<sup>1</sup> the plants. So the proposed definition of a Type 1 facility allows one small structure with artificial lighting for overwintering plants.

### **Locations for Type 1 (“Outdoor”) vs. Type 2 (“Indoor”) Production**

The Planning Commission was averse to prohibiting outdoor production entirely, in particular because it uses less energy and is less costly for small start-ups. But they did want to limit the size of outdoor production in the zones that typically have more residential uses (i.e., Rural and Agriculture) as one way to reduce odor impacts (most odor complaints have arisen around the larger (Tier 3) hybrid<sup>2</sup> facilities in the Rural district).

Thus, the draft regulations propose to:

- a) Allow Type 1 facilities only in the Rural and Agricultural districts and limit the area of production facilities to a maximum of 1 and 2 acres, respectively, (§20.80.690(2)(a)); and
- b) Allow Type 2 facilities only in the Rural (with a facility size limit of 1 acre) and industrial (RIM, LII, & HII) districts (with no facility size limit).

(Note: Lot coverage standards for each district also place a limit on the total square footage of structures on a lot commensurate with the lot size.)

### **Use and Permit Requirements**

As a way to further reduce externalities the Commission wanted to require permits that have more public process. Thus, rather than being a Permitted use in most zones as they are currently, the following is proposed:

- In the Rural and Agriculture districts Type 1 production and processing should be an Administrative Approval Use (requiring public notice, written comments, and decision by staff);
- In the Rural district Type 2 production should be a Conditional Use (requiring public notice and a public hearing and decision by the Hearing Examiner).

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<sup>1</sup> According to one knowledgeable producer overwintering plants is part, but only part, of the purpose of the headhouse. Their primary purposes are 1) the preservation of genetics and 2) the propagation of new plants.

<sup>2</sup> Moving plants between and using both artificial and natural lighting (or indoor and outdoor) so as to achieve more growing cycles.

- In the Rural Industrial and Manufacturing, Light Impact Industrial, and Heavy Impact Industrial districts Type 1 production should not be allowed (as these zones are intended for industrial type development and higher wage job creation) but Type 2 production and processing should be allowed as a Permitted Use.
- Additionally, neither marijuana production nor processing should be allowed in the Rural Forestry district, as this zone is intended to protect such lands for forest production and forestry jobs. Currently there are no production or processing facilities located in this district.

## Lighting

One of the other externalities from outdoor grow operations people have complained about is the excessive lighting coming from grow lights in transparent and semi-transparent structures (i.e., green- and hoop-houses). Additionally, growing seasons can be extended to up to 3-4 cycles by using artificial lighting, extending the odiferous periods significantly.

For outdoor fixtures (security lights, etc.), lighting impacts can be mitigated by requiring the installation and use of down-shielding. For facilities using artificial lighting in their growth cycles, lighting impacts can be mitigated by requiring the installation and use of blackout shades. Such language has been included in the draft amendments (§20.80.690(3)(a)).

## Odor

Odor from Type 2 (“indoor”) production can be controlled through the installation and use of ventilation and odor control systems, and such language has been included in the draft amendments (§20.80.690(3)(g)(ii)). And though language has been included stating that odor from any production facility cannot be detectable at or beyond the property boundaries at a level that causes a public nuisance (§20.80.690(3)(g)(i)), odor from Type 1 facilities cannot be controlled the same as with Type 2 production facilities. However, it is understood that Type 1 production can generally only obtain one growth cycle, so the time and duration of odors from these facilities should be limited. Additionally, it can be significantly reduced in time and duration through the other regulations the Commission recommends, as discussed herein.

## Limit on Number of LCB Licenses per Lot

As a way of preventing multiple businesses from operating on the same lot or from one business buying additional LCB licenses and stacking multiple licenses to create larger scale, more intensive operations, the Commission proposes to limit operations to one production and/or processing license(s) per lot in the more residential districts. Thus, such language has been included in the draft regulations for the Rural and Agriculture districts. (§20.80.690(2)(d))

## Setbacks/Separation Requirements

Currently production in the Rural, Rural Forestry, and Agriculture districts requires a 1,000’ separation (measured from property lines) from community centers<sup>3</sup> and a 300’ setback (measured from

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<sup>3</sup> Defined in Title 20 as “land and/or building(s) owned by a public agency or private nonprofit entity used for social, civic, educational, religious, or recreational purposes, which serves mainly the community where located; including but not limited to community halls and centers, grange halls, senior citizen centers, teen centers, youth clubs, field houses, and churches. The facilities are available for occasional public meetings. They may also have the minimal kitchen facilities required for occasional banquets. Private clubs as defined in this title are not included.”

