

**CITY OF SALEM
BEFORE THE HEARINGS OFFICER**

A REQUEST TO IDENTIFY THE	}	
APPROPRIATE USE CLASSIFICATION FOR A	}	SUD19-01
PROPOSED HEMP PROCESSING AND	}	
EXTRACTION USE, FOR PROPERTY ZONED IBC	}	
(INDUSTRIAL BUSINESS CAMPUS), AND	}	FINDINGS OF FACT,
LOCATED AT 5475 GAFFIN ROAD SE-97317	}	CONCLUSIONS, AND
(MARION COUNTY ASSESSOR'S MAP AND TAX	}	DECISION
LOT NUMBER: 082W04B / 01700).	}	

PROCESS:

This application does not require a public hearing.

SUMMARY OF THE APPLICATION AND DECISION

SUMMARY OF RECORD

The following items were received into the record:

All materials submitted by the applicant, including any applicable professional studies such as traffic impact analysis, geologic assessments, and stormwater reports; any materials and comments from public agencies, City departments, neighborhood associations, and the public; all documents referenced in the staff report dated March 28, 2019; and the Supplemental Response to the Hearings Officer dated April 2, 2019.

FACTS AND FINDINGS

1. **The following facts and finding are taken from the Planning Administrator's Staff Report dated March 28, 2019 and the Applicant's Supplemental Response dated April 2, 2019:**

- a. **Background**

The Planning Administrator has determined in prior cases that other hemp and marijuana processing uses involving use of flammable solvents in the extraction process fall under the heavy manufacturing use category. The applicant is interested in locating a hemp processing and extraction use in an existing building located at 5475 Gaffin Road SE which is within the IBC (Industrial Business Campus) zone. The IBC does not allow Heavy Manufacturing uses. The applicant proposes that the proposed activities should be categorized as a General Manufacturing use.

The Applicant provided a written description of the proposed activities relating to the proposed use (included as Attachment B to the Planning Administrator's report), which demonstrates that the proposed use possesses characteristics of four use categories, General Manufacturing, Warehousing and Distribution, General Wholesaling, and Heavy Manufacturing. The Applicant is requesting that

the Hearings Officer provide a Similar Use Determination to determine the proper classification and categorization for the proposed use. The Applicant has provided a Response to further explain the Applicant's disagreement with the Planning Administrator's analysis.

b. Proposed Use

The Applicant describes the proposed use, Hempin Labs, as a processing site for the bulk extraction of cannabinoids from industrial hemp. The proposed use would be located entirely within an enclosed building. There will be no proposed outside storage or activities associated with the proposed use.

The Applicant's summary identifies the following activities involved in the proposed use:

- a. Drying of hemp plant using conveyor belt drying system for sale to end-users.
- b. Milling of hemp plant into uniform particle sizes, which can be directly sold to end-user, or for further processing.
- c. Extraction of isolates from hemp distillate oil, for sale to end user, or for further processing.
- d. Crystallization of isolated materials for sale to end users.
- e. Grinding of isolated materials to uniform particle sizes.
- f. Packaging of full or semi-processed products into food-grade containers.
- g. Fabrication of other hemp-derived products for sale to end-users.
- h. Storage of hemp plant and dried hemp plant for farmers and wholesalers/manufactures.
- i. Storage of milled hemp plant, dried hemp plant, crude hemp oil, hemp distillate oil, and crystallized hemp isolates in inventory.
- j. Delivery of hemp plant, dried hemp plant, crude hemp oil, hemp distillate oil, and crystallized hemp isolates to purchasers.
- k. Sale of hemp plant, dried hemp plant, crude hemp oil, hemp distillate oil, and crystallized hemp isolates to retailers, wholesalers, and farms through sales conducted offsite or online.
- l. Sale of other hemp-derived products to retailers, wholesalers, and general public (minor) through offsite or online sales.
- m. Processing of hemp plant into hemp distillate oil for further processing.

