



Board of County Commissioners

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January 29, 2016

Re: Regulation of Marijuana Production and Land Uses in the Exclusive Farm Use Zone

Deschutes County has engaged the public in a process to develop local land use regulation of marijuana related uses including production, processing, wholesaling, and retailing. Most prominent in the discussion was marijuana production (grows) in the rural areas of Deschutes County. Outstanding concerns emerged with regard to:

- Infringement on right-to-farm protections
- Uncertainty and ambiguity of HB 3400 reasonable regulation opportunities
- Potential for protracted legal challenges with uncertain outcomes.

The purpose of this letter is to highlight and outline these specific issues and concerns.

Deschutes County respectfully requests the 2016 Legislature to:

- 1. Clarify and define, “reasonable time, place, and manner regulations” in HB 3400 (2015) including how it relates to Oregon’s right-to-farm law.**

Without defining “reasonable regulations,” LUBA or higher courts will provide clarity of its meaning through appeals or other legal remedies when regulations are adopted, applied or implemented. The appeals process will require significant time and money by all parties involved and result in tremendous uncertainty until final resolutions/decisions are reached.

In addition, we believe LUBA or the courts may nullify county reasonable time, place and manner regulations due to conflicts with the right-to-farm law in the EFU leaving local jurisdictions and surrounding property owners with only minimal mitigation measures as provided by the OLCC rules.

- 2. Amend or interpret Oregon’s Right-to-Farm Law to allow counties to adopt regulations to mitigate sight, sound, smell, location, security, etc. of recreational marijuana production and processing. In addition, clarify that Oregon’s Right-to-Farm Law only applies to crops lawfully allowed under federal law.**
- 3. Amend state law to treat medical and recreational marijuana production the same in terms of land use permitting, under the same state agency authority, and with the same or consistent decision making processes (i.e., Land Use Compatible Statements).**

BACKGROUND

PRODUCTION OF MARIJUANA IS A FARM USE

Section 34(1)(a) of HB 3400 specifies that marijuana is a crop for the purposes of “farm use” as defined in ORS 215.203. Section 34(1)(b) states that marijuana qualifies for the protections, and limits on regulation afforded to all other farm crops (i.e. tomatoes, hay, etc.).

Proponents of marijuana businesses and the Farm Bureau have asserted that the provisions of Section 34 preclude regulation of the concerns and impacts identified by staff, the public and others (i.e., odor, noise, visual).

OREGON RIGHT TO FARM PROTECTIONS

Oregon has established a right-to-farm law to protect “...farming... practices from legal actions that may be intended to limit, or have the effect of limiting, farming... practices” (ORS 30.933(1)(c)).

ORS 30.930(2) finds that “Farming practice” means a mode of operation on a farm that:

- (a) Is or may be used on a farm of a similar nature;
- (b) Is a generally accepted, reasonable and prudent method for the operation of the farm to obtain a profit in money;
- (c) Is or may become a generally accepted, reasonable and prudent method in conjunction with farm use;
- (d) Complies with applicable laws; and
- (e) Is done in a reasonable and prudent manner.

ORS 30.935 prohibits local laws that make farm practices a nuisance or trespass. For this purpose, ORS 30.932’s definition of “nuisance” or “trespass” includes but is not limited to actions or claims based on noise, vibration, odors, smoke, dust, mist from irrigation, use of pesticides and use of crop production substances.

Traditionally, this has been interpreted to mean that a local government may not adopt time, place, and manner regulations that limit farming practices such as additional setbacks, noise and odor control, visual screening, and other design or operational standards. Therefore, as noted above, the concerns and impacts expressed could not be addressed.

“REASONABLE REGULATION” OF RECREATIONAL MARIJUANA PRODUCERS ALLOWED

Sections 33 of HB 3400 allows local jurisdictions to adopt ordinances that impose “reasonable regulations” on the operation of recreational marijuana producers, processors, wholesalers, and retailers. More specifically, Section 33(1)(a) provides opportunity for “Reasonable conditions on the manner in which a marijuana producer [licensed by OLCC] may produce marijuana.” The legislation does not define “reasonable regulation” or provide examples of what reasonable regulations or conditions may be.

The concern is that establishing “reasonable regulations” on marijuana production located in the Exclusive Farm Use zone would constitute limitation of farming practices and, thereby violate the provisions of the right-to-farm protections previously cited. Perhaps, the intent was to allow “reasonable regulations” for marijuana producers not located in the EFU zone. Consequently, the courts, rather than the Legislature, may be the authority that interprets and, by default, defines what constitutes a “reasonable regulation.”

