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MEMORANDUM

DATE: DECEMBER 5, 2023

TO: HONORABLE BOARD OF SUPERVISORS

FROM: ROB FITZSIMMONS, PLANNER II, PLANNING AND BUILDING SERVICES

SUBJECT: APPEAL OF DENIAL OF ADMINISTRATIVE PERMIT AP_2023-0015

On June 30, 2023, Editte Lerman, Esq. of Emerald Law Group (Agent), on behalf of Kure Wellness, Inc (Applicant) and Russell Green (Owner) filed an appeal (Attachment C to this Memorandum) of the decision by the Zoning Administrator to deny Administrative Permit modification AP_2023-0015. The application requests that an existing cannabis dispensary/microbusiness, previously permitted via AP_2017-0109, receive authorization to install and operate a drive-through window. The project is located 3.25± miles north-northeast of Ukiah city center, on the north corner of the intersection between Lake Mendocino Drive (CR 227B) and East Side Calpella Rd (CR 227); located at 800 Lake Mendocino Dr, Ukiah (APN 168-224-31).

CHRONOLOGY AND ZONING ADMINISTRATOR ACTION

The application for the Administrative Permit modification, AP_2023-0015, was submitted on April 27, 2023 and deemed complete on May 26, 2023. On May 15, 2023, Staff sent referral packets to responsible agencies for comments. After a review of the comments received, the application materials, and public comment, Staff prepared a Staff Report recommending denial and scheduled the project for hearing. The project was heard at the June 23, 2023 special hearing of the Zoning Administrator, who ultimately denied the application. Attachment A to this memorandum is the Staff Report prepared for the Zoning Administrator hearing and related attachments.

STAFF ANALYSIS

Section 20.243.050 of the County Code contains general limitations on cannabis facilities, which apply to retail facilities and microbusinesses. Specifically, paragraph (A) provides that all cannabis facilities shall comply with all applicable regulations in the Mendocino County Code and State law. Division 10 of the California Business and Professions Code contains statutes regulating cannabis cultivation, distribution, sale and related activities, and Section 26013 provides that the Department of Cannabis Control (“DCC”) shall make and prescribe reasonable rules and regulations as may be necessary to implement, administer and enforce its duties under Division 10. The DCC has promulgated regulations in Title 4, Division 19, of the California Code of Regulations (“CCR”). Regulations adopted pursuant to the Administrative Procedure Act have the force of law.

Of particular relevance to the subject application is Section 15025 of Title 4, Division 19 of the CCR (hereinafter referred to as Section 15025). Subdivision (a) of this section provides that licensed retailers and microbusinesses shall only serve customers who are within the licensed premises or at a delivery address that meets the requirements of Division 19. It further specifies that:

- (1) The sale and delivery of cannabis goods shall not occur through a pass-out window or a slide-out tray to the exterior of the licensed premises.
- (2) Licensed retailers or licensed microbusinesses authorized to engage in retail sales shall not operate as or with a drive-in or drive-through at which cannabis goods are sold to persons within or about a motor vehicle.

- (3) No cannabis goods shall be sold and/or delivered by any means or method to any person within a motor vehicle.

As such, the starting premise of the CCR is that cannabis shall not be retailed through a drive-through window, which would mean approval of the subject application would not be consistent with State law. Further, if authorized by the County, the applicant would not be able to get approval of the modification by the DCC. However, paragraph (e) of Section 15025 provides that a commercial cannabis business may have a drive-in or drive-through window only if, prior to June 1, 2018:

- (1) The commercial cannabis business received a license or permit from the local jurisdiction for a premises including a drive-in or drive-through window which was disclosed on the local application; or
- (2) The commercial cannabis business has submitted an application to the local jurisdiction for a license or permit which, at the time of submission of the application, included information that a drive-in or drive-through window was already part of, or proposed to be part of, the premises, and after June 1, 2018, the local jurisdiction approves the premises with a drive-in or drive-through window.

The applicant alleges that it has met all of the necessary elements of both paragraphs (1) and (2) of Section 15025(e). On April 27, 2023, Editte Lerman of Emerald Law Group submitted the subject application for AP_2023-0015, along with a cover letter (Attachment D of the Zoning Administrator Staff Report) and additional materials to support the claim that authorization for a drive-through window should be granted. The April 27, 2023 Cover Letter itself, attached as Attachment D of the Zoning Administrator Staff Report included several exhibits, which are summarized below:

Exhibit 1: 2/17/2022 Revision of the Site Plan for BU_2021-2567, an expired building permit application for a remodel of the existing facility, including a drive-through window.

Exhibit 2: Site Plan for AP_2023-0015, identifying the drive-through. This version of the Site Plan was not included with any previous permit application.

Exhibit 3: A portion of an expired, 2015 Business License issued to Russell Green dba Kure Wellness. This presumably corresponds to BL_2015-0110, a Retail Merchant/Service permit for “nutritional consulting and other wellness services” and the retail of “convenience items, holistic herbs, etc.”. This would have been understood by the County at the time to include cannabis retail. However, this document includes no statements regarding use of a drive-through component.

Exhibit 4: A Mendocino County Grand Jury Report from 4/20/2011, addressing the need for a Medical Marijuana Dispensary (MMJD) ordinance.

Exhibit 5: A Medical Cannabis Activity Registration Form submitted by Kure Wellness, Inc on 5/17/2016 to establish priority processing for County cannabis permits while a new permitting regime was being established. This submittal disclosed that both indoor and outdoor cannabis cultivation had occurred on the parcel prior to 1/1/2016, and that a dispensary, cultivation, nursery, manufacturing, and processing were all proposed. The County’s receipt of this form did not grant any form of authorization – it was essentially only a statement of interest in permitting on the part of Kure Wellness.

Exhibit 6: Email exchange between terminalc@gmail.com and johnsonork@co.mendocino.ca.us, discussing a “9.31 permit inspection” for Kure Wellness at 21041 Locust Street, Willits, an address approximately 16.5 miles northwest of the subject parcel. This does not appear to be relevant to the subject application.

Exhibit 7: Application materials for AP_2017-0109 and CFBL_2017-0010, the current Administrative Permit and Cannabis Facilities Business License for the Kure Wellness dispensary/microbusiness. This exhibit also appears to reproduce the entirety of Exhibit 5, and an excerpt of MCC Chapter 20.243 with an arrow pointing to Section 20.243.080 (see the discussion under Site and Permit History in the Staff Report for

why MCC §20.243.080 no longer applies to Kure Wellness). Nothing in these materials indicate the current or future presence of a drive-in or drive-through component.

Exhibit 8: Signed Staff Report for AP_2017-0109, dated 5/25/2018. The report does not include any discussion of a drