

The Independence City

INDEPENDENT

LEGAL RISK NO BARRIER TO MARIJUANA BUFFER

By Anne Scheck

May Day blossomed the first Monday of this month with a new and surprising marijuana policy. In a unanimous vote, the Independence Planning Commission approved buffer zones of 250 feet for neighborhoods adjacent to the city's heavy industrial zone, which will benefit residents along Stryker Road -- if the city council votes to approve the commission's recommendation.

"I applaud the Planning Commission for their actions and look forward to discussing (this) at the council level," said City Councilor Ken Day, who was on hand when the vote was taken.

"It was more than I expected," said Melinda Short, who had filed an appeal with the city over a grow-and-processing cannabis facility on Stryker Road, shortly after the city approved it. Though Ms. Short didn't prevail in that effort, she and other homeowners did clinch some concessions, such as changes in odor mitigation and noise control of the operation. Given that the city had recommended no buffers at all in the area, "it was great to see that regardless of what the staff was

advocating, the Planning Commission was more favorable to it (buffers)," she said. In fact, the newly recommended buffer zones appear to mark the first time city advice has been disregarded.

When marijuana became legal in Oregon, cities got significant leeway for passing laws to regulate it. But, in Independence, the group of citizens who pushed for buffer zones -- including Ms. Short -- received almost no support from city staff. That's because requiring even minimal buffering would pose a litigation risk, according to City Manager David Clyne. Why? "We are not able to share legal advice from our City Attorney as it could be a breach of the attorney-client privilege enjoyed by the City of Independence," Mr. Clyne stated, when asked by email for a specific reason in late April.

However, Mr. Clyne's view is far from universal. At a recent discussion on cannabis at the Salem City Club, the co-chair of the legislature's *Joint Committee on Marijuana Legalization*, Sen. Ginny Burdick, said cities that voted in favor of marijuana, as Independence did, can largely set

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their own rules -- if those rules are reasonable and don't conflict with state law.

Asked about whether a city could put in buffer zones, Sen. Burdick observed that, under Oregon statute, cities are "empowered" to enact such provisions. That's the same opinion expressed by the *League of Oregon Cities*, which last December concluded that, under state rules, "cities can impose their own more stringent land-use requirements and restrictions." The exception: Municipalities must abide by buffers mandated by the state, and cities can impose no more than a 1,000-foot buffer between recreational marijuana retailers.

Why then was there such a push for zero buffering? "I'd guess maybe the city was trying to make it friendly for marijuana," speculated Ms. Short.

However, Independence Planning Commissioner Eric Smith, who has a background in public policy, noted before the vote was taken that there are places for marijuana retailers and producers to locate in Independence, even with 250-foot buffers in the industrial area. Commissioner Smith, who moved to approve the buffer zones, said the concept does curb the number of sites available for marijuana business.

The commissioners had pored over different maps showing the impact of buffer zones on potential marijuana business locations.

"I don't think we are over-regulating by (adopting) 250 feet," Mr. Smith said.

In addition to the buffer zones, the commissioners approved 20-foot setbacks for buildings in the industrial zone, an action that will have to be approved by the city council, as well.

However, the commissioners seemed to want to strike a balance between what might be fair to both sides: businesses and residents. Revenue from marijuana is anticipated to help cash-strapped cities in two ways: through a three-percent local sales tax and by a state tax, which will return much of that money to cities. And marijuana sales are outpacing expectations; Revenue ticked up to \$10 million weekly this spring, according to a report given at a recent meeting of the Oregon Liquor Control Commission (OLCC).

However, tax revenue from marijuana sales "is not some savior on a white horse" for government coffers, countered Margo Lucas, a local marijuana business owner. Ms. Lucas previously operated a medical cannabis clinic in Independence but now is refurbishing a building in Monmouth to expand into recreational marijuana.

Too much legitimate competition in Monmouth and Independence -- seven-to-eight dispensaries, for example -- will mean a diminishing return, she predicted. In fact, the price for marijuana showed downward trend over a six-month period assessed last year by *Cannabis Benchmarks*, a tracking data service that has become an industry reference.

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"I don't see any 'upside' in over-saturation," said Ms. Lucas, noting that when she went to buy a phone recently "the guy behind the counter told me he was going to open a dispensary," apparently convinced this business "is the hottest thing going." She's trying to "hold the line on pricing," to ward off financial risk from potentially less costly illegal sale. "But it will be very challenging," Ms. Lucas said.

However, she understands why cities fear being seen as over-restrictive – and why the recent vote on buffers might be controversial.

"They do risk litigation," Ms. Lucas said. Even if a city prevails, a lawsuit is "draining to the city budget," she observed. "That's a valid concern," she said.


But legal representation for marijuana producers and sellers can be strewn with possible and serious difficulties. Five years ago, an article in the *Oregon Law Review* suggested that lawyers with clients who sell or produce marijuana -- even in places where state legislatures have deemed it legal -- are taking on professional risk by assisting a state-sanctioned business that remains a federal crime. More recently, a paper published this winter by the American Bar Association made that point clearly and strongly.