The Hearings Officer notes the Applicant's explanation from the Applicant's March 18, 2019 request: "[o]nly one step (occupying 1.17% of the Gaffin Facility) in the processing of hemp plant materials would fall under the category of "heavy manufacturing," as the conversion of hemp plant in to crude hemp distillate uses ethanol as part of the conversion process. Ethanol, however, is generally not used either before or after this step in processing hemp. The Ethanol storage and use is an accessory use."

c. Classification of Uses

The Hearings Officer notes that the various land uses allowed within the City are classified under SRC Chapter 400 (Use Classifications). SRC Chapter 400

establishes a hierarchical framework for the organization of land uses beginning with general classifications of land uses (e.g. Residential, Commercial, Public Service, Industrial, etc.), which are then further divided into categories of land uses (e.g. Household Living, Business and Professional Services, Retail Sales and Service, Manufacturing, etc.), which in turn are further described as uses (e.g. Single Family Residential, Office, Retail Service, Manufacturing) based on the common functional, product, or physical characteristics of the use and its related impacts.

The use categories identified under SRC Chapter 400 include a narrative description of the general characteristics of the use, examples of the types of activities that possess the characteristics of, and therefore fall within, the use, and a list of activities that possess some of the characteristics of the use but which more appropriately are classified under another use.

While SRC Chapter 400 is intended to provide a comprehensive framework for the classification of land uses, the SRC provides for instances when a particular use may not be readily classified under the specific use categories included within the chapter. SRC 400.015(d) establishes a similar use determination process for specific uses which cannot be readily classified as falling within a particular use, or for specific uses that possess the characteristics of two or more uses, can be classified. SRC 400.015(a) directs how to classify a use: “[t]he principal activity, or principal activities, that occur upon a property establish the use. A principal activity falls within a specific use when the principal activity possesses the characteristics of the use, and the broader use category the use falls within.”

d. Analysis of General Manufacturing

General Manufacturing falls within the Manufacturing use category of SRC Chapter 400. SRC 400.100 describes the Manufacturing use category as follows:

“Manufacturing consists of the production, processing, fabrication, packaging, or assembly of goods. Natural, man-made, raw, secondary, or partially completed materials may be used in the manufacturing process. Products may be finished or semi-finished, and are generally made for the wholesale market, for transfer to other plants, or to order for firms or consumers. Goods are generally not displayed or sold on site, but if so, they are a subordinate part of sales. Relatively few customers come to a manufacturing site.”

The characteristics of General Manufacturing are described under SRC 400.100(a)(1) as follows:

“General manufacturing is characterized by the production, processing, fabrication, assembly, or packaging of primarily finished products for entry into the stream of commerce for ultimate sale to the end user. Materials used generally include semi-finished products produced in heavy manufacturing industries; and may include some small amounts of natural and/or raw materials. Products produced can be of any size, but are generally smaller than those produced in heavy manufacturing. Production does not involve significant impacts on adjacent properties due to noise, vibration, dust, smoke, fumes, or noxious odors; and is not

dangerous or polluting. General manufacturing uses may require large, medium, or small scale facilities, and the work, and storage of product, may be conducted either inside or outside. Products are generally not displayed or sold on site, but if so, they are a subordinate part of sales."

Examples of General Manufacturing Uses include:

- Breweries, wineries, distilleries, and cider houses where on-site food and/or beverage consumption is not the primary activity;
- Chemical products manufacturing that does not involve, or that does not have, significant impacts on adjacent properties due to noxious odors, noises, dust, smoke vibrations, or potential danger;
- Commercial or industrial catering kitchens where food is prepared and delivered off-site;
- Manufacturing of apparel;
- Manufacturing of computer and electronic products;
- Manufacturing of food, beverage and related products;
- Manufacturing of pharmaceuticals;
- Manufacturing of signs;
- Manufacturing of wood, plastic, metal, ceramic, rubber, textile, and leather products;
- Production or assembly of equipment, machinery, and fabricated products.

The Applicant's statement describes the following activities as falling under the general manufacturing use classification, estimating that approximately 50,000 square feet of space (or 38.51% of the floor area for the facility) will be devoted to these activities:

- a. Drying of hemp plant using conveyor belt drying system for sale to end-users.
- b. Milling of hemp plant into uniform particle sizes, which can be directly sold to end-user, or for further processing.
- c. Extraction of isolates from hemp distillate oil, for sale to end user, or for further processing.
- d. Crystallization of isolated materials for sale to end users.
- e. Grinding of isolated materials to uniform particle sizes.
- f. Packaging of full or semi-processed products into food-grade containers.
- g. Fabrication of other hemp-derived products for sale to end-users.