OREGON FARM BUREAU COMMENTS

In a letter dated December 7, 2015, Jenny Dresler, Oregon Farm Bureau Federation Director of State Public Policy, cited concerns “...about Deschutes County’s proposal to impose setbacks, noise and odor restrictions, and other regulations on cannabis. Such regulation of an agricultural commodity invites right to farm litigation on a highly politicized commodity and creates a risk of regulation of cannabis being used as precedent to regulate other agricultural commodities.” Ms. Dresler further stated that the Oregon Farm Bureau “...has long fought to protect and support producers’ right to farm free from burdensome regulation and to protect producers from a “not in my backyard” mentality regarding the dust, odors, and noise that are inherently part of production agriculture. We encourage you to reconsider your decision to regulate nuisance associated with cannabis and adopt regulations which ensure that it is treated like any other agricultural commodity.”

LOCAL CONDITIONS

Statewide Planning Goal 3 requires counties to preserve and maintain agricultural lands. However, in discussions on the future of agriculture in Deschutes County, there are still differences of opinion over which lands should be designated farm lands and which should not, as well as what land uses should be allowed. Farm lands contribute to the County in a number of ways. Agriculture is part of the ongoing local economy. Wide-open farm lands offer a secondary benefit by providing scenic open spaces that help attract tourist dollars. Farm lands also contribute to the rural character that is often mentioned as important to residents. Finally, it should be noted that agricultural lands are preserved through State policy and land use law because it is difficult to predict what agricultural opportunities might arise, and once fragmented the opportunity to farm may be lost.

On the other hand, there is widespread agreement that much of Deschutes County’s designated farm land is marginal at best, particularly without irrigation. The climate, especially the short growing season, makes commercial farming challenging and usually a losing proposition financially. Statewide Planning Goal 3 does not really account for the conditions in Deschutes County, resulting in agricultural zoning being applied to land with no history of farming and limited potential for profitable farming. The small size of agricultural parcels adds significantly to the challenges. It has been argued that preserving farm lands benefits the wider public at the expense of agricultural landowners. There is considerable pressure to convert agricultural land to residential or other uses.

The debate is complicated because there are impacts to the farming community from converting agricultural lands to other uses. It can be challenging for a farmer who has residential neighbors because farming activities can have noise, odor and/or dust impacts. The right-to-farm law discussed earlier offers some protection to farmers, but as residential uses grow there is pressure to convert, leading to a greater loss of agricultural lands.

The introduction of marijuana production into these farming areas, particularly those areas of smaller lotting patterns and nonfarm residential development, highlights the compatibility concerns expressed by both farm and nonfarm, rural residential property owners. The unique conditions and development patterns present in Deschutes County only amplify the concerns of these diverse populations and the challenge in mitigating potential impacts to maintain compatibility nearby land uses. We continue to work collaboratively with the Department of Land Conservation and Development to initiate rulemaking to develop a statewide "non-resource lands program" to allow counties to accurately designate rural lands that do not meet the state's definitions of agricultural or forest lands such as those in our county.

Please find attached maps of the Exclusive Farm Use (EFU) Zone in Deschutes County showing the number and size of lots.

TREAT MEDICAL & RECREATIONAL MARIJUANA THE SAME

Medical and recreational marijuana land uses should be regulated and reviewed subject to the same standards and under the same state and local agencies. Combining the programs ensures consistencies and efficiencies in the administrating the program(s), application review and decision making, enforcement, and customer service across the state. Most of the marijuana producers, neighbors, and impacts will be the same. Creating one integrated program will enable state and local governments to provide a high level of customer service to interested parties on all sides of this issue rather than navigating between different programs resulting in confusion, misinformation or misunderstandings, and unneeded complexity and cost.

