November 7, 2018

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REPORT AND DECISION

SUBJECT: Department of Permitting and Environmental Review file no. **CDUP160002**

CLOUD BUD
Conditional Use Permit Appeal
SEPA Appeal

Location: 20241 269th Avenue SE, Maple Valley

Appellants: Marney and Scott Valdez and Adrian Medved
represented by **Stacy Goodman** *and* **Todd Wyatt**
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SUMMARY OF RECOMMENDATIONS/DECISION:

Department's Preliminary Recommendation:	Deny appeal
Department's Final Recommendation:	Deny appeal
Examiner's Decision:	Deny SEPA appeal; Deny CUP appeal, but with added conditions

EXAMINER PROCEEDINGS:

Hearing opened:	October 3, 2017
Hearing convened:	October 5, 2017
Hearing convened:	October 10, 2017
Hearing record left open for briefing:	October 10, 2017
Hearing record closed:	October 27, 2017

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the Hearing Examiner's Office.

After hearing the witnesses' testimony and observing their demeanor, studying the exhibits admitted into evidence, and considering the parties' arguments and the relevant law, the Examiner hereby makes the following findings, conclusions, and decision.

Overview

1. The matters before the Hearing Examiner are consolidated appeals of a conditional use permit (CUP) and determination of nonsignificance (DNS) for the growing and processing of marijuana. The growing will take place primarily outdoors and will produce odors as the plants bud and flower that Appellants and neighbors find objectionable. Processing is limited to drying, curing, trimming, and packaging.

2. During project review, applicable regulations are determinative of the type of land use permitted at the site, including conditional uses. RCW 36.70B.030. The regulations to which the CUP application is vested allowed small marijuana production operations (up to 2,000 square feet) as a permitted use and larger operations (up to 30,000 square feet) as a conditional use.

3. The "very nature of a [CUP] type of land use decision is that of a use allowed at the discretion of local government, subject to those conditions that are deemed appropriate by local decision-makers." Counties have a "*broad range of discretion* … in determining whether to grant a particular application and the conditions that are appropriate *in each case*." *Timberlake Christian Fellowship v. King County,* 114 Wn. App. 171, 181, 61 P.3d 332 (2002) (emphasis added) (*Timberlake*).

4. The Examiner's goal in reviewing a CUP is to strike "an appropriate balance between the needs of the [applicant] and the concerns of the neighbors in the rural area." *Timberlake,* 114 Wn. App. at 181.

5. Neither the Department of Permitting and Environmental Review (DPER) nor the Examiner may deny the land use permit based solely on evidence of net neighborhood

opposition. *Sunderland Family Treatment Services v. City of Pascoe*, 127 Wn.2d 782, 797, 903 P.2d 986 (1995); *Maranatha Mining, Inc. v. Pierce County*, 59 Wn. App. 795, 804, 801 P.2d 985 (1990) (*Maranatha*).

6. The King County Code (KCC or Code) outlines eight criteria that must be met before granting any CUP. KCC 21A.44.040. In addition to these criteria, the Code gives the Examiner broad discretion to impose conditions on a project beyond those contained in the original application. KCC 20.22.030.B. *See also, Timberlake*, 114 Wn. App. at 182 (discussing a prior provision of the Code).

7. Marijuana production and processing is a very young industry in the state of Washington and in King County. King County first adopted zoning regulations for marijuana retail, processing, and production activities in 2013–14 and has revised them several times in the subsequent years. DPER is still understanding and studying the industry. Testimony of Ty Peterson. One of the most contentious issues has been the odor from budding and flowering marijuana plants. In the course of developing and revising its marijuana regulations, DPER has received and reviewed voluminous odor studies, consulted with Puget Sound Clean Air Agency (PSCAA), and considered policy issues related to odor. Testimony of Ty Peterson.

8. While the Appellants, neighbors of the proposed marijuana production operation, present many issues, the heart of their appeal is the odor produced by the outdoor growing of marijuana.

9. The Examiner is upholding the CUP and DNS, but imposing conditions requiring periodic monitoring of the operation to gauge compliance with the CUP conditions and a more timely approval of the Notice of Construction, the permit issued by the PSCAA, the agency on which the County relies for mitigation of odor impacts.

FINDINGS AND CONCLUSIONS:

1. The Examiner conducted an unaccompanied visit of the vicinity, travelling on SE 200th Street and SE 208th Street, on November 5, 2017.

Background

2. On February 26, 2016, Cloud Bud LLC (Applicant) submitted an application to DPER for a CUP to allow approximately 30,000 square feet of marijuana production and a marijuana greenhouse within a fenced area and for the drying, curing, trimming, and packaging of the marijuana. Exhibits A-4[1], D-2. The Applicant intends to grow one crop of marijuana per year during the months of April–October. Exhibit D-2, Finding A, p. 3; Exhibit D-34; testimony of William Cloud and Ty Peterson. Although initial propagation will take place in the greenhouse, the marijuana will be grown primarily outdoors within the fenced area. Exhibit D-2, Finding A, p. 2; testimony of William Cloud.

[1] Exhibit A-4 contains a number of separate documents, many of which are also included in the D-series exhibits. For ease of locating and reviewing the exhibits, this decision refers to the D-series exhibits where possible. If a document is not included in the D-series, this decision refers to a specific document within Exhibit A-4.

3. The proposal is located on parcel 012206-9044, an approximately 10.4-acre parcel located in the RA-5 zone (Property). Exhibit A-4, Cover Page; King County Assessor's website. Dale and Betty Alsager are the record owners of the Property. King County Assessor's website.

4. The Property is served by 269th Avenue SE, a private access, which connects to a public street, SE 200th Street, to the north. Exhibit D-10.

5. At the time the Applicant submitted its application, the Code allowed recreational marijuana production on parcels of at least 4.5 acres in the RA-5 zone. Production of up to 2,000 square feet was allowed as a permitted use; production of 2,001-30,000 square feet was allowed as a conditionally permitted use. KCC 21A.08.090.[2] Recreational marijuana processor I (defined as drying, curing, trimming, and packaging) was a permitted use in the RA-5 zone on parcels of at least 4.5 acres. KCC 21A.08.080; KCC 21A.06.7344. The producer/processor was required to be licensed by the Washington State Liquor Control Board (now the Washington State Liquor Cannabis Control Board (WSLCB)). KCC 21A.08.090; KCC 21A.08.080.

6. In early 2016, neighbors observed work being done on the Property and on 269th Avenue SE. Testimony of Adrian Medved.

7. DPER determined the CUP application to be complete on March 18, 2016. Exhibits D-2 and D-28. For the appeals before the Hearing Examiner, the most important consequence of DPER's completeness determination is that it caused the application to vest to the regulations in effect on February 26, 2016, the date Cloud Bud LLC submitted its application. KCC 20.20.040.A. The vested use includes the necessary support structures to support that use. KCC 21A.02.060.B.

8. On July 25, 2016, the Metropolitan King County Council (Council) adopted Ordinance 18326, prohibiting marijuana production/processing in the RA-5 zone and imposing additional requirements on marijuana production in the RA-10 and RA-20 zones, including a larger minimum parcel size and setbacks, documentation that the operator has applied for a PSCAA Notice of Construction Permit (NOC), and PSCAA approval of the NOC before marijuana products can be imported onto the site. Exhibit A-27.

9. Construction of the marijuana production operation and greenhouse began in earnest in summer 2016. Testimony of Marney Valdez and Adrian Medved; Exhibits A-57 through A-60.

10. DPER issued a Stop Work Order on June 10, 2016, for construction of an 8-foot fence (150' x 150') and greenhouse associated with the CUP under review. Exhibit A-70. It required the Applicant to submit a complete application for an Already Built Construction (ABC) pre-screening meeting by July 15, 2016, and to submit a complete building permit application within 30 days of the pre-screening meeting. Exhibit A-70, June 15, 2016, letter from DPER to William Cloud and Dale and Betty Alsager.

[2] Unless otherwise indicated, all references to the Code are to the Code in effect on February 26, 2016.

11. The Applicant subsequently submitted an ABC application for the 8-foot fence. Testimony of William Cloud and Ty Peterson. It paid the application fee which, as authorized by Title 27 KCC, is double permit fees for work undertaken without permits. Testimony of William Cloud. DPER placed the application on hold pending resolution of these appeals. Exhibit A-11, July 27, 2016, email from Holly Sawin to Mr. Cloud; testimony of Ty Peterson.

12. The Applicant submitted an application to PSCAA on August 25, 2016. Exhibit D-24, Attachment A; Exhibit C-10; testimony of William Cloud.

13. Neighbors observed marijuana plants being brought to the site in May, 2017. Testimony of Adrian Medved and Marney Valdez; Exhibits A-13 and A-58.

14. The Applicant initially limited their marijuana production to 2,000 square feet. Testimony of William Cloud.

15. On June 9, 2017, DPER conditionally approved the CUP. The operation, as approved, includes one crop per year primarily grown outdoors; an 8-foot high fenced production area of approximately 26,620 square feet containing a 1,080-square foot greenhouse; associated driveway, parking, utilities, and drainage system; and wetland buffer averaging and compensatory mitigation. Exhibit D-2. No mechanical or chemical processing is allowed. No retail or general public access is permitted. Exhibit D-2, Finding A, p. 3.

16. On June 9, 2017, DPER issued a DNS under the State Environmental Policy Act (SEPA) for the proposal. Exhibit D-1.

17. Adrian Medved and Scott and Marney Valdez (Appellants) timely appealed the CUP and the DNS.

18. After obtaining the CUP, the Applicant increased their marijuana production area (also referred to as a "grow area") to approximately 26,000 square feet, the amount permitted under the CUP. Testimony of William Cloud.

The Organization of the Examiner's Decision

19. The CUP appeal presents fifteen issues relating to seven topics, a number of which are outside of the Examiner's jurisdiction; the SEPA appeal raises nine issues. To assist the parties and any appellate body in understanding and reviewing her decision, the Examiner has organized her decision by reviewing her powers and the burden and standard of proof. The decision then addresses the CUP and SEPA appeals by topic.

The Hearing Examiner's Powers and Duties/Burden and Standard of Proof/Finality

20. A CUP is a Type 2 decision by the Director of DPER, appealable to the Hearing Examiner. KCC 20.20.020.E.

21. The Examiner may grant or deny the appeal and may include any conditions, modifications, and restrictions as she finds necessary to carry out applicable laws,

regulations, and adopted policies. KCC 20.22.030.B. The Examiner has added a condition requiring periodic review of the CUP to monitor compliance with its conditions and the ability of the Applicant to appropriately mitigate odors and has revised conditions to require that the Applicant obtain the PSCAA NOC by August 1, 2018, a date chosen based on evidence that odors are most noticeable in August-September. The Examiner is mindful of the fact that PSCAA has placed the Applicant's NOC application on hold pending these appeals and may continue to do so in the event of further appeals. To ensure that she does not impose a condition which cannot be met, this decision provides that, in the event of further appeal(s), the Applicant must obtain the NOC prior to the growing season following resolution of the appeal.

22. Appellants bear the burden of proof. Hearing Examiner Rules of Procedure and Mediation (Examiner Rules) XV.E.1.

23. For the CUP appeal, the standard of proof is a preponderance of the evidence. Examiner Rule XV.F.1. The Examiner's review is *de novo*, i.e., she does not give substantial weight to DPER's decision.

24. For the DNS appeal, the standard of proof is clearly erroneous based on the record as a whole. Examiner Rule XV.F.2. The Examiner must give substantial weight to the threshold determination made by the responsible official. WAC 197-11-680(3)(a)(viii); KCC 20.44.120.A.3.

25. The Examiner's decision on these appeals is a final decision. KCC 20.22.040.T (CUP); KCC 20.22.040.U (DNS).

Matters Outside of the Examiner's Jurisdiction

26. The Hearing Examiner has only the authority granted to her by the Council. *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 588, 958 P.2d 962 (1998); *Lejeune v. Clallam County*, 64 Wn. App. 257, 270, 823 P. 2d 1144 (1992); *Chausee v. Snohomish County Council,* 38 Wn. App. 630, 636, 689 P.2d 1084 (1984). KCC 20.22.040 through 20.22.060 enumerate the decisions and recommendations the Examiner is authorized to make.

27. An appeal statement must, among other things, identify the alleged errors in the decision. KCC 20.22.080.C. The scope of an appeal is limited to matters or issues raised in the appeal statement and any amendments to the appeal statement the Examiner authorizes. KCC 20.22.080.G. Appellants did not request nor did the Examiner authorize any amendments to the appeal statement.

28. In their Rebuttal to the DPER Staff Report and Response to Statement of Appeal (Rebuttal), the hearing in this matter, and in their Post-Hearing Briefs, Appellants presented argument and testimony that went well beyond the specific allegations of error in their Statement of Appeal (Appeal). However, DPER did not object. Further, their Appeal states that it incorporates by reference the voluminous letters, correspondence, and pleadings they submitted to DPER related to the CUP and SEPA threshold determination. Appeal, pp. 2-3. Therefore, the Examiner has treated this argument and

testimony as properly before her so long as Appellants raised the issue in their pleadings or the documents, letters, and correspondence they submitted as exhibits.

The CUP Appeal

Topic 1: Complete Application/Vesting/New Application (CUP Appeal Issues 4, 10, and 11 (part))

29. Appellants contend that the application was not complete as of the date of adoption of Ordinance 18326 and, consequently, DPER could not approve a CUP for marijuana production and processing uses on the Property.

30. The Examiner's enumerated powers do not include a determination of whether an application is complete.

31. Further, DPER's notice of complete application causes an application to be conclusively deemed to be complete and vested. KCC 20.20.050.D; KCC 20.20.070. Supplemental information required after vesting of a complete application does not affect the validity of the vesting of the application. KCC 20.20.070.B. Thus, unless the Applicant misrepresented material facts in obtaining the CUP, DPER's determination of completeness must stand.

32. In the event a party appeals this decision to and a court determines that the Examiner does have jurisdiction over a determination of completeness, the Examiner makes the following Findings/Conclusions regarding the completeness and vesting of the CUP application.

33. In their Appeal, Appellants argue the application was not complete on July 25, 2016, the date of adoption of Ordinance 18326, because it did not include a SEPA environmental checklist, did not identify all critical areas, and did not include applications for a critical areas alteration and subdivision. Appeal, pp. 6, 13-15.[3] In the hearing in this matter and in post-hearing briefing, Appellants argue that the application was deficient because it did not include a certificate of sewer and water availability; a list of any permits or decisions applicable to the development proposal that had been obtained or that were pending; a determination of whether drainage review applied; and current assessors maps and a list of tax parcels to which public notice must be given. Appellants' examination of Ty Peterson; Appellants' Post-Hearing Brief, pp. 2-3.

34. KCC 20.20.040 provides, in pertinent part:

> A. …Applications for land use permits requiring Type 1, 2, 3 or 4 decisions shall be considered complete as of the date of submittal upon determination by the department that the materials submitted meet the requirements of this section.

(Emphasis added.)

[3] In CUP Issue 4, Appellants cite RCW 19.27.095. However, that provision governs vesting of building permit applications, not CUPs. Therefore, the Examiner does not address that argument.

> B. A permit application is complete for purposes of this section when it meets the procedural submission requirements of the department and is sufficient for continued processing even though additional information may be required or project modifications may be undertaken subsequently. The determination of completeness shall not preclude the department from requesting additional information or studies either at the time of notice of completeness or subsequently if new or additional information is required or substantial changes in the proposed action occur, as determined by the department.

(Emphasis added.)

35. In making a determination of completeness, DPER determines whether the listed items have been submitted, not whether the information contained within them is adequate. Testimony of Ty Peterson.

36. Environmental Checklist. In preparation for the pre-application conference, DPER determined that the proposal fell within the categorical exemptions for minor new construction in WAC 197-11-800(1)(a)(i) and KCC 20.44.040.A.1 and, therefore, did not require an environmental checklist. Exhibit A-4, PREA15-0099 Typical CUP Submittal Requirements Checklist January 6, 2016; testimony of Ty Peterson. They understood that PSCAA had SEPA jurisdiction and would conduct SEPA review for the NOC application. Exhibit D-2, Background, p. 2.

37. The categorical exemptions for minor new construction do not apply when the project "is wholly or partly on lands covered by water." Appellants argue that the presence of wetlands on the property removes the proposal from the categorical exemption. Exhibit A-7. However, the marijuana production/processing operation was located outside of not only the wetlands themselves, but also their required buffers. At the time the Applicant submitted its application and at the time DPER determined it to be complete, DPER's determination that the proposal was categorically exempt was correct.

38. DPER subsequently determined that the Applicant would need to replace a culvert underneath 269th Avenue SE, with the consequence that the categorical exemption no longer applied. It required the Applicant to submit an environmental checklist, which they did on February 9, 2017. This requirement does not operate to retroactively make the application incomplete.

39. Critical Areas. At the pre-application conference, DPER provided the Applicant a memo from Laura Casey, Environmental Scientist III, which advised, among other things, that a critical areas report would be required to address wetlands and streams/drainage features within 200 feet of the proposed grow area. Exhibit A-53.

40. The Applicant engaged Sewall Wetland Consulting, Inc. to prepare a Critical Area Designation Report which they submitted as part of their CUP application. The initial Sewall Report, dated December 11, 2015 (2015 Sewall Report), describes observations of jurisdictional wetlands, streams, and buffers on or within 200 feet of the southern half of the Property. Exhibit D-12a. At the hearing in this matter, Ms. Casey and Mr. Ed Sewall

explained that the study area encompassed the area of the project and the largest critical area buffer that might apply. Testimony of Ed Sewall and Laura Casey.

41. Mr. Sewall reviewed secondary resources, including the National Wetland Inventory Map, NRCS Soil Survey online mapping and data, the King County iMap with wetland and stream layers activated, and the Washington Department of Natural Resources Water Typing Mapping for the site. He documented a single forested and emergent wetland on the south side of the site which appears to extend off-site to the south a short distance and does not appear as large as depicted on the King County iMap wetland layer. Exhibit D-12a; testimony of Ed Sewall.

42. Laura Casey, the Ecologist responsible for review of critical areas and shorelines issues for the DPER Commercial Product Line, reviewed the application, including the 2015 Sewall Report, and secondary sources, such as King County iMap and a 2013 delineation report for property to the west performed by Chad Armour. The Armour report is contained in Exhibit D-13. She then conducted a site visit with Mr. Sewall and Mr. Alsager on April 18, 2016. Exhibit A-46; testimony of Laura Casey. During the site visit, she discussed with Mr. Sewall wetlands located in the southwest and southeast portions of the Property and asked that he include them on the site plan. Testimony of Laura Casey.

43. Mr. Sewall was aware of both wetlands. He had unintentionally omitted the southwestern wetland from his 2015 report. Testimony of Ed Sewall and Laura Casey. It is a small Category III wetland requiring a 60-foot buffer. The wetland and buffer are sufficiently distant from the proposal that they do not affect its layout. Testimony of Laura Casey; Exhibit D-32. The wetland to the southeast is also a Category III wetland requiring a 60-foot buffer. It is even more distant from the area of the Property on which the proposal is located and, similarly, does not affect the proposal's layout. Exhibit D-32.

44. To allow her to continue with her review of the CUP application, Ms. Casey requested additional critical areas investigation of a pond to the north of the proposed marijuana production area to determine whether it was excavated out of upland or wetland; determine whether the east–west ditch north of the pond is a Type N aquatic area or wetland; determine if the north–south ditch meets the criteria for salmonid use in the Presumption of Salmonid Use administrative rule;[4] and determine if a wetland exists off-site to the west. She requested a revised site plan to show all of the critical areas in the vicinity of the proposed growing operation and that the growing operation will be outside of critical areas and their buffers, including the southwestern wetland Mr. Sewall unintentionally omitted in his 2015 report. Exhibit A-46.

45. Based on soils testing, Mr. Sewall determined that the pond was not excavated out of wetland; that the stream meets the criteria for a Type N water requiring a 65-foot buffer measured from the ordinary high water mark, and that it does not meet the criteria for salmonid use under the Presumption of Salmonid Use Administrative Rule. Exhibit D-12b.

[4] The referenced east-west and north-south ditches are one ditch, which Mr. Sewall classified as a Type N stream. Ms. Casey concurred.

46. Somewhat north of the proposed marijuana production area, the Type N stream traverses the Property east-west and then turns north-south. Exhibit D-32. The Applicant proposed buffer averaging, reducing the buffer to the west of the proposed grow area, and enlarging it to the north. Exhibit D-32. In addition, the buffer averaging plan proposes a willow enhancement area adjacent to the east side of the stream which will benefit aquatic life downstream by cooling the water in the Type N stream. Exhibit D-32; testimony of Laura Casey.

47. Ms. Casey also asked Mr. Sewall to confer with the Washington Department of Fish & Wildlife (WDFW) to determine whether it has relevant management recommendations for elk breeding habitat and whether modification of the wetland buffer widths is necessary for elk, a species of local importance. Exhibit A-46. WDFW advised Mr. Sewall that it did not foresee any change in wildlife use or habitat impact. Exhibit D-27.

48. KCC 20.20.040.A.6 requires that a Type 2 application include a site plan prepared in a form prescribed by the director. DPER's Conditional Use Permit Instructions & Information form instructs an applicant to "locate all critical areas and associated buffers on plans." Exhibit A-74, p. 5. The site plan the Applicant submitted with their application showed the wetland described and delineated in the 2015 Sewall Report, the 60-foot buffer, and a measurement of the closest point of the proposed grow area to the wetland indicating that it is set back 75 feet from the wetland (the sum of the 60-foot buffer and the 15-foot building setback from the buffer).

49. Appellants argue that the application was incomplete because the site plan did not identify the wetlands on the southeastern and southwestern portions of the Property and on property to the west and the Type N stream.

50. The purpose of critical area review is to determine whether there is a critical area on the development proposal site. KCC 21A.24.100. As part of the critical area review, DPER reviews the critical area reports and determines whether there has been an accurate identification of all critical areas, an alteration will occur to a critical area or its buffer, and the development proposal is consistent with the critical areas regulations. KCC 21A.24.100.B; Exhibit A-46. That is precisely what occurred in this case.