structures) from existing off-site residences<sup>4</sup>. For processing the same rule applies in the Rural district, but only the 300' setback from residences applies in the Rural Forestry district, and the 1,000' setback from community centers in the Agricultural district. The Commission expressed no interest in modifying the existing setback and separation requirements so the existing ones have been carried over into the proposed amendments. (§20.80.690(2)(b))

But additionally, based on public comments the Commission received, the draft amendments would require a 1,000 foot separation between production facilities so that one particular neighborhood doesn't all end up with several. (§20.80.690(2)(c))

### **Processing Facilities that Use Hazardous Materials**

The Commission agreed that processing facilities that use hazardous materials should only be allowed in the industrial districts. Such language has been included in the draft amendments (§20.80.690(2)(f)). Currently there are no such facilities in the rural districts, as adequate fire flow is necessary and can't be obtained without major investment. Thus, this change shouldn't affect any existing processors.

### **Nonconforming Rules**

The Commission agreed that production and processing facilities made nonconforming by revisions to the marijuana regulations should be able to continue (as are all nonconforming uses under the County code), but not be able to expand (by any significant amount) or change to another nonconforming use. Thus such language has been included (§20.80.690(1)(e)).

## **IV. Comprehensive Plan Evaluation**

The proposed amendments to WCC Title 20 (Zoning) have been developed using the guidance of the Comprehensive Plan so as to remain consistent. Though there are no policies regarding marijuana production or processing, the following support the proposed amendments:

Policy 2DD-2: Protect the character of the rural area through the County's development regulations.

(Supports limiting the size, location, and types of marijuana production facilities in the rural areas so as to reduce externalities)

Policy 2FF-2: Support resource-based industries that require only rural services, conserve the natural resource land base, and help maintain the rural character and lifestyle of the community. Assure adequate facilities, mitigation and buffers through development regulations.

(Supports eliminating marijuana production and processing facilities as an allowed use in the Rural Forestry district.)

## **V. Draft Findings of Fact and Reasons for Action**

Staff recommends the Planning Commission adopt the following findings of fact and reasons for action:

1. The County Council placed on the County's annual docket PLN2021-00009, directing Planning and Development Services (PDS) to: "Review and revised Whatcom County Code relating to marijuana growing and processing in rural areas. Consider impacts of marijuana growing and processing

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<sup>4</sup> This 300' setback was taken from our manure lagoon regulations (WCC 20.80.225(2)) as a way to reduce odor impacts.

facilities in rural areas, and evaluate growing and processing facilities as an agricultural or non-agricultural use. Consider compatibility with GMA and County Comprehensive Plan.”

2. Whatcom County Planning and Development Services (PDS) submitted an application (PLN2021-00009) to revise the County’s recreational marijuana production, processing, and retail sales zoning regulations.
3. A determination of non-significance (DNS) was issued under the State Environmental Policy Act (SEPA) on September 29, 2021.
4. Notice of the subject amendments was submitted to the Washington State Department of Commerce on September 13, 2021, for their 60-day review.
5. On October 14, 2021, the Planning Commission held a duly noticed public hearing to consider testimony on the proposed draft amendments.
6. The County Council held a duly noticed public hearing on the proposed amendments on   X  , 2021.
7. The amendments are consistent with the Growth Management Act, Whatcom County Comprehensive Plan, Chapter 314-55 WAC, and other applicable requirements.
8. The proposed amendments reflect current local circumstances and promote the general public health, safety, morals and welfare.
9. Once this ordinance is adopted and effective there is no longer a need for the interim moratorium imposed by Ordinance No. 2021-066.

## **VI. Proposed Conclusions**

1. The amendments are in the public interest.
2. The amendments are consistent with the Whatcom County Comprehensive Plan.

## **VII. Recommendation**

At their October 14, 2021, meeting the Planning Commission voted 5-2-0 to approve the draft findings of fact and the amendments shown in Exhibit A.

Planning and Development Services recommends that the County Council approve the draft ordinance with amendments to the Whatcom County Code as shown in Exhibit A.



