

Oct. 4, 2022

Supervisor McGourty and Supervisor Haschak recommendations on Clarification of Tree Removal Prohibition in 10A.17

Recommendations to the General Government Committee

Tree removal An Affidavit shall be used by an applicant to establish that protected tree removal was for purposes other than for developing of a cultivation site, including for disease concerns, safety concerns, and reduction of fire hazard within the buffer from buildings established by CalFire (fire-safe clearance) or to reduce fuel loads by removing diseased, scarred, dying, burned, or dead trees and brush anywhere on the cultivation site. For purposes of this provision, current CalFire clearance standards shall be the distance used for the exemption from the tree removal prohibition. There shall be a presumption that any trees removed outside of a cannabis garden fence and any trees removed beyond 50 feet from a structure used to grow cannabis was not removed for the purpose of developing the cultivation site. The Affiant shall set forth and attest to the fact that any tree removal did not violate the ordinance because (a) it did not involve the type of trees prohibited from removal or (b) the trees removed were not removed for purposes of developing a cultivation site, but were removed for some other purpose including, but not limited to, for disease concerns, safety concerns, and reduction of fire hazard within the buffer from buildings established by CalFire (fire-safe clearance) or to reduce fuel loads by removing diseased, scarred, dying, burned, or dead trees and brush anywhere on the cultivation site. The Affiant shall set forth the reason for the tree removal and IF the trees were removed within the fencing required by 10.A.17 or within 50 feet of a structure used for growing cannabis, the Affiant shall list the number and types of trees removed. Any tree removal outside of a cannabis garden fence, or if not fencing is involved because the cannabis is grown in structures, outside of a 50-foot distance from the structure used, is not prohibited under this section or relevant to the affidavit unless the area where the tree removal occurred now contains cannabis plants or structures used in the cultivation operation. In that circumstance, the Affiant shall attest to the original purpose of the tree removal that occurred and so long as it is one of the allowable purposes listed in the first paragraph, post-removal use, for cannabis activities, of the area where protected trees had to be removed for an allowable purpose, shall not be prohibited. In other words, outside of the limited exceptions in the first paragraph, protected tree removal for purposes of developing a cultivation site is prohibited, but use of an area that had protected trees removed for other valid purposes may later be used for cultivation activities and tree removal outside of a cannabis garden fence or beyond 50 feet from a structure growing cannabis is presumed to not have been removed for purpose of developing a cultivation site. Furthermore, tree removal within 50 feet of a structure used in the cannabis business for purposes of fire-safe clearance, is presumed to be lawful if the building is permitted or in the process of being permitted. Page 2 of 3 Specific allegations of violation of the ordinance with sufficient proof to support the specific allegation of the violation may be referred to Code Enforcement for pursuit of a Notice of Violation and further civil and administrative claims. Denial or termination of a cultivation permit may not occur unless and until the county establishes with clear and convincing evidence that the attestation is false in a material way and that there is evidence of a specific violation of the tree removal prohibition. Once the Affiant attests to the facts that establish no violation of the ordinance has occurred, the burden shifts to the county to prove

with clear, convincing, and specific evidence that the tree removal involves trees that were protected and that they were removed for purposes of developing a cultivation site and were not removed because of concern for disease, hazard, fire clearance, fuel load reduction of damaged, dying, burned or dead trees. The county may not rely exclusively on aerial images from unknown dates in 2017, or dates that are after the effective date of the ordinance but that do not conclusively establish when the alleged protected tree removal for purposes of developing a cultivation site was conducted. Additionally, the county may not assume that if a tree was removed outside of a garden fence that its removal in any way benefited the cultivation site merely due to its proximity and therefore was removed for the purpose of developing a cultivation site. Tree removal for firesafe clearance to a cannabis structure is specifically allowed if the building is or will be permitted. In order to justify denial or termination, the county must prove conclusively that the protected tree removal occurred after May 4, 2017 and must prove that the removal was not otherwise allowed as specified above. All protected tree removal that did not qualify for one of the exemptions listed in paragraph one, inside a cannabis garden fence or within 50 feet of a structure used for growing cannabis, that the Affiant declares was removed prior to 5/4/17 shall be assessed for impact to the environment to determine if there was a less than significant impact. Either a private qualified biologist can prepare an analysis and provide it to MCD to determine, or the matter shall be referred to CDFW during the SSHR referral for the assessment of the impact of any protected tree removal inside the cannabis garden fence or within 50 feet of a structure used for growing cannabis. All tree removal that did qualify for one of the exemptions and was done within the cannabis garden fence or within 50 feet of a structure used to grow cannabis, will go through the normal SSHR process to determine the impact and to recommend any remediations that might help bring the impact to less than significant levels. However, in such analysis, the impact of any fire, actual and potential, shall be specifically addressed in the analysis and any conclusions regarding impact of tree removal shall include an assessment of whether the impact to the environment resulting from actual fire and standing dead and scarred trees that cause further fire danger, from clean-up activities after a fire, and from continuing fire danger and its potential impact on the environment if protected trees are not removed, must be considered. Page 3 of 3 MCD does not have to rely on verification by a licensed professional to establish that the tree removal was not prohibited. Specifically, in the case of dead and dying trees, proof that the trees were dead, dying, diseased, or unsafe may be established by means other than a licensed professional. Brush removal is not prohibited under 10A.17. Impacts of ground disturbance due to grading are assessed later in the application process either in the SSHR review or ultimately, during the CEQA review. Since all issues related to ground disturbance of the project are considered in the CEQA process and all brush and tree removal that is not in violation of 10A.17 should not result in a denial of a permit, the proper scope of compliance relates to adherence to water quality, grading permits, and non-exempt tree removal prohibitions. However, the ordinance contemplates development of infrastructure which is specifically allowed and regulated through building permits and adherence to other state water and environmental programs and county size and zoning limits. Conducting brush removal to ensure fire-safe conditions does not automatically result in unwarranted ground disturbance. The current Vegetation Modification notice process contains burdens of proof and presumptions that are unreasonable and must be changed. As currently implemented, MCD's Vegetation Modification process treats shrub removal in the same manner as prohibited tree removal. In addition to the changes for clarification to the process and exemptions from the prohibition on tree removal, a reasonable process concerning shrub removal can be handled entirely thorough enforcement of existing conditions of the cannabis permit that relate to water quality and the issue of the impact of

any ground disturbance is handled in the CEQA process. As a result, shrub removal, unless it is part of a tree removal, should not be subject to any special process or procedure. Any shrub removal as part of tree removal should be handled in accordance with the process and presumptions set forth above in the tree removal section. Any shrub removal that is conducted must comply with all water quality and runoff protections, regardless of whether the removal was done pursuant to a grading permit, was done by hand, or was for fire safety or fuel reduction. Whether shrub removal for fire safety and building fire clearance must be referred to CDFW for an SSHR is a separate issue. If the shrub removal was done in accordance with a grading permit, and the permit was complied with, wouldn't referral to CDFW for SSHR be redundant? If shrub removal was done for fire-clearance to comply with a building permit, is SSHR necessary when the entire project will be assessed during the CEQA submission and review? If brush removal is done without grading and merely for fuel reduction and does not threaten water quality, is that the kind of disturbance that warrants an SSHR referral?