51. With the exception of the wetland off-site to the west on the Dolder property, all of the critical areas are shown on Exhibit D-32, the approved wetland buffer averaging plan. According to the 2013 delineation performed by Chad Armour, the wetland to the west is a Category III wetland requiring a 60-foot buffer. The 60-foot buffer would overlap and be subsumed within the 65-foot buffer for the Type N aquatic area and, therefore, does not need to be shown on Exhibit D-32. Testimony of Laura Casey.

52. Appellant's expert, Dr. Sarah Cooke,[5] opined based on aerial photographs that a ditch or stream is located approximately 50 feet to the south of the proposed marijuana production area. Exhibit 65, Figures 5 and 7. Mr. Cloud, Mr. Sewall, and Ms. Casey testified, based

[5] Dr. Cooke also provided her opinion regarding whether DPER should have determined that the application was complete. The Examiner did not consider her testimony on this topic because it lies outside of Dr. Cooke's area of expertise. *Simmons v. City of Othello*, 199 Wn. App. 384, 392, 399 P.3d 546 (2017).

on site visits, that the area labeled on Dr. Cooke's figures as "ditch/stream" is in fact one of many elk or animal trails criss-crossing the Property. The preponderance of the evidence is that the area Dr. Cooke identified as a "ditch/stream" is an animal trail.

53. A ditch exists to the south of the area labeled as a "ditch/stream" on Dr. Cooke's report. Mr. Sewall identified it in the 2015 Sewall Report. Exhibit D-12a. Ms. Casey described it her April 25, 2016, letter to Mr. Cloud following her site visit. Exhibit A-46.

54. Appellants argued that this southern ditch may be a stream and may satisfy the Presumption of Salmonid Use Administrative Rule, in which case, the required buffer would extend into the marijuana production area.

55. A ditch is an artificial open channel used or constructed for the purpose of conveying water. KCC 21A.06.326. An artificial channel is not a stream unless it is used by salmonids or used to convey a stream that occurred naturally before construction of the artificial channel. KCC 21A.06.1240.

56. The southern ditch joins the Type N stream off-site to the west and then drains in a sheet flow through a wetland to the southwest. It does not have a defined channel through the wetland. Exhibit D-12b; testimony of Ed Sewall.

57. Based on site visits, Mr. Sewall and Ms. Casey concluded that the ditch is a ditch, not a stream, and is, therefore, not a regulated critical area.

58. The preponderance of the evidence is that the southern ditch is not a stream therefore, does not affect the location or layout of the proposal.

59. Certificate of sewer availability. KCC 20.20.040.A.3.a requires that a Type 2 application include a certificate of sewer availability or site design approval for an on-site sewage system by the Seattle-King County Department of Public Health. DPER determined that a certificate was not required because the proposal does not trigger the need for a septic system and is not located within the drainfield for the Alsager residence. Exhibit A-4, Typical CUP Submittal Requirements Checklist January 6, 2016; testimony of Ty Peterson. DPER may waive any of the listed specific submittal requirements that it determines to be unnecessary for review of an application. KCC 20.20.040.D.3.

60. DPER did not err in determining that a certificate of sewer availability is not required.

61. Certificate of water availability. KCC 20.20.040.A.4 requires that a Type 2 application include a current certificate of water availability or documentation of an approved well if the development requires a source of potable water. Exhibit A-4, page 1, a document entitled "MAIN FILE Critical Areas Alteration Exception or Conditional Use Permit," is the CUP application submittal checklist DPER filled out to determine whether required application components had been submitted. It indicates that the Applicant submitted a certificate of water availability. The document accepted as a certificate of water availability is found in Exhibit D-22 and is a document entitled "Declaration of Covenant Private Water Supply."

62. The Applicant waters the marijuana plants by hand and provides bottled water to his employees. Testimony of William Cloud. Appellants argue that Exhibit D-22 limits the use of the well to private domestic use and that the water for the well, therefore, cannot be used to water the marijuana crop. While the declaration does describe the well as "for private domestic use," the purpose of the declaration is to prevent the construction of cesspools, sewer, or septic systems within 100 feet of the well. It does not demonstrate that the water from the well cannot be used to water the marijuana plants; nor does the Examiner have the jurisdiction to make such a determination.

63. Drainage review. If drainage review applies, an applicant for a Type 2 permit must submit all drainage plans and documentation required by the Surface Water Design Manual. KCC 20.20.040.A.14.

64. Appellants presented no evidence or argument to support their assertion that the application was incomplete because it did not include a drainage plan.

65. The Applicant submitted with its CUP application a Preliminary Technical Information Report/Level I Downstream Drainage Analysis (TIR). Exhibit D-11a. It submitted a final TIR on January 17, 2017. Exhibit D-12b.

66. Other application or permits. KCC 20.20.040.A does not include subdivision and critical areas alteration applications as items which must be included in a Type 2 application. Thus, even if they were ultimately required, the failure to submit them with the CUP application would not make the application incomplete. Further, Chapter 20.20 KCC authorizes but does not require consolidated permit applications. KCC 20.20.020.B and 20.20.040.A.1.

67. KCC 20.20.040.A.11 requires a list of any permits or decisions applicable to the development proposal that have been obtained or that are pending. There is no evidence in the record that Cloud Bud LLC had obtained any other permits before filing of the CUP application. In their Post-Hearing Brief, Appellants contend that the application was deficient because it did not indicate that the WSLCB license to grow and process marijuana is pending. Post-Hearing Brief, p. 3.

68. The first page of the CUP Application form indicates that WSLCB # 412129-7A is a related file. Exhibit A-4, CUP Application form. That related file is the WSLCB license file for Cloud Bud, LLC. Exhibit C-13. Moreover, KCC 21A.08.090.B.17 limits marijuana production to producers licensed by the WSLCB. All parties to this matter were keenly aware that Cloud Bud, LLC requires a WSLCB license.

69. The WSLCB issued a license to the Applicant on August 2, 2016. Exhibit D-2, Finding E.4, p. 9.

70. The preponderance of the evidence is that the application identified permits or decisions that had been obtained or were pending.

71. Assessor's maps. KCC 20.20.040.A.15 requires that a Type 2 application include current assessor's maps and a list of tax parcels to which public notice must be given. In their Post-Hearing Brief, Appellants contend that the application was deficient because it did

not include assessor's maps. Post-Hearing Brief, p. 3. There is no evidence or testimony in the record allowing the Examiner to determine whether assessor's maps were submitted.

72. The site plan submitted with the application shows the tax parcel numbers for the Property and the nine surrounding properties. Exhibit D-14.

73. As the Supreme Court noted in *Lauer v. Pierce County*, 173 Wn. 2d 242, 267 P.3d 988 (2011) (*Lauer*), if applicants could vest their projects by misrepresenting facts, local governments would have the daunting task of investigating every application to determine its accuracy within a 28-day period. The same can be said of the standard to which Appellants ask the Examiner to hold DPER. They demand that DPER determine within 28 days that the many documents that must be submitted with an application are accurate and complete to the point they require no revisions. The standard for a determination of completeness is not perfection, but sufficiency for continued processing. RCW 36.70B.070; KCC 20.20.040.B. The CUP application was sufficient for continued processing.

74. KCC 20.20.080. KCC 20.20.080 provides that applicant-requested modifications to a pending application require filing a new application if DPER determines the requested modification or revision would result in a substantial change in a proposal's review requirements. If the Applicant were required to file a new application, it would lose its vesting. DPER-initiated changes to a pending application do not require filing of a new application.

75. A "substantial change" includes locating buildings closer to the nearest property line, increasing the proposed square footage of any buildings, or changes that will lead to significant impacts to the built or natural environment that were not addressed in the original development proposal. KCC 20.20.080. Appellants argue that the culvert replacement will lead to significant environmental impacts not addressed in the original proposal. Appellants' Post-Hearing brief, pp. 4-5.

76. DPER determined that the culvert replacement was required. It is, thus, a DPER-initiated change to the CUP application which does not affect the vesting of the application.

77. Even if considered applicant-initiated, by issuing the DNS, DPER determined that the culvert replacement would not have a significant environmental impact. Exhibit A-3. While Appellants appealed the DNS, they did not contend that the culvert replacement would cause significant adverse environmental impacts. Nor is there any evidence in the record that culvert replacement would cause significant adverse environmental impacts.

78. Appellants have not shown that KCC 20.20.080 requires a new application.

Topic 2: Misrepresentation of Material Fact (CUP Appeal Issue 9)

79. In their Appeal, Appellants allege that Dale Alsager "blatantly" misrepresented to DPER that his property is not used as a residence and contend that this alleged misrepresentation was material. Appeal, p. 12. Their Rebuttal added two alleged material misrepresentations: Mr. Cloud misrepresented that he had notified or contacted

neighbors within 1,000 feet of the proposed grow site and Mr. Alsager failed to inform the County that the off-site vehicle pullout required by CUP Condition 8.c requires neighbor approval. Rebuttal, pp. 5-6. At the hearing, Appellants argued that the omissions of several critical areas in the 2015 Sewall Report amounted to misrepresentation. In their Post-Hearing Brief, they contend that the Applicant misrepresented that the marijuana grow cannot be seen by children. Post-Hearing Brief, p. 9.

80. Appellants cite *Lauer, supra,* for the proposition that material misrepresentations preclude validity of an application. Appeal, p. 12. They provide an excellent summary of *Lauer* in their Post-Hearing Brief at pages 6-8. The *Lauer* case worked its way to the Supreme Court, which determined whether the Garrisons' fish and wildlife variance application vested to the regulations in effect at the time of their building permit application for the residence necessitated the variance. The operative statute was RCW 19.27.095, which provides that a "valid and fully complete building permit application" vests. The Supreme Court reviewed both the "valid" and the "fully complete" requirements, finding that the Garrison' application satisfied neither criterion. Limiting its ruling to the unique facts before it, the *Lauer* court held that:

> [A] permit application that is not allowed under the regulations in place at the time it is submitted and is issued under a knowing misrepresentation or omission of material fact confers no rights upon the applicant.

173Wn. 2d 242, 263, 267 P.3d 988 (2011) (emphasis added).

81. Unlike *Lauer*, the proposed use at issue before the Examiner was allowed at the time the Applicant submitted its CUP application.

82. A "knowing misrepresentation of a material fact" is synonymous with "fraud."

Fraud is:

> A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment.

Black's Law Dictionary (10th ed. 2014).

83. Alsagers' residence. Setting aside the fact that Mr. Alsager is not the applicant for the CUP, Appellants presented no evidence to support their contention that Mr. Alsager represented that he did not reside on the Property or present any evidence that, had he done so, the representation in any way affected DPER's decision. The CUP application and SEPA checklist disclose the fact that a single-family residence and mother-in-law or cottage house are located on the Property. Exhibit A-4, CUP Application Form, Question 3, page 2; Exhibit D-6, p. 8.

84. In response to questions from the Hearing Examiner, Mr. Peterson testified that he was aware that the Alsagers reside on the Property and that neither Mr. Alsager nor Mr. Cloud had represented that they did not.

85. The preponderance of the evidence is that Mr. Alsager did not misrepresent his residing on the Property.

86. Communications with Neighbors. There is no evidence in the record that the Applicant represented that he had notified or contacted all neighbors within 1,000 feet of the proposed marijuana production site.