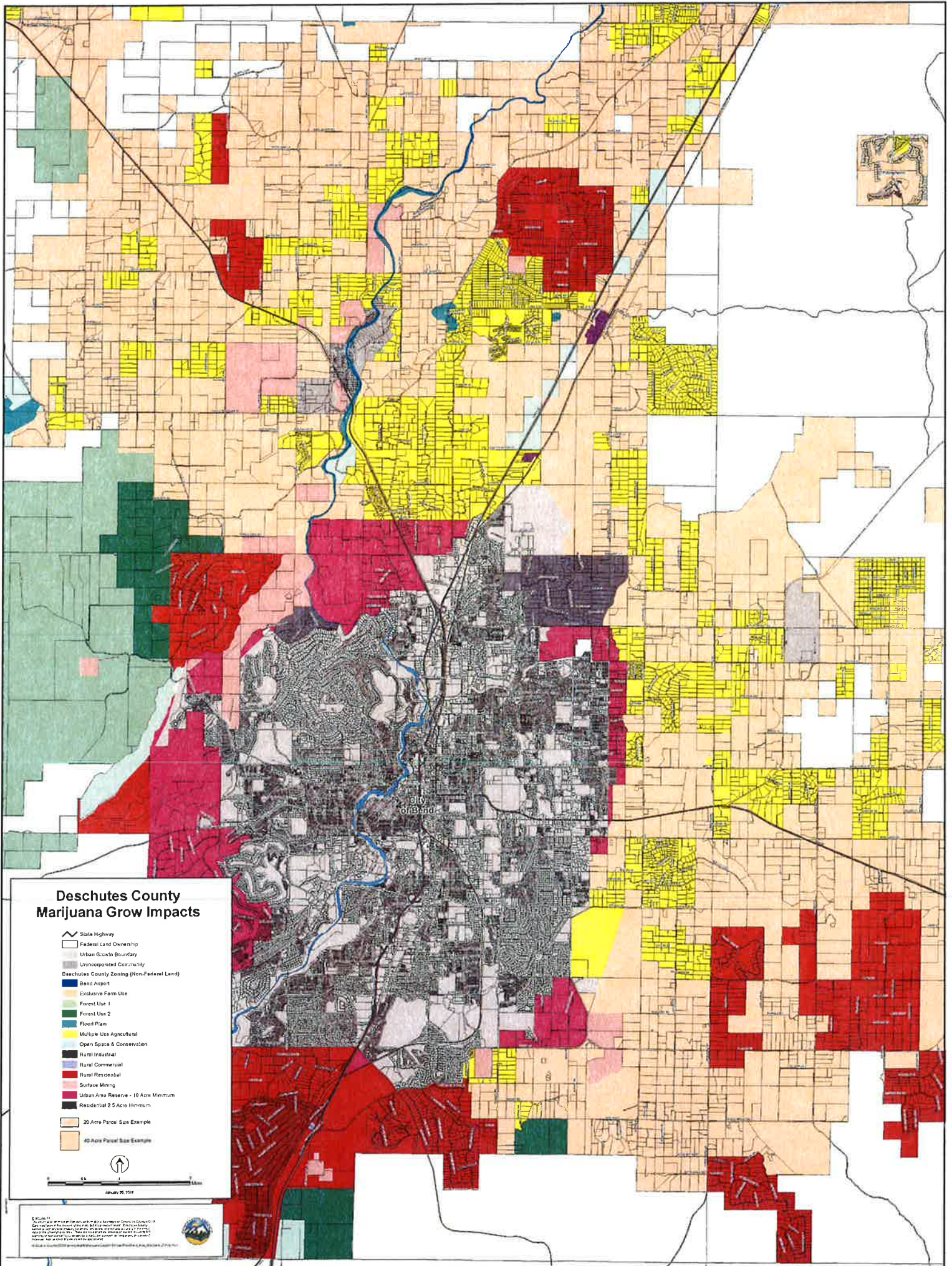
Please know this action is very important as Deschutes County decides how to move forward with local marijuana regulations in the coming months.

Thank you for your consideration.

On behalf of the Deschutes County Board of Commissioners,



Alan Unger, Chair



**Deschutes County
Marijuana Grow Impacts**

- State Highway
- Federal Land Ownership
- Urban Growth Boundary
- Unincorporated Community
- Deschutes County Zoning (Non-Federal Land)**
- Bend Airport
- Exclusive Farm Use
- Forest Use 1
- Forest Use 2
- Flood Plain
- Multiple Use Agricultural
- Open Space & Conservation
- Rural Industrial
- Rural Commercial
- Rural Residential
- Surface Mining
- Urban Area Reserve - 10 Acre Minimum
- Residential 2.5 Acre Minimum
- 20 Acre Parcel Size Example
- 40 Acre Parcel Size Example



January 26, 2011





Deschutes County - Tumalo Area



Deschutes County - East of Bend Area