The Hearings Officer notes that General Manufacturing uses are characterized by the production, processing, or packaging of primarily finished products for entry into the stream of commerce for ultimate sale to the end user, and general manufacturing uses typically involve small amounts of natural and/or raw materials.

The proposed use involves delivery of large amounts of natural and/or raw material for processing into a variety of finished and semi-finished products for further production by other manufacturing uses. While some of the uses described

by the Applicant may fall under the general manufacturing use category, other activities described in this section share the characteristics of heavy manufacturing. The Hearings Officer notes that although the Applicant's Supplemental Response indicates that some of the activities at the site could be considered General Manufacturing uses if the activities were viewed in isolation, rather than as part of an integrated process, the Applicant provided little quantitative evidence to demonstrate how much of the activity or products would be part of an integrated process that is better categorized as Heavy Manufacturing.

e. Analysis of Warehousing and Distribution

Warehousing and distribution falls within the Wholesale sales, storage, and distribution use category of SRC Chapter 400. SRC 400.095 describes the Wholesale sales, storage, and distribution use category as follows:

"Wholesale sales, storage, and distribution consists of facilities for the storage, transfer, distribution, repackaging, or wholesale sales of physical goods or personal property other than live animals."

The characteristics of Warehousing and distribution are described under SRC 400.095(c)(1) as follows:

"Warehousing and distribution is characterized by the storage and/or distribution of goods or personal property. Goods are generally delivered to other firms or the final consumer. Except for some will-call pickups, there is little on-site sales."

Examples of Warehousing and Distribution Uses include:

- Catalog and mail order houses;
- Cold storage plants and frozen food lockers;
- Distribution centers;
- Distribution facilities for internet retailers;
- Free standing warehouses associated with retail stores such as furniture or appliance stores;
- Grain terminals;
- Major post offices and postal distribution centers;
- Repossession service;
- Stockpiling of sand, gravel, bark dust, or other aggregate and landscaping materials;
- Truck or rail freight terminals.

The Applicant's statement describes the following activities as falling under the warehousing and distribution use classification, estimating that approximately 49,500 square feet of space will be devoted to these activities, or 38.12% of the floor area for the facility.

- a. Storage of hemp plant and dried hemp plant for farmers and wholesalers/manufactures.
- b. Storage of milled hemp plant, dried hemp plant, crude hemp oil, hemp

distillate oil, and crystallized hemp isolates in inventory.

- c. Delivery of hemp plant, dried hemp plant, crude hemp oil, hemp distillate oil, and crystallized hemp isolates to purchasers.

The Hearings Officer notes the staff analysis stating that the storage of materials brought to the site for further production, and storage of materials produced during the manufacturing process is considered an accessory use of the principal manufacturing use, because the described activity is clearly incidental, subordinate to, dependent upon, and conducted in support of the principal use. The Planning Administrator concludes that Warehousing and distribution is not the appropriate use classification for this use.

The Hearings Officer also notes the Applicant's reply that asserts this analysis is not correct, stating that "Hempin provides drying, curing, and storage services. Merely because hemp is being delivered, dried, cured, and stored does not automatically imply this product will go through extraction at Hempin's Gaffin Facility. Hempin has clients that contract solely for drying, curing, or storage."

The Hearings Officer notes that this particular disagreement is illustrative of an analytical approach to the use classification that sometimes refers to uses, activities, and steps in processes interchangeably, viewing the amount of space allocated to a step in a process as a separate activity or separate use. The Hearings Officer notes the Applicant's explanation that the processing of hemp into crude oil would never be found independently of any other of the processing steps. The Hearings Officer sees no particular basis in the SRC that supports segregating the steps in processing a particular product into separate activities or uses. To the extent that various steps cannot occur independently, the Hearings Officer views the process as likely constituting a single activity, not various activities.