87. The CUP application asks in Question 14:

> Have interested community groups or neighboring property owners been notified about this development project?
>
> __ Yes __ No If Yes, who has been contacted and what were their reactions?

Mr. Cloud answered:

> I contacted Dustin - the only residents within 1000 feet of the grow operation. I talked to a couple that is planning on buying the adjoining property to the west. They have a packaging company that supplies packaging equipment for the recreational marijuana industry. I have made an attentive [sic] agreement to use their packaging products for Cloud Bud. There has been at least one meeting of the Maple Valley Chamber of Commerence [sic] when Cloud Bud was brought up. The neighbors were not receptive to my plans.

Exhibit D-5 (emphasis added).

The response to Question 14 on the CUP application as well as the typographical errors in the response suggest that the Applicant was referring to residences (homes) within 1,000 feet of the proposed grow area, not to each property within 1,000 feet.

88. DPER received a substantial amount of public comment, the tone of which was generally negative. Testimony of Ty Peterson.

89. The Appellants have not shown that Applicant misrepresented his contacts with his neighbors.

90. Critical Areas. The history of the critical areas analysis is summarized in Topic 1, Critical Areas, above. The preponderance of the evidence is that Mr. Sewall unintentionally omitted the southwestern wetland from his initial report. The omission does not amount to misrepresentation, nor did it affect the outcome of the permit decision. DPER thoroughly reviewed critical areas in the vicinity of the proposal and required revisions to the proposal to provide the required buffer and building setback from the buffer for the Type N stream. DPER has approved a buffer averaging plan which allows the Applicant to reduce the buffer along the western boundary of the marijuana production area to 48 feet and to increase the buffer to the north of the marijuana production area. Exhibit D-32. These revisions reduced the size of the grow area from 30,000 square feet to 22,600 square feet.

91. The WSLCB regulations require that the marijuana production area be enclosed by an 8-foot site-obscuring fence. Because the fence is greater than 6 feet in height, it is considered a structure. The fence on the western boundary of the marijuana production area is currently located within the required building setback from the buffer and will have to be relocated.

92. The Appellants have not shown that the Applicant misrepresented critical areas in the vicinity of the proposal.

93. Visibility. For the proposition that the Applicant misrepresented that their operation cannot be seen by children, Appellants cite the CUP application form, Exhibit D-5, p. 3. Question 13.a asks whether local school officials have been consulted regarding the proposed development. The Applicant responded:

> Development is more than 1 mile away from closest school. The 8' tall obscuring cedar fence will prevent children from seeing the growing marijuana.

Appellants contend that this statement is a misrepresentation because children traveling on SE 208th Street would be able to look down onto the Property and see the operation.

94. Appellants cite WAC 315-55-075(1) for the proposition that this answer is material. WAC 315-55-075(1) provides:

> Outdoor production may take place in… an expanse of open and cleared ground fully enclosed by a physical barrier. To obscure public view of the premises, outdoor production must be enclosed by a site obscure wall or fence at least 8 feet high.

It does not require that an outdoor production be invisible to the public. The 8-foot tall solid cedar fence will, in fact, obscure or screen the view of the growing operation from most vantages.

95. The CUP application form is used for any use requiring a conditional use permit. It is not tailored to and does not reference marijuana production or inquire about the visibility of the proposed conditional use.

96. The Medveds cannot see the fence from their house. Testimony of Adrian Medved. The operation can be seen from the Dolders' property to the west, which is at a higher elevation. Exhibits A-57 through A-61.

97. Ms. Medved testified that she can see the marijuana operation if she drives along SE 208th Street. Mr. Peterson testified that he could not. From the aerial photographs available on King County iMap and the Examiner's vicinity visit, it is apparent that much of the view into the Property from SE 208th Street is obscured by structures, trees, and landscaping. There is a short stretch to the southwest of the Property along which it may be possible to view the operation. The view is an oblique one across a large property which appears to be in rural agricultural use. Using the measuring tool in iMap, this vantage point on SE 208th Street is more than 800 feet from the proposal. Based on the

contours on iMap, the elevation of SE 208th Street along this stretch is 525–40, while the elevation of the marijuana production area is 505. While it may be possible for those passing along this short stretch of SE 208th Street to see the operation, they would see a cedar fence and a greenhouse, and in later summer, plants and temporary structures used for drying the marijuana, similar to a cloche. These are all items typically found in the rural area. Appellants have not shown that this limited visibility is relevant to the CUP decision criteria or material to DPER's decision.

98. Road Maintenance Agreement. Appellants contend that Mr. Alsager failed to inform the County of a Road Maintenance Agreement, Exhibit A-15, but presented no argument or analysis explaining why Mr. Alsager had a duty to inform the County of this agreement, that DPER was unaware of the agreement, or that its lack of knowledge of that agreement influenced its CUP decision. The Appellants have not shown misrepresentation.

Topic 3: Home Occupation/Home Industry/Agricultural Product Sales/Marijuana Production and Processing Uses (CUP Appeal Issues 1-3 and 6-7).

99. Home occupation/home industry. Appellants contend that the fact that the Alsagers reside on the Property causes the proposed marijuana production and processing use to be a home occupation or home industry, both of which are specifically prohibited in the rural zone. KCC 21A.030.085.J.4 (home occupation); KCC 21A.030.090.J (home industry). Citing *Kelly v. County of Chelan*, 157 Wn. App. 417, 462, 237 P.3d 346 (2010) (*Kelly*). They argue that the application could not vest because the use was not permitted by the Code. Appeal, pp. 4-5; Appellants' Post-Hearing Brief, p. 1.

100. Appellants misunderstand home occupations and home industries. A home occupation is:

> [A] limited – scale service or fabrication activity undertaken for financial gain, which occurs in a dwelling unit or accessory building and is subordinate to the primary use of the site as a residence.

KCC 21A.06.610 (emphasis added).

A home industry is:

> [A] limited – scale sales, service or fabrication activity undertaken for financial gain, which occurs in a dwelling unit or residential accessory building, or in a barn or other resource accessory building and is subordinate to the primary use of the site as a residence.

KCC 21A.06.605 (emphasis added).

101. The proposal falls within neither of these definitions. It takes place largely outdoors, not within a dwelling unit, accessory building, or barn. It is not subordinate to the Alsagers' residential use. The operative lease, dated January 15, 2016, designates the "production parcel." Exhibit A-19, Sections 1 and 2 and Attachment A. The lease prohibits the Alsagers from entering the grow operation without being escorted by an employee or owner of Cloud Bud, LLC, the Lessee. Exhibit A-19, Section 4. Water, power, and cable services are to be separately metered so that the Lessee's use of utilities will be easily

identified and paid for separately by the Lessee. Exhibit A-19, Section 5(c). The leasehold improvements are Lessee's responsibility. Exhibit A-19, Section 5(d). The Lessor and Lessee have no monetary, business, or family connection other than the lease agreement. Exhibit A-19, Section 8(a). Appellants themselves argue that the lease carves out for all intents and purposes a lot replete with fenced boundaries, separate access, and utility stubs. Appeal, p. 15.

102. The Code classifies uses into eight categories: residential, recreational/cultural, general services, government/business services, retail, manufacturing, resource, and regional land uses. Chapter 21A.08 KCC. Resource uses are further categorized into agriculture, forestry, fish and wildlife management, and mineral uses. Recreational marijuana production is classified as an agricultural resource use. KCC 21A.08.090.

103. It is common to have more than one primary use on a rural parcel. Testimony of Ty Peterson.

104. Both the Alsagers' residential use and the Applicant's marijuana production/processing use are primary uses permitted by the regulations to which the CUP application vested.

105. *Kelly* is not on point. In *Kelly,* Division III of the Court of Appeals held that a CUP did not vest because the density proposed exceeded the density permitted by the county code and comprehensive plan with which the zoning regulations specifically required compliance. In this matter, the marijuana production/processing use was conditionally permitted as a primary use at the time the Applicant submitted their application.

106. Agricultural products sales. The definition of agricultural products sales expressly excludes marijuana. KCC 21A.06.040. Appellants argue that, therefore, the growth of marijuana cannot be considered an agricultural use and that the use, therefore, is inconsistent with King County Comprehensive Plan (KCCP or Comprehensive Plan) Policies R-204, R-205, and R-324 which underscore the importance of agricultural uses in rural areas.

107. Appellants misconstrue the Code. As explained above, the Code classifies recreational marijuana production as an agricultural resource use. KCC 21A.08.090. In contrast, it classifies both agricultural products sales and recreational marijuana sales as retail uses. KCC 21A.08.070. The former is allowed in the rural zone; the latter is not.[6] The distinction is logical. A farm stand is a common feature in the rural area.

108. The Council determined the production of marijuana is an appropriate agricultural use in the RA-5 zone, but the retail sales of marijuana products are not and that these provisions are consistent with the Comprehensive Plan. The avenue for challenging consistency of the Zoning Code with the Comprehensive Plan is an appeal of the regulations to the Growth Management Hearings Board, not an appeal of a project permit to the Hearing Examiner.

[6] Recreational marijuana sales are allowed only in the community business and regional business zones. KCC 21A.08.070.

Topic 4: CUP Standards and Reliance on PSCAA (CUP Appeal Issues 8, 13–15)

109. KCC 21A.44.040 establishes the standards for granting a conditional use. Appellants contend that the proposal is inconsistent with criteria A, B, E, and H. Appeal, pp. 10-12.

110. KCC 21A.44.040.A (Criterion A) requires that the use be designed in a manner which is compatible with the character and appearance of existing or proposed development in the vicinity. Appellants contend that the use is not an agricultural use; outdoor growing of marijuana conflicts with the character of the rural area; and the vicinity is a residential neighborhood. The essence of Appellants' arguments on Criterion A is that marijuana production is, by definition, incompatible with the rural area.

111. As discussed in above in Topic 3, the Council has classified the production of marijuana as an agricultural use which may be conditionally permitted in the RA-5 zone. The Council has, thus, determined that, in appropriate cases and with appropriate conditioning, marijuana production can be carried out in a way which is compatible with the rural area. The Examiner cannot find that marijuana production is *per se* incompatible.

112. DPER reviewed the proposal for compatibility with the character and scale of existing and permitted buildings and developments. Testimony of Ty Peterson; Exhibit D-2, Existing Conditions Findings 2-4 and Other Considerations, Finding 9. Fences, greenhouses, and the growing of agricultural crops are common in the rural area and consistent with structures on surrounding properties.

113. While the Examiner is cognizant of the fact that the Appellants and some of the other witnesses reside on their properties, she cannot find that the RA-5 zone in this vicinity is an exclusively or even primarily a "residential neighborhood." The King County Comprehensive Plan envisions the rural area as an area appropriate for multiple uses, including working farms and forests, livestock uses, home-based industries and housing. KCCP, p. 3-6. KCCP Policy R-201 establishes eleven designation criteria for the rural area, only one of which relates to housing. KCCP Policy R-210.g.

114. The CUP application and testimony from neighbors indicate that, while some of the adjacent properties have residences, they also have barns, shipping containers, home-industries, a variety of non-residential buildings, and open pasture areas. Exhibits A-4 and D-2; testimony of Adrian Medved, Marney Valdez, and Holly Dolder. These uses reflect the intended multi-use nature of rural lands.