"Lawyers take on tremendous risk when representing legal marijuana businesses or ancillary service providers, particularly when that representation goes beyond mere

legal advice," wrote Florida attorney-at-law Bruce Reinhart, the author. He concluded by stating that representing clients in the legal marijuana market "may not be worth the risk." Asked by phone about that conclusion, he affirmed that, in his opinion, such legal practice could be viewed as "aiding and abetting" an activity still considered criminal under federal law.


And there also is some evidence that litigation risk can arise from opponents of marijuana, just as it has in Independence from homeowners who live near grow sites. (See "The CIVICS LESSON: *When Pollution is in the Air, Fumes Can Be Illegal Trespassers*").

In fact, homeowners in the Independence Airpark have filed their intent to submit yet another appeal with the *Land Use Board of Appeals*, after twice lodging appeals with the city over the grow-and-processing facility on a plot of land on Stryker Road, across from the airpark neighborhood. "Our concern is that the city didn't follow its own rules," said Gary Van Horn, president of the Independence Airpark Homeowners Association, which represents well over 100 households.

However, marijuana is a "moving target," according to OLCC Commissioner Marvin Révoal, who chaired a recent meeting of the commission. He observed that change seems the only constant as the state grapples with evolving marijuana law. If more revisions are needed "we'll take those steps," he said.-- 

The CIVICS LESSON:

When Pollution is in the Air, Fumes Can Be Illegal Trespassers

Oregon courts generally agree that industrial odors deemed offensive are foul to the nose and involuntarily smelled by those in the vicinity. Beyond that, the legal fine points seem as fuzzy as airborne pollen. From garbage rot to chemical fumes, the very phrase used in the Independence City Code to describe olfactory nuisance – “offensive to the community” – boils down to a matter of circumstance. How intense is it? When does it occur? For how long? How many are affected by it? Breathing bad air by jogging near the source doesn’t constitute a legal nuisance and neither does gagging on a whiff of tainted wind - - unless it proves fatal or nearly so. In fact, several of the ground-breaking cases on odor in Oregon haven’t hinged on whether an odor is a nuisance under a municipal code, but whether life is disrupted on personal property. If there is negligent oversight or reckless disregard of emissions onto land with homes, an act of trespassing can occur. One landmark ruling is a case filed by retirees Orris and Velda Lunda, who built a home in a residential section of LaPine in 1970. A few years later, a concrete plant moved into an industrial zone about 180 feet north of the Lundas. Dry cement shipments started arriving, allegedly causing particles to permeate the air. Additionally, the couple found the whole process very noisy, with jackhammers sometimes rumbling and diesel trucks driving in and out. In the court decision in favor of the Lundas, the concrete company was ordered to contain the dust and noise. A jury awarded the couple \$5,000 in damages. The case is seen as establishing trespass by noise and dust. The issue of odor wasn’t directly addressed, but the Lundas reported the smell of diesel gas exhaust was part of the reason for their complaint. --  AS

The INDY HOP:

Seeking Super Tech Talent For Minet’s Future in the CHS Auditorium

Make way Millennials. Stand aside Gen X and Y. It’s time to listen up as Generation Z paves the way. This cohort’s been internet-connected “since the day you were born,” observed Minet’s General Manager, Don Patten, addressing a room full of teens. The occasion was a recent city council meeting at Central High School. Even without a driver’s license, they’re what Minet is looking for, he told them – to launch a youth advisory council. “Minet wants to listen to you” as the telecom operation navigates its future, he said. Some students seemed eager to help. However, one young woman told Mr. Patten that though social media is great, Snapchat and Instagram are no substitute for up-close-and-personal, real-life face time. “Like this,” she said, referring to the high school’s hosting of the council meeting. It’s very “personable,” she said.

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Guest Editorial *by* Melinda Short

When we bought our home in the airpark almost two years ago we based our decision, in part, on what types of facilities already existed on Stryker, and what was proposed to be built there. A small marijuana-processing plant seemed in line with these facilities. Yet, in only a matter of months -- by the time the actual application was filed -- it had grown into a larger processing plant and a grow operation.

We knew about the industrial area across the street, and we also knew airparks are rarely in the best part of town, but we never even considered that a vote legalizing marijuana would mean this type of operation across the street from our house.

While the airpark residents' participation was instrumental in gaining some hard-fought concessions from the developer for noise and odor, this type of operation has no place near a residential area despite the industrial zoning.

The City failed to act in a timely manner to pass regulations on this new industry and was reluctant to do so after the fact. The outcry over the proposed operation was a wake-up call that a residential buffer zone was necessary and was what the citizens wanted. Persistence and the power of numbers caused the city to reconsider and pass reasonable buffer zones for this highly incompatible zoning situation.

The facility application that was passed prior to the code changes is one of the first and probably the largest marijuana facility to date for Independence. Marijuana, for good or bad, is here to stay and perhaps such facilities will become the new normal as they are cropping up everywhere in rural areas, towns and cities.

The City's retroactive stance was frustrating and time consuming, but eventually the outcome was a good one. I appreciated the Planning Commission and the members of the City Council supporting our position on the buffer zones despite strong staff opposition. It was not the case when the application was being processed, but I believe the conclusion was fair and will ultimately allow everybody to coexist.

Melinda Short, a local resident, attended city meetings for more than a year on behalf of her neighborhood. She also filed an appeal with the city, helping to ensure that public hearings on the operation were held this winter and spring.