The Hearings Officer notes that while the activities the Applicant has indicated will occur on the site do not automatically imply that the product will go through extraction, the record does not contain any indication of what percentage, volume or amount of hemp at the facility would be owned by clients and not used in the extraction process. The Hearings Officer concludes that it is as likely that the amount of product dried, cured or stored for clients (outside of the extraction process) is merely an incidental activity within the 49,500 feet that otherwise will be devoted to steps of an integrated extraction process as it is that the 49,500 square feet of space is devoted to a primary activity for clients that is not part of the extraction process. The Hearings Officer notes that the burden of explaining the specific uses in a manner that allow a proper determination is on the Applicant. Without facts in the record to the contrary, the hearings officer concludes that in this specific instance the Applicant has not met this particular burden. The Hearings Officer therefore concludes that Warehousing and distribution is not the appropriate classification for this use.

f. Analysis of General Wholesaling

General wholesaling falls within the Wholesale sales, storage, and distribution use category of SRC Chapter 400. SRC 400.095 describes the Wholesale sales, storage, and distribution use category as follows:

“Wholesale sales, storage, and distribution consists of facilities for the storage, transfer, distribution, repackaging, or wholesale sales of physical goods or personal property other than live animals.”

The characteristics of General Wholesaling are described under SRC 400.095(a)(1) as follows:

“General wholesaling is characterized by sales of physical products primarily to customers other than the general public, including retailers, other wholesalers, and industrial, commercial, institutional, farm, or business users. The general public rarely comes to the site. Products are generally stored on-site, and may also be assembled, sorted, graded and/or re-packaged on-site. For establishments primarily engaged in sales to industrial, commercial, institutional, farm, or business users, activities on the site may also include on-site sales or order taking display areas. Products may be picked up on-site or delivered to the purchaser. General wholesaling takes place primarily within an enclosed building, and does not include the sale of dangerous, toxic, or potentially contaminating products.”

Examples of General Wholesaling include:

- Wholesale sales of supplies, light-duty equipment, and storage fixtures;
- Wholesale sales of products that are not dangerous, toxic, or potentially contaminating;
- Wholesale sales of automobiles and other motor vehicles, manufactured dwellings, and trailers, when stored inside.

The Applicant’s statement describes the following activities as falling under the general wholesaling use classification, estimating that approximately 27,850 square feet of space will be devoted to these activities, or 21.45% of the floor area for the facility.

- a. Sale of hemp plant, dried hemp plant, crude hemp oil, hemp distillate oil, and crystallized hemp isolates to retailers, wholesalers, and farms through sales conducted offsite or online.
- b. Sale of other hemp-derived products to retailers, wholesalers, and general public (minor) through offsite or online sales.

The Hearings Officer notes the Planning Administrator’s analysis that “General wholesaling of products produced during the manufacturing process is considered an accessory use of the principal manufacturing use, because the described activity is clearly incidental, subordinate to, dependent upon, and conducted in support of the principal use. General wholesaling is not the appropriate use classification for this use.”

The Hearings Officer notes the Applicant’s argument in its Supplemental Response that “[t]here are many situations in which the products Hempin is wholesaling are not a subordinate process to ethanol extraction. Hempin has

agreements to turn existing oils into white-label products, to make water-soluble isolate with third-party provided isolate, and other wholesaling frameworks that are not reliant or subordinate to Hempin's ethanol extraction. The emphasis that Staff places on the use of ethanol is misplaced. Hempin's ethanol use constitutes a minor percentage of its intended usage (1.17%) and ethanol is not considered a "hazardous chemical," as defined by the Code of Federal Regulations. See 29 C.F.R. § 1910.119, Appx. A (attached)."

The Hearings Officer is not persuaded that the percentage of floor space in a facility devoted to a step in a process is the sole or most useful measure of whether the overall process is a primary activity. The Hearings Officer notes that there is no evidence in the record to indicate what volume of products or proportion of receipts makes up the many situations where products Hempin would wholesale are not subordinate to the process that includes ethanol extraction as a required step. Without this quantifiable evidence, the Applicant has not met its required burden and the Hearings Officer concludes that General wholesaling is not the appropriate use classification for this use.

The Hearings Officer notes the argument that ethanol is not considered a "hazardous chemical" as defined by 29 C.F.R. § 1910.119, Appx. A. The Hearings Officer notes that the appendix is titled "Highly Hazardous Chemicals, Toxics and Reactives" and provides the following description:

"This appendix contains a listing of toxic and reactive highly hazardous chemicals which present a potential for a catastrophic event at or above the threshold quantity."