**Table 1. Summary of Existing Marijuana Rules**

Type	Zone Requirements						Supplemental Requirements (Applies in all zones)					
	Zone	Permit Type	Distance req't	Lot Size	Accessory Use	Odor	Odor	Lighting	Traffic	Parking	Character	Max. Employees
Production	R	ADM	Not w/in 1,000' of a community center or 300' of an offsite residence <sup>5</sup>	If land is < 4.5 ac then facility limited to 2,000 sf <sup>6</sup>			For indoor production only, must install ventilation, can't emit odors beyond walls, or bother neighbors	Must be controlled away from adjoining properties and roads	Can't be more than what's expected in the zone	Must provide off-street parking	Must be compatible with area's character	N/A
	RF	P										
	A	P										
	RIM	P		For indoor production only, must install ventilation, can't emit odors beyond walls, or bother neighbors								
	LII	P										
	HII	P										
Processing	R	ADM	Not w/in 1,000' of a community center or 300' of an offsite residence <sup>1</sup>	If land is < 4.5 ac then facility limited to 2,000 sf <sup>2</sup>	Must be accessory to production	For indoor processing only, must install ventilation, can't emit odors beyond walls, or bother neighbors	For indoor processing only, must install ventilation, can't emit odors beyond walls, or bother neighbors	Must be controlled away from adjoining properties and roads	Can't be more than what's expected in the zone	Must provide off-street parking		10
	RF	P	Not w/in 300' of an offsite residence <sup>1</sup>									10
	A	P	Not w/in 1,000' of a community center <sup>1</sup>									20
	RIM	P										10
	LII	P										10
	HII	P										10
Retail	STC	P		Limited to 2,500 sf								
	NC	P										
	RGC	P										
	GC	P										

<sup>5</sup> May be waived when all adjacent property owners agree.

<sup>6</sup> Note that a Tier 1 production license allows up to 10,000 sf of grow area, so this rule essentially prohibits production on smaller lots.

Table 2. Summary of Proposed Marijuana Rules

Type	Zone Requirements			Supplemental Requirements										
	Zone	Facility/Permit Type	Lot Coverage <sup>1</sup>	Facility Size Restrictions	Separation of Facilities	Accessory Use	Separation	# of Licenses	Hazardous Materials	Screening	Odor	Lighting	Noise	Other
Production	R	Type 1 – ADM	No structure or combination of structures shall occupy or cover more than 5,000 square feet or 20%, whichever is greater, of the total lot area, not to exceed 25,000 square feet. (§20.36.450)	For parcels < 4.5 ac production or processing facilities limited to 2,000 sf  For parcels ≥ 4.5 ac production facility limited to 1 ac  Also limited by lot coverage restrictions	Not w/in 1,000' of another production facility		Not w/in 1,000' of a community center or 300' of an offsite residence <sup>2</sup>	1 production and/or 1 processing license per lot	N/A	Consistent with WCC 20.80.345 (Buffer Plantings).	Must install engineered odor control system; no VOCs shall be emitted that is detectable at or beyond the property boundaries	Light fixtures shall be designed and down-shielded away from adjoining properties, critical areas, shorelines, and public roads. Indoor lights must use blackout shades.  All structures using artificial lighting for aiding in the growth cycle of plants shall install and employ mechanisms (e.g., blackout shades) that prevent light from escaping production structures	Shall comply with WCC 20.80.620 (Noise), and have a mechanical engineer design the noise control system	Must also comply with security, water, waste disposal, and parking standards
		Type 2 – CUP												
	AG	Type 1 – ADM	No structure or combination of structures, including accessory buildings, shall occupy or cover more than 25% of the total area of the subject parcel... (§20.40.450)	For parcels < 4.5 ac production facility limited to 2,000 sf  For parcels ≥ 4.5 ac production facility limited to 2 ac  Also limited by lot coverage restrictions										
	RIM	Type 2 – P	In a rural community designation, combined floor area of all buildings shall not exceed that of a use of the same type that existed on a lot in that same rural community designation on July 1, 1990. (§20.69.451)  In a rural business designation, building or structural coverage of a lot shall not exceed 50% of the total area. (§20.69.452)											
	LII	Type 2 – P	The maximum building coverage shall not exceed 60% of the lot size. (§20.66.450)											
	HII (ADM)	Type 2 – P	The maximum building or structural coverage shall not exceed 60% of the lot size. (§20.68.450)											
Processing	R	ADM	Same as for production, above	For parcels < 4.5 ac processing & production area limited to 2,000 sf		Must be accessory to production	Not w/in 1,000' of a community center or 300' of an offsite residence <sup>2</sup>	1 production and/or 1 processing license per lot	Not allowed					
	AG	ADM												
	RIM	P												
	LII	P												
	HII	P												
									Allowed, but with standards					
Retail	STC	P		Limited to 2,500 sf										
	NC	P												
	RGC	P												
	GC	P												

<sup>1</sup> Though not a specific marijuana facility regulation, these rules apply to all hard surfaces, including structures and would limit the size of structures commensurate with the lot size.