115. The Comprehensive Plan also recognizes that agricultural uses may affect nearby residences in ways the residents find objectionable. KCCP Policy R-204.c provides that agricultural management practices in the rural area should not be construed as public nuisances when carried on in compliance with applicable regulations even though they may impact nearby residences.

116. Appellants have not shown that the CUP fails to comply with Criterion A.

117. KCC 21A.44.040.B (Criterion B) requires that the location, size and height of buildings, structures, walls and fences, and screening vegetation not hinder neighborhood

circulation or discourage the permitted development or use of neighboring properties. Appellants contend that the use will discourage permitted development of neighboring properties such as the Dolders' property to the west.

118. CUP criterion B focuses on the physical design of the proposal. Appellants presented no information that the location, size, and height of the greenhouse, perimeter fence, or the planting approved as mitigation for the stream buffer averaging plan discourage permitted development of neighboring properties. Their objection is to the odor generated by budding and flowering marijuana plants.

119. Appellants have not shown that the CUP fails to comply with Criterion B.

120. KCC 21A.44.040.H (Criterion H) requires that the CUP not conflict with the Comprehensive Plan or the basic purposes of Title 21A KCC. Appellants contend that the CUP is inconsistent with KCCP Policies R-204, R-205 and R-324 and the definition of agricultural products sales. The Examiner has addressed these contentions in Topic 3 above.

121. Appellants have not shown that the CUP fails to comply with Criterion H.

122. KCC 21A.44.040.E (Criterion E) is at the heart of these appeals. It requires that the conditional use not be in conflict with the health and safety of the community. Appellants contend that the odor from the marijuana grow would be detrimental to the overall health and safety of the community. Appeal, pp. 16-17. DPER considered health impacts from a land-use perspective, including lighting, hours of operation, intensity, odor control, and traffic. Testimony of Ty Peterson.

123. As the CUP explains, King County has chosen not to regulate odors in the rural areas and has no measurable standards, definitions, or requirements pertaining to odor, other than KCC 21A.31.250, which requires recreational marijuana production facilities requiring a CUP to submit an odor management plan for any areas of indoor processing or ventilation of any structure used to produce or process marijuana. Exhibit D-2, bullet 4, p. 12. The purpose of the odor management plan is to minimize odors and fumes from chemicals or products used in or resulting from either production or processing of marijuana. KCC 21A.31.250.

124. Other uses permitted in the rural area, such as dairy farms, generate odors. Exhibit D-2, bullet 4, p. 12; Testimony of Ty Peterson.

125. The Applicant's odor management plan is comprised of the following components: (1) utilization of an enclosed marijuana greenhouse with an air exchange/filtration system for limited processing of plants during the most odorous time in their production process; (2) use of carbon filters in temporary outdoor tented structures used for drying marijuana; (3) use of the strains of marijuana which produce the least odor; and (4) obtaining and adhering to the PSCAA permitting requirements and standards. Exhibit D-2, p. 12; Exhibit A-4, CUP Application form, Attachment C; testimony of William Cloud. The Applicant has implemented components 1-3. As explained below, it has not yet obtained the PSCAA NOC.

126. Although not required by the code in effect at the time, DPER imposed Conditions 3 and 10 to address odor concerns.[7] They require the Applicant to submit a copy of the approved PSCAA NOC to DPER after "the building/grading permit issuance" and prior to final construction approval. If the applicant does not do this, the CUP is null and void. At the time of the hearing in this matter, Conditions 3 and 10 had not been triggered. DPER had put the building permit for the fence on hold pending outcome of these appeals and the Applicant had not yet applied for a permit for the greenhouse.

127. Appellants contend that Condition 3 is wholly insufficient, that odors from outdoor marijuana grows cannot be controlled because the wind cannot be controlled. Appeal, pp. 16-17. They also contend that the Applicant will not be able to satisfy PSCAA standards. Appellants' Post-Hearing Brief, pp. 11-12.

128. The Applicant submitted an application to PSCAA on August 25, 2016. Exhibit D-24, Attachment A; Exhibit C-10; testimony of William Cloud. A former PSCAA employee advised him that PSCAA requires that there be no detectable cannabis odor from any marijuana facility beyond the property boundary in a rural area; the operator is required to monitor at or beyond the property line at least once each calendar week and an independent third party at least every 30 days; and the operator must keep records of the monitoring. Exhibit C-7. He also provided Mr. Cloud with an example of conditions imposed on an outdoor marijuana production operation. Exhibit C-10; testimony of William Cloud.

129. Mr. Cloud followed up with PSCAA in May 2017, advising that he was ready to start his first outdoor crop and asking whether there was anything he needed to do for PSCAA. Exhibit C-12.

130. PSCAA put the application on hold pending the County's decision on the CUP and the resolution of these appeals. Exhibit A-14, May 10, 2017, email from PSCAA to Stacy Goodman; testimony of Rick Hess. PSCAA will provide a comment period on its draft permit. Exhibit A-14, May 10, 2017, email from PSCAA to Stacy Goodman.

131. PSCAA enforces regulations set forth in chapter 173-400 WAC, the purpose of which are to establish technically feasible and reasonably attainable standards to control and/or prevent the admission of air contaminants. WAC 173-400-010. As required by these regulations, PSCAA applies a "best available control technology" or "BACT" standard to permit review. BACT is:

> [A]n emission limitation based on the maximum degree of reduction for each air pollutant subject to regulation under chapter 70.94 RCW emitted from or which results from any new or modified stationary source, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes and available methods, systems, and techniques… for control of each such pollutant.…

[7] Ordinance 18326 added a requirement that PSCAA approve the NOC before marijuana products are imported onto a marijuana production site. Current KCC 21A.08.090, Exhibit 27, section 15, p. 43.

WAC 173-400-030(12).

132. PSCAA may adopt standards or requirements. WAC 173-400-020(2). PSCAA Rule 9.11(a) provides:

> It shall be unlawful for any person to cause or allow the omission of any air contaminant in sufficient quantities and of such characteristics and duration as is, or is likely to be, injurious to human health, plant or animal life, or property, or which unreasonably interferes with enjoyment of life and property.

At the hearing in this matter, Rick Hess, an inspections manager at PSCAA, described this as a nuisance standard.

133. PSCAA uses a 5-level scale (0-4) to determine the strength and unpleasantness of an odor, with level 0 being no odor detected and level 4 being an odor so strong that a person does not want to remain present. PSCAA Rule 9.11(b)(1).

134. Ms. Medved smelled the marijuana on occasion during the summer of 2017. The odor comes and goes. When it is present, it irritates her throat and eyes, can make it unpleasant to eat or work outdoors, and clings to her clothes. Testimony of Adrian Medved.

135. Appellants presented testimony of neighbors of several other marijuana production operations in King and Skagit counties. Those operations are generally not comparable to the one at issue as they involve serial crops (testimony of Mike Sherstad, Kris Zucconi, and Lawrence Snyder) or the witness was unaware of any odor management plan (testimony of Mike Sherstad).

136. Ms. Medved, Marney Valdez, Scott Valdez, and Ms. Dolder submitted online complaints to PSCAA regarding the Cloud Bud operation. Exhibit A-33, pp. 8 and 10-13. On August 17, 23, and 29, 2017, Scott and Marney Valdez described the smell as skunk/musk. On August 29 and 30, 2017, Ms. Dolder, Ms. Valdez, and Ms. Medved complained of a strong sulfuric smell that they attributed to the Applicant, suspecting that they used sulfuric pots to mask the marijuana odor. Mr. Cloud testified that he did not burn sulfur pots.

137. PSCAA conducted site visits of the Applicant's marijuana production in early and late September, 2017. It was not able to determine that the odors constituted a nuisance. Testimony of Rick Hess.

138. Mr. Cloud walks around the fence line at least weekly to determine if he can detect an odor. Testimony of William Cloud.

139. The preponderance of the evidence is that marijuana produces an odor which many find unpleasant for a period of approximately 6 weeks, with the strongest smell occurring for approximately 2 weeks when the plants are fully budded. Exhibit A-4, CUP Application form, Attachment C; testimony of William Cloud describing the 14-week cycle at his previous medical and recreational marijuana operation; testimony of Ty Peterson regarding review of odor studies; testimony of Adrian Medved, Marney Valdez, Scott

Valdez, Holly Dolder, and Linda MacLeod regarding their experience in August–September 2017.

140. Exhibit A-40 is an example of conditions PSCAA imposed on an outdoor marijuana production use in Woodinville. It imposes a condition that no detectable cannabis odor from the facility is allowed outside the facility property line. Although Appellants characterized this condition as a regulatory standard, the Examiner was not able to find an adopted standard in chapter WAC 173-400 or PSCAA's rules requiring that cannabis odor not cross a property line. Nor did Appellants provide a citation to one. Mr. Hess described this condition as BACT. Therefore, the Examiner concludes that PSCAA imposed this condition as BACT.

141. Exhibit A-40 also established a one-year trial for the operation during which the operator must monitor odors at and beyond the property line on a weekly basis and a neutral third party on a monthly basis; the operator must immediately initiate corrective action to eliminate the odor if odor is detected; the operator must keep detailed daily records regarding the size and growth stage of the plants and weather conditions including windspeed and direction, temperature, precipitation, and cloud cover.

142. It is reasonable to expect that PSCAA will impose conditions similar to those contained in or described in Exhibits A-40, Exhibit C-7, and Exhibit C-10 on the Applicant.

143. A violation of the PSCAA approval would constitute a violation of the CUP conditions of approval. Testimony of Ty Peterson.

144. As approved by DPER, CUP Condition 1 requires that the building/grading permit be issued within four years of transmittal of the CUP's decision or by June 9, 2021. The Examiner has clarified Condition 1 to provide that building/grading permit(s) for all components of the proposal which require a building or grading permit including, but not limited to, the fence, greenhouse, and vehicle turnout be issued within four years of her decision.

145. As approved by DPER, CUP Conditions 3 and 10 require that the Applicant obtain the PSCAA NOC prior to final inspection approval of the required building/grading permit. Final inspection occurs after issuance of the permit. Thus, the CUP as conditioned by DPER, would allow the marijuana production to continue to operate for more than four years before obtaining the PSCAA approval on which DPER relies for mitigation of odor impacts. This timeframe is not reasonable.

146. The Examiner has revised Conditions 3 and 10 to require that the Applicant obtain the PSCAA NOC by later of August 1, 2018 or, in the event of an appeal(s), within 12 months of the final resolution of any appeal(s).

Topic 5: Subdivision (CUP Appeal Issue 11)

147. Appellants contend that the lease constitutes a subdivision under KCC 19A.08.060, KCC 19A.08.070, and the state subdivision statute, chapter 58.17 RCW. Appeal, p. 15. In their Post-Hearing Brief, they clarified that this issue is tied to their argument that the use is an impermissible home occupation or home industry. They contend that, so long as the use

is conducted on a parcel on which a residence is located, it is a home occupation or home industry and that, if Applicant wishes to avoid this result, they must subdivide the parcel to create a separate parcel for its use. As the Examiner has found that the use is not a home occupation or home industry, she does not address this issue further.

148. Appellants also contend that the failure to file a subdivision application with the CUP application is jurisdictional. Appeal, p. 15. They do not explain how the failure to file a subdivision application is jurisdictional. Presumably, they believe it makes the CUP application incomplete, a contention addressed in Topic 1 above.

Topic 6: Access (CUP Appeal Issue 12)

149. Appellants contend that the proposal does not comply with KCC 21A.12.220.E, which requires that the site "shall abut or be accessible from at least one public street functioning at a level consistent with the King County Road Design Standards" because it does not abut and is not accessible from a public street; DPER issued a variance from the Road Design Standards for 269th Avenue SE; and traffic information regarding a prior use provided by the Applicant is false.

150. The proposal is accessible from SE 200th Street, a public street to the north by means of 269th Avenue SE, the private access. Exhibit D-10; Exhibit D-2, Finding B.6 (Access), p. 4.

151. The Road Design Standards permit variances. The fact that the Applicant obtained a variance for 269th Avenue SE does not demonstrate failure to comply with KCC 21A.12.220.E.

152. Appellants presented no evidence or testimony regarding alleged, unspecified inaccuracies in the traffic study provided by the Applicant.

153. Appellants have not shown that the proposal does not comply with KCC 21A.12.220.E.

Topic 6: The Applicant's ability to comply with the CUP conditions

154. Appellants contended at the hearing and in the Post-Hearing Briefs that the Applicant will not be able to comply with PSCAA standards and the WSLCB regulation requiring a site-obscuring fence and will not be able to provide the required vehicle pullout area. Appellants cite *HJS v. Pierce County*, 148 Wn.2d 451, 61 P.3d 1141 (2003) (*HJS*) for the proposition that the Examiner has the authority to reverse DPER's CUP decision on that basis.

155. *HJS* is inapposite. That case involved the Pierce County Hearing Examiner's expressly granted authority to revoke or modify any site plan approval or permit if the permit has been exercised contrary to the terms of approval. The permit holder had intentionally and flagrantly violated clearing restrictions contained in a subdivision approval. The examiner found that the violations were especially egregious because the conditions which had been violated had been imposed to address the most significant issues associated with the permit approvals and to avoid the preparation of an environmental impact statement.

156. Unlike *HJS*, the Examiner has no express authority to overturn a permit decision based upon a concern that the Applicant may not be able to comply with conditions. Nor has the Applicant violated a condition of CUP approval, much less blatantly or flagrantly violated it.

157. The Applicant did construct the fence and greenhouse without permits. DPER determined that these matters could be resolved through the CUP. The Applicant has submitted an ABC permit for the fence and will have to submit a building permit for the greenhouse and move the fence to provide the required building setback from the Type N stream buffer.

158. With regard to the PSCAA permit, as explained in the discussion of CUP Criterion E in Topic 4, PSCAA has found no violation of its nuisance standard. Whether it will impose the conditions outlined in Exhibit C-10 remains to be seen. The Applicant has reviewed these conditions, implemented some of them, and testified that he believes he will be able to comply with them and is willing to undertake additional odor management measures if directed to do so by PSCAA. Appellants have not demonstrated that the Applicant will not be able to comply with a permit which has not yet been issued.

159. DPER has confirmed that violation of the PSCAA NOC constitutes violation of the CUP. The Examiner has required periodic review of the CUP. This condition provides an avenue for revisiting this issue if the Applicant is unable to comply with the NOC.

160. Appellants contend construction of the vehicle pullout required by CUP Condition 8.c requires agreement of all parties to the Road Maintenance Agreement contained in Exhibit A-15 and that the Applicant will not be able to obtain the approval of the other parties to the agreement. DPER contends that the Alsagers and their lessee have authority to construct the vehicle pullout under an order of partial summary judgment in Superior Court. The Examiner does not have the authority to resolve this dispute.

161. The Road Maintenance Agreement requires express written consent of each of the parties to the agreement for any alterations, additions, or improvements to the private road which exceed filling of chuckholes and periodic regravelling. The primary purpose of this Agreement appears to be cost sharing of maintenance obligations. If it is determined that the Road Maintenance Agreement controls and the Applicant is unable to obtain the approval of the other parties, it will be unable to fulfill CUP Condition 8.c. DPER can address this potential outcome during the periodic review required by Condition 13, as can the Examiner in the event of an appeal.

162. The proper remedy to address the concern that an applicant may not be able to comply with permit conditions is to monitor the operation and to withdraw the permit in the event of noncompliance. *Maranatha*, 59 Wn. App. at 992.

The DNS Appeal

163. Appellants contend that DPER should have issued a mitigated DNS (MDNS) rather than a DNS; the SEPA official did not have sufficient information to adequately assess wetlands, odors, traffic, aesthetics, and water; DPER did not address a known elk-breeding area; the environmental checklist did not identify crop odors, and the

responsible official made no inquiry or investigation into odor impacts; and DPER did not conduct an independent review because Ty Peterson acted as the responsible official and the project manager for the proposal.

164. SEPA does not require the County to issue a MDNS rather than a DNS simply because it has determined that it will impose conditions on a project approval. In fact, the SEPA rules expressly provide that, before requiring mitigation measures, agencies "shall consider whether local, state, or federal requirements and enforcement would mitigate an identified impact." WAC 197-11-660(1)(e). Further, if, during project review, a GMA county, such as King County:

> …determines that the requirements for environmental analysis, protection, and mitigation measures in [its] development regulations…or in other applicable local, state or federal laws or rules provide adequate analysis of and mitigation for specific adverse environmental impacts of the project action [it] shall not impose additional mitigation under [SEPA].

WAC 197-11-660(1)(g) (emphasis added).

165. DPER properly relied on the critical area regulations for analysis of and mitigation of impacts to critical areas. It thoroughly analyzed wetlands, streams, and critical area buffers in the vicinity of the proposal. CUP Condition 5 outlines the conditions applicable to the wetlands and Type N stream. The CUP acknowledges that required improvements to the private access driveway will encroach into wetlands, streams, and their buffers. Impacts to these critical areas and their buffers will be evaluated during review of the building and/or grading permit for the improvements. Avoidance and minimization of impacts will be required, with compensatory mitigation for allowed alterations. Exhibit D-2, p. 10.

166. Appellants observe that the 2015 Sewall Report did not include all wetlands. After reviewing the environmental checklist, the responsible official may require additional information including field investigations and research reasonably related to determining a proposal's environmental impacts. WAC 197-11-100. Again, that is precisely what occurred here. DPER required further analysis of: (a) a ditch it ultimately determined to be a Type N stream; (b) a pond it determined based on soils analysis to be a man-made pond and not a wetland; (c) the location of the wetlands to the southeast and southwest; and (d) consultation with WDFW regarding impacts to elk.

167. Appellants contend that no critical areas report or alterations application was submitted with the environmental checklist. Appeal, p. 23. In response to a question on the environmental checklist asking for a list of any environmental information that has been prepared, or will be prepared, directly related to this proposal, the Applicant referenced the 2015 Sewall Report which they had previously submitted to DPER. SEPA does not require that every application be attached to an environmental checklist.

168. The Applicant does not propose to alter critical areas. It they do propose buffer averaging for the Type N stream. Buffer averaging does not require a critical areas alteration permit. Testimony of Laura Casey.

169. Consistent with WAC 197-11-660(1)(e) and (1)(g), the responsible official relied on the PSCAA requirements and enforcement to mitigate odor impacts and annotated the environmental checklist with the following:

> A clean air permit is required from the Puget Sound Clean Air Agency. A Notice of Construction permit from PSCAA will be obtained.

NOC 11237, Exhibit D-2, Finding E.1, p. 8, Finding E.8, p. 10, bullet 5, p. 12; Exhibit D-7, p. 4.

170. The responsible official relied on use of the portable toilet for sewage disposal for the Cloud Bud employees.

171. Appellants did not present any evidence supporting their contentions that traffic impacts will be greater than estimated and that the proposal will generate significant adverse aesthetic impacts.

172. Appellants contend that the designation of Mr. Peterson as the responsible official does not comply with WAC 197-11-910. The operative sentence of that provision states in full:

> Since it is possible under these rules for an agency to be acting as a lead agency prior to actually receiving an application for a license to undertake a private project, designation of the first department within the agency to receive an application as the responsible official will not be sufficient.

DPER assigns applications to various product lines during a weekly "huddle." Testimony of Ty Peterson and Laura Casey. It determined that the Cloud Bud CUP application should be assigned to the commercial product line of which Mr. Peterson is the Product Line Manager. At that time, DPER determined that the proposal was categorically exempt under SEPA. Nearly a year later, DPER determined that replacement of a culvert under the private access road triggered SEPA review. DPER was not acting as a lead agency under SEPA at the time it received the CUP application. WAC 197-11-910 does not apply.

173. Appellants have not shown a violation of the State or County SEPA rules or that the proposal, as conditioned, will result in a significant adverse environmental impact.

DECISION:

The CUP is hereby GRANTED subject to the following conditions:

1. All required building/grading permits, including permit(s) for the fence, greenhouse, and improvements to 269th Avenue SE shall be issued within four years of the transmittal date of this decision. This period may be extended for one year pursuant to KCC 21A.42.090.E.

2. After issuance of the building/grading permit(s) and prior to final construction approval, Applicant shall submit a copy of a WSCLB valid license to DPER. Otherwise, this action shall become null and void.

3. The Applicant shall submit a copy of the approved PSCAA Notice of Construction permit to DPER by August 1, 2018, unless the Examiner's decision is appealed. In the event of an appeal of the Examiner's decision, the applicant shall submit a copy of the approved PSCAA Notice of Construction permit to DPER within 12 months of the final resolution of any appeal(s). Otherwise, the CUP shall become null and void.

4. Development shall be in substantial conformance with the revised site civil plans dated received January 17, 2017, and Wetland Buffer Averaging Plan received October 17, 2016.

5. The proposal shall comply with the following wetland conditions as part of the building/grading permit approval.

    A. The Category III wetlands on this property shall be protected from this development with a 60-foot wide buffer and 15-foot building setback upland from the buffer edge. The Type N aquatic areas will be protected from future development with a 65-foot buffer (except where buffer width is averaged) and 15-foot building setback upland from the buffer edge. All other wetlands and aquatic areas on this parcel and along the private driveway and access road shall be protected consistent with KCC chapter 21A.24.

    B. A Final Wetland Buffer Averaging Plan shall be provided for DPER review and approval with a grading or building permit application, following approval of the CUP. This plan shall also address impacts from construction or widening of the private driveway, and the access road, 269th Avenue SE. The critical areas and mitigation locations shall be clearly shown on the grading and/or building permit site plan.

    C. A Performance Financial Guarantee will be required to be posted prior to grading and/or building permit issuance to cover plant procurement, installation, and at least three years of monitoring.

    D. An as-built drawing shall be provided following implementation of the Final Wetland Buffer Averaging Plan. DPER staff shall inspect the installation of the Wetland Buffer Averaging Plan.

    E. The Wetland Buffer Averaging Plan shall be monitored by the Applicant for three years following acceptance of installation to ensure that the performance standards are met. A monitoring report shall be provided to DPER after October 31 of each year.

    F. Maintenance of the mitigation area shall occur annually. Irrigation shall be provided June through September for the first year following planting, to supplement rainfall so the plantings receive one inch of water per week.

6. The development of this project is subject to all rules, regulations, policies, and codes that are not specifically modified by this approval.