The Hearings Officer notes that the General Wholesaling characteristics set out in SRC 400.095(a)(1) includes a statement that this use "does not include the sale of dangerous, toxic, or potentially contaminating products." Which seems fairly irrelevant in this case. On the other hand, the Heavy Manufacturing characteristics includes the description that "[m]aterials used generally include large amounts of natural and/or raw materials obtained from extractive industries or agricultural/forestry production; or materials that are potentially hazardous or explosive." The Hearings Officer sees considerable difference between "highly hazardous chemicals" and "potentially hazardous or explosive" materials. As a combustible solvent, ethanol is certainly potentially hazardous or explosive for purposes of this section.

g. Analysis of Heavy Manufacturing

Heavy Manufacturing falls within the Manufacturing use category of SRC Chapter 400, listed in Section 4.

The characteristics of Heavy Manufacturing are described under SRC 400.100(b)(1) as follows:

"Heavy manufacturing is characterized by the production or processing of finished or semi-finished products that are generally made for the wholesale market or for the transfer to other plants to be used in the further manufacturing of other more complex products. Materials used generally include large amounts of natural

and/or raw materials obtained from extractive industries or agricultural/forestry production; or materials that are potentially hazardous or explosive. Products produced are typically heavy in weight and large in size or volume. Production may involve significant impacts on adjacent properties due to noise, vibration, dust, smoke, fumes, or noxious odors; and may be dangerous or polluting. Heavy manufacturing uses typically require large-scale facilities and a substantial portion of the work, and storage of product, may be conducted outside. Products are generally not displayed or sold on site, but if so, they are a subordinate part of sales.”

Examples of Heavy Manufacturing include:

- Leather tanning;
- Manufacturing of chemical products;
- Manufacturing of explosives, ordnance, small arms, and ammunition;
- Manufacturing of petroleum and coal products;
- Manufacturing of primary metals;
- Manufacturing of starch and vegetable fats and oils;
- Meat processing and packing;
- Production of asphalt, cement, and concrete products;
- Production of lime, gypsum, and other nonmetallic mineral products;
- Pulp, paper, and paperboard mills;
- Sawmills.

The Applicant’s statement describes the following activities as falling under the heavy manufacturing use classification, estimating that approximately 1,510 square feet of space will be devoted to these activities, or 1.17% of the floor area for the facility.

- a. Processing of hemp plant into hemp distillate oil for further processing.

The Hearings Officer notes the Planning Administrator’s analysis is that the proposed use involves delivery of large amounts of natural and/or raw material for processing into a variety of finished and semi-finished products for further production by other manufacturing uses. Further, the manufacturing process relies on use of a flammable and combustible liquid (ethanol) as a solvent for the processing of hemp plant material into distillate oil.

The Hearings Officer notes that the Applicant states that the proposed use will be different than other hemp processing operations that have been classified as heavy manufacturing uses due to the use of a closed loop system, where the ethanol is recycled through a closed vacuum environment. However, the process still involves the use and storage of ethanol, a potentially hazardous and combustible liquid. The use of hazardous and/or explosive materials in the manufacturing process places this use in the heavy manufacturing category.

The Hearings Officer notes the Applicant's description of the proposed Hempin operation at the Gaffin Facility as fully enclosed with "state-of-the-art air handling, fire suppression, and temperature-controlled vaults for the safe storage of chemicals- like ethanol". The Hearings Officer notes that the closed loop system further protects employees and the general public from risk of harm due to the use of the ethanol, and the proposed use's lack of significant impact to surrounding uses or properties in any manner due to noxious odors, noises, dust, smoke, vibrations, or potential danger. Nonetheless, the Hearings Officer finds that the language in SRC 400.100(b)(1) focuses on the materials used in the manufacturing process, in addition to the possible impacts on adjacent properties. The Hearings Officer finds that conducting the use in a facility that adequately mitigates potential impacts on adjacent properties does not change the nature of the use.

Conclusion and Decision

Based on the nature and impacts of the proposed activities and materials used in the manufacturing process proposed for the site, the Hearings Officer finds that the proposed processing of the bulk extraction of cannabinoids from industrial hemp has more characteristics in common with a Heavy Manufacturing use than it does with General Manufacturing.

Therefore, for the reasons stated above the Hearings Officer has determined that the proposed Hemp Processing and extraction use is classified as a Heavy Manufacturing use under SRC 400.100(b).

DATED: April 8, 2019.

A handwritten signature in dark ink, appearing to read "James K. Brewer", with a long horizontal line extending to the right.

James K. Brewer, Hearings Officer