7. Final approval of the drainage system proposed under this CUP will be conducted and finalized under the subsequent building permit. The TIR and civil engineering plans will be reviewed for compliance of the 2009 King County Surface Water Design Manual (KCSWDM).

    A. The proposed project is exempt from the flow control facility and the water quality requirements of the 2009 KCSWDM. The project is required to provide a flow control BMP. Rain Gardens will be utilized to meet the flow control BMP requirement.

    B. The 2009 KCSWDM requires 8-inch pipes for privately maintained conveyance systems.

    C. Show the Critical Areas buffers on the civil engineering plans.

8. The proposal shall comply and be consistent with the conceptual design of civil plans dated received January17, 2017, and road variance engineering conditions as part of the building/grading permit(s) approval which will require:

    A. No commercial-sized vehicles; the maximum vehicle size will be panel-van size.

    B. On-site parking area design to provide for vehicle turnaround.

    C. Off-site vehicle pull out area to allow pullout for vehicles passing one another along 269th Avenue SE, generally in accordance with conceptual plan, but final location to be determined during permit review to assure no infringement on, or mitigation to, potential wetlands buffers.

9. The Applicant shall submit documentation that it has applied for a PSCAA Notice of Construction permit when it submits for the greenhouse construction permit application. All department permits issued to either marijuana producers or marijuana processors, or both, shall require that a PSCAA Notice of Construction permit be issued as required by Condition 3.

10. Any non-exempt noise generated by this proposal shall be in conformance with the provisions contained in King County Code Title 12.

    Work activity associated with the marijuana production and processing shall be in accordance with Washington State Department of Labor and Industries' acceptable practices and consistent with portable restroom and sanitary facilitates typically associated with agricultural and resource based work.

11. Solid and/or liquid wastes generated during marijuana production and processing shall be stored, managed, and disposed of in accordance with applicable state and local requirements. To comply with the King County Solid Waste Code, Applicant shall

coordinate with King County Public Health for disposal of any solid and hazardous waste generated by the marijuana production.

12. Applicant shall submit a detailed photometric lighting plan for the proposed outdoor lighting at the time of building/grading permit application. Lighting shall not exceed 1-foot candle at any property line.

13. For three consecutive years, DPER shall conduct an annual review of the CUP to determine whether the site is operating consistently with all existing permit conditions using the procedure in KCC 21A.22.055.B for periodic review of a mineral extraction operating permit (a Type 2 land use decision). If the site is operating consistently with all existing permit conditions for three consecutive years, subsequent reviews shall be conducted every five years.

ORDERED November 7, 2018.

Alison Moss
Hearing Examiner pro tem

NOTICE OF RIGHT TO APPEAL

King County Code 20.22.040 directs the Examiner to make the County's final decision for this type of case. This decision shall be final and conclusive unless proceedings for review of the decision are timely and properly commenced in superior court. Appeals are governed by the Land Use Petition Act, Chapter 36.70C RCW.

MINUTES OF THE OCTOBER 3, 5, AND 10, 2017, HEARINGS ON THE APPEAL OF CLOUD BUD, DEPARTMENT OF PERMITTING AND ENVIRONMENTAL REVIEW FILE NO. CDUP160002

Alison Moss was the Hearing Examiner in this matter. Participating in the hearing were: Cristy Craig, Todd Wyatt, William Cloud, Ty Peterson, Adrian Medved, Marney Valdez, Scott Valdez, Linda McLeod, Cindy Kemp, Dr. Dale Alsager, Laura Casey, Rick Hess, Sarah Spear Cooke, Ph.D., Mike Sherstad, Kris Zucconi, Holly Dolder, Thom Dolder, Lori Scott, Laurence Snyder, and Ed Sewall.

The following exhibits were offered and entered into the record on October 3, 2017:

Department-offered exhibits

Exhibit no. D-1	Determination of Non-Significance, dated June 9, 2017
Exhibit no. D-2	Conditional use permit no. CDUP160002 report and decision, dated June 9, 2017
Exhibit no. D-3	Notice of decision and SEPA threshold determination, dated June 9, 2017

Exhibit no. D-4	Land use permit application, received February 26, 2016
Exhibit no. D-5	Conditional use permit application, dated January 21, 2016
Exhibit no. D-6	Affidavit concerning critical areas compliance with posting date of January 16, 2016
Exhibit no. D-7	SEPA checklist, received February 9, 2017
Exhibit no. D-8	Fire district receipt, dated January 21, 2016
Exhibit no. D-9	Certification and transfer of applicant status, dated January 18, 2016
Exhibit no. D-10	Memorandum from Jeff Schramm to William Cloud with trip generation, dated February 12, 2016
Exhibit no. D-11	a. Preliminary technical information report/Level 1 downstream drainage analysis, dated February 25, 2016 b. Final technical information report, dated January 8, 2017
Exhibit no. D-12	a. Letter from Sewall Wetland Consulting to William and Sharon Cloud with critical area designation report, dated December 11, 2015 b. Letter from Sewall Wetland Consulting to Laura Casey with response to request for critical areas additional information, dated May 27, 2017
Exhibit no. D-13	Letter from Chad Armour to Tom Barghausen with wetland delineation, dated September 2, 2013; Letter from DPER to Tom Barghausen with critical areas designation no. CADS130274, dated December 11, 2013
Exhibit no. D-14	Map of property
Exhibit no. D-15	Map of fence detail
Exhibit no. D-16	a. Map of property by Bennet PS&E, dated December 9, 2002 b. Map of Cloud Bud conditional use permit c. Map of site plan d. Map of TESC plan
Exhibit no. D-17	Letter from DPER to William Cloud with subject of rural minor access road improvements to 269th Avenue SE, dated October 3, 2016
Exhibit no. D-18	Letter from DPER to Mark Rigos with subject of Cloud Bud site, dated December 22, 2016
Exhibit no. D-19	Email from Robert Eichelsdoerfer to Norman Cabiao with subject of rural minor access road improvements to 269th Avenue SE, dated September 21, 2017
Exhibit no. D-20	Email from Peter Rimbos to Normal Cabiao with subject of rural minor access road improvements to 269th Avenue SE, dated September 20, 2017
Exhibit no. D-21	iMap of neighborhood, dated September 20, 2016
Exhibit no. D-22	Declaration of covenant private water supply, dated July 10, 1995
Exhibit no. D-23	Drawing, approved May 25, 2001
Exhibit no. D-24	Response to letter from DPER with subject of CDUP160002, dated August 5, 2016
Exhibit no. D-25	Letter from DPER to William Cloud with 2007 KCRDCS adjustment no. VARR160020, dated December 2, 2016
Exhibit no. D-26	Road variance authorization letter, dated November 17, 2016
Exhibit no. D-27	Email from Stewart Reinbold to Christopher Anderson with subject of Cloud 9 proposal, dated October 5, 2016

Exhibit no. D-28	Letter from DPER to William cloud with notice of complete application for application time periods, dated March 18, 2016
Exhibit no. D-29	Wetland and drainage corridor evaluation and delineation report: recent active pasture and existing roadway maintenance actions, dated August 13, 2004
Exhibit no. D-30	Letter from Cooke Scientific re: review of the Cloud BUD permit application with King County, dated September 26, 2017
Exhibit no. D-31	Letter from Sewall Wetland Consulting re: Cloud CDUP16-0002, Parcel #0122069044 SWC Job# 14-129
Exhibit no. D-32	Preliminary wetland buffer averaging plan, dated June 28, 2016
Exhibit no. D-33	Statement of qualifications of Laura Casey

Appellants-offered exhibits

Exhibit no. A-1	Conditional use permit no. CDUP160002 report and decision, dated June 9, 2017 *(duplicate of D-2)*
Exhibit no. A-2	Notice of decision and SEPA threshold determination, dated June 9, 2017 *(duplicate of D-3)*
Exhibit no. A-3	Determination of non-significance, dated June 9, 2017 *(duplicate of D-1)*;
Exhibit no. A-4	Critical areas alteration exception or conditional use permit no. CDUP160002, completed March 18, 2016; Land use permit application, received February 26, 2016 *(duplicate of D-4)*; Typical CUP submittal requirements checklist, dated January 6, 2016; Conditional use permit application, dated January 21, 2016 *(duplicate of D-5)*; Affidavit concerning critical areas compliance, dated January 16, 2016 *(duplicate of D-6)*; SEPA checklist, received February 9, 2017 *(duplicate of D-7)*; Map of property *(duplicate of D-14)*; Declaration of covenant private water supply, dated July 10, 1995 *(duplicate of D-22)*; Drawing, approved May 25, 2001 *(duplicate of D-23)*; Fire district receipt, dated January 21, 2016 *(duplicate of D-8)*; Certification and transfer of applicant status, dated January 18, 2016 *(duplicate of D-9)*; Summary of charges, dated February 26, 2016; Memorandum from Jeff Schramm to William Cloud Bud with trip generation, dated February 12, 2016 *(duplicate of D-10)*; Preliminary technical information report/Level 1 downstream drainage analysis, dated February 25, 2016 *(duplicate of D-11a)*; Letter from Sewall Wetland Consulting to William and Sharon Cloud with critical areas designation report, dated December 11, 2015 *(duplicate of D-12a)*; Letter from Chad Armour to Tom Barghausen with wetland delineation, dated September 3, 2012 *(duplicate of D-13)*
Exhibit no. A-5	Letter from DPER to William cloud with notice of complete application for application time periods, dated March 18, 2016 *(duplicate of D-28)*

Exhibit no. A-6	Letter from Carson Noel PLLC to DPER with Appellants' opposition to Cloud Bud, dated April 25, 2016
Exhibit no. A-7	Letter from Carson Noel PLLC to DPER with additional comments, dated May 3, 2016
Exhibit no. A-8	Letter from Carson Noel PLLC to DPER with additional comments, dated May 12, 2016
Exhibit no. A-9	Letter from Carson Noel PLLC to DPER with additional comments, dated September 16, 2016
Exhibit no. A-10	Letter from Carson Noel PLLC to DPER with additional comments, dated April 7, 2017
Exhibit no. A-11	Letter from Carson Noel PLLC to DPER with comments and requests, dated April 27, 2017
Exhibit no. A-12	Letter from Carson Noel PLLC to DPER with comments, dated April 27, 2017
Exhibit no. A-13	Letter from Carson Noel PLLC to DPER with comments, dated May 8, 2017
Exhibit no. A-14	Letter from Carson Noel PLLC to DPER with comments, dated May 10, 2017
Exhibit no. A-15	Road maintenance agreement, dated January 1986
Exhibit no. A-16	Road standards variance request to the County Road Engineer, dated December 8, 2016; Road variance authorization letter, dated November 3, 2016 *(duplicate of D-25)*; Road standards variance request to the County Road Engifeer, dated November 3, 2016; Certification and transfer of applicant status, dated November 4, 2016; Letter from DPER to William Cloud with subject of rural minor access road improvements to 269th Avenue SE, dated October 3, 2016 *(duplicate of D-17)*; Memorandum from Jeff Schramm to William Cloud with trip generation, dated February 12, 2016 *(duplicate of D-10)*; Drop-off cover sheet for permit no. CDUP160002, dated December 6, 2016; Maps of neighborhood; Letter from DPER to William Cloud with 2007 KCRDCS adjustment no. VARR160020, dated December 2, 2016 *(duplicate of D-25)*; Internal DPER email with subject CDUIP160002, dated March 27, 2017
Exhibit no. A-17	Statutory warranty deed, dated August 11, 1995
Exhibit no. A-18	Lease agreement, dated April 9, 2015
Exhibit no. A-19	Lease agreement, dated January 15, 2016
Exhibit no. A-20	Farm conservation plan, dated January 2005
Exhibit no. A-21	Declaration of covenant private well, received November 29, 1990
Exhibit no. A-22	San Juan County Hearing Examiner decision no. PAPL00140001 and PAPL140002, dated December 10, 2014;
Exhibit no. A-23	General notice of violation from Puget Sound Clear Air Agency no. 3008688, dated May 7, 2017

Exhibit no. A-24	United States Bankruptcy Court Western District of Washington case no. 1610111CMA response to motion for relief from the automatic stay/declaration of debtors, dated July 28, 2017
Exhibit no. A-25	Photograph of property
Exhibit no. A-26	King County ordinance no. 18269 signature report, dated April 26, 2016
Exhibit no. A-27	King County ordinance no. 18326 signature report, dated July 26, 2016
Exhibit no. A-28	King County Code Title 21A, updated March 8, 2016
Exhibit no. A-29	Email from DPER to Peter Rimbos with information on technical screening, dated March 28, 2016
Exhibit no. A-30	Email from DPER to Ron Dolee with answers to questions, dated May 17, 2016
Exhibit no. A-31	Internal DPER email with feedback on MJ public testimony, dated December 3, 2013
Exhibit no. A-32	Skagit County ordinance no. O20150005, dated May 5, 2015
Exhibit no. A-33	Puget Sound Clean Air Agency case no. 20175011061 evaluation summary of May 3, 2017 incident
Exhibit no. A-34	Breitbart article titled “Sacramento County bans outdoor marijuana grow operations,” dated April 23, 2014
Exhibit no. A-35	Sacramento County Code 6.88.050
Exhibit no. A-36	Letter from Carson Noel PLLC to Puget Sound Clean Air Agency with comments, dated April 17, 2017
Exhibit no. A-37	Email from Carson Noel PLLC to DPER with copy of letter to Puget Sound Clean Air Agency, dated April 27, 2017
Exhibit no. A-38	Email from Carson Noel PLLC to DPER with affidavit, dated May 5, 2017
Exhibit no. A-39	Affidavit of Marney and Scott Valdez and Adrian Medved regarding CDUP160002, dated May 4, 2017
Exhibit no. A-40	Order of approval to construct from Puget Sound Clean Air Agency, dated June 14, 2016
Exhibit no. A-41	Response to general notice of violation from Puget Sound Clean Air Agency no. 3008688, received June 22, 2017
Exhibit no. A-42	Puget Sound Clean Air Agency evaluation summaries of complaints
Exhibit no. A-43	Press release article titled “Horticultural research initiated in Maple Valley,” dated March 28, 2016
Exhibit no. A-44	Maps of site plan
Exhibit no. A-45	SEPA checklist *(duplicate of D-7)*
Exhibit no. A-46	Letter from DPER to William Cloud with request for critical areas additional information, dated April 25, 2016
Exhibit no. A-47	Email from DPER to William Cloud with acceptance of proposed buffer averaging and Sewall Wetland Consulting mitigation plan, dated August 10, 2016
Exhibit no. A-48	Letter from Mark Rigos to DPER with response to review comment letter of May 31, 2016, dated July 9, 2016
Exhibit no. A-49	Letter from Sewall Wetland Consulting to Laura Casey with response to request for critical areas additional information, dated May 27, 2017 *(duplicate of D-12b)*
Exhibit no. A-50	Letter from Carson Noel PLLC to DPER with Appellant’s opposition to file no. CDUP160002, dated April 25, 2016

Exhibit no. A-51	Letter from Mark Rigos to DPER with response letter for Cloud Bud site, dated April 17, 2016
Exhibit no. A-52	Letter from Sewall Wetland Consulting to William and Sharon Cloud with critical area designation report, dated December 11, 2016 *(duplicate of D-12a)*
Exhibit no. A-53	Internal DPER letter with critical areas review, dated November 4, 2015
Exhibit no. A-54	Letter from Chad Armour to Tom Barghausen with wetland delineation, dated September 2, 2013 *(duplicated of D-13)*
Exhibit no. A-55	Letter from DPER to Tom Barghausen with critical areas designation no. CADS130274, dated December 11, 2013 *(duplicated of D-13)*
Exhibit no. A-56	Wetland/stream conditions of permit/approval no. B06M1048, dated July 20, 2006
Exhibit no. A-57	Photograph of property
Exhibit no. A-58	Photograph of property
Exhibit no. A-59	Photograph of property
Exhibit no. A-60	Photograph of property
Exhibit no. A-61	Photograph of property
Exhibit no. A-62	Email from Muckelshoot Indian Tribe Fisheries Division to DPER with comments on notice of application, dated January 10, 2017
Exhibit no. A-63	Search records for Cloud Bud LLC
Exhibit no. A-64	Photographs of elk
Exhibit no. A-65	Letter from Cooke Scientific to Carson Noel PLLC with review of Cloud Bud permit application, dated September 12, 2017
Exhibit no. A-66	Revised technical information report, dated July 10, 2016
Exhibit no. A-67	VOICE of the Valley article titled “Horticultural research initiated in Maple Valley,” dated April 5, 2016
Exhibit no. A-68	Letter from DPER to Mark Rigos with technical information report comments, dated March 28, 2016
Exhibit no. A-69	Letter from DPER to Mark Rigos with technical information report comments, dated May 31, 2016
Exhibit no. A-70	Stop work order no. ENFR160465, dated June 10, 2016 Letter from DPER to William Cloud and Dale and Betty Alsager with code enforcement case no. ENFR160465, dated June 15, 2016; Internal DPER email with subject ENFR160465, dated July 26, 2016
Exhibit no. A-71	Order of the Spokane County Board of Equalization petition no. BE160096, dated October 3, 2016; Letter from Robert Bertsch to Spokane County Board of Equalization with comments, dated August 15, 2016; Letter from Robert Bertsch to Spoke County Board of Equalization with comments, dated October 17, 2016; Taxpayer petition to Spokane County Board of Equalization review of real property valuation determination, dated June 7, 2016; Official valuation notice, dated tax year 2017; Parcel information for parcel no. 243519016, dated April 12, 2017; WAC 314-55-075
Exhibit no. A-72	King county webpage regarding home business
Exhibit no. A-73	CUP instructions and information
Exhibit no. A-74	Photograph, marijuana grow (9/27/2017)

Applicant-offered exhibits

Exhibit no. C-1	Photograph of subject property
Exhibit no. C-2	Photograph of property
Exhibit no. C-3	Photograph of property
Exhibit no. C-4	Photograph of property
Exhibit no. C-5	Photograph of property

The following exhibits were offered and entered into the record on October 5, 2017:

Appellants-offered exhibits

Exhibit no. A-75	Curriculum vitae of Sarah Spear Cooke, Ph.D.
Exhibit no. A-76	Email
Exhibit no. A-77	Photographs taken by Chris Zakoni
Exhibit no. A-78	Photograph taken by Holly Dolder
Exhibit no. A-79	Photograph taken by Holly Dolder
Exhibit no. A-80	Site plan C-2.0 annotated

Applicant-offered exhibits

Exhibit no. C-6	Photograph, annotated
Exhibit no. C-7	Emails between Willie Cloud and Alan Butler, with subject line Incompleteness notice of Cloud Bud - NOC 11237, dated November 21, 2016
Exhibit no. C-8	Cloud Bud SEPA application to Puget Sound Clean Air Agency (PSCAA), received August 18, 2016
Exhibit no. C-9	Receipt from PSCAA to William Cloud via email, dated August 25, 2016
Exhibit no. C-10	Excerpt from PSCAA document regarding conditions for marijuana growing operations
Exhibit no. C-11	Emails between Willie Cloud and Betsy Wheelock, with the subject NOC Invoice, dated September 29, 2016 and November 18, 2016
Exhibit no. C-12	Email from Willie Cloud to Alan Butler, sent May 15, 2017
Exhibit no. C-13	Letter from Washington State Liquor and Cannabis Board to William Cloud, dated March 3, 2016

The following exhibit was offered and entered into the record on October 16, 2017:

Exhibit no. D-34	Email from Ty Peterson to Examiner Alison Moss, dated October 16, 2017

AM/vsm

November 7, 2018

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON

King County Courthouse
516 Third Avenue Room 1200
Seattle, Washington 98104
Telephone (206) 477-0860
hearingexaminer@kingcounty.gov
www.kingcounty.gov/independent/hearing-examiner

CERTIFICATE OF SERVICE

SUBJECT: Department of Permitting and Environmental Review file no. **CDUP160002**

CLOUD BUD
Conditional Use Permit Appeal
SEPA Appeal

I, Vonetta Mangaoang, certify under penalty of perjury under the laws of the State of Washington that I transmitted the **REPORT AND DECISION** to those listed on the attached page as follows:

☒ EMAILED to all County staff listed as parties/interested persons and parties with e-mail addresses on record.

☒ caused to be placed with the United States Postal Service, with sufficient postage, as FIRST CLASS MAIL in an envelope addressed to the non-County employee parties/interested persons to addresses on record.

☒ caused to be placed via County INTEROFFICE MAIL to County staff to addresses on record.

DATED November 7, 2018.

Vonetta Mangaoang
Senior Administrator

Battles, Monica and Jim
Hardcopy

Bonomi, Walter
Hardcopy

Bourn, Nancy and Larry
Hardcopy

Bronk, Jeff and Nancy
Hardcopy

Burdick, Pamela-Robert
Hardcopy

Carlson, Joanne
Department of Permitting and Environmental Review

Casey, Laura
Department of Permitting and Environmental Review

Cloud, William
Cloud Bud LLC
Hardcopy

Craig, Cristy
Prosecuting Attorney's Office
Hardcopy

Davis, Robert and Ann
Hardcopy

Fuller, Dan and Erin
Hardcopy

Goll, Shirley
Department of Permitting and Environmental Review

Gonzalez, Donna and Jose
Hardcopy

Goodman, Stacy
Carson and Noel PLLC
Hardcopy

Gustine, Timm and Cheryl
Hardcopy

Johnson, Tori
Hardcopy

LaBrache, Lisa
Metropolitan King County Council

Millard, Abbie
Hardcopy

Nakamura, Nami-Gary
Hardcopy

Noel, Wright
Carson and Noel PLLC
Hardcopy

Peterson, Ty
Department of Permitting and Environmental Review

Rasmussen, Jeanne-Frank
Hardcopy

Rimbos, Peter
Greater Maple Valley Unincorporated Area Council
Hardcopy

Sabour, Sherie
Department of Permitting and Environmental Review

Sawin, Holly
Department of Permitting and Environmental Review

Sheridan, Diane-Howard
Hardcopy

Stillmaker, Robert-Patricia
Hardcopy

Williamson, Bill
Williamson Law Office
Hardcopy

Winter, Dale
Hardcopy

Wright, Margie
Hardcopy

Wyatt, Todd
Carson and Noel PLLC
Hardcopy

Zappe, Aaron and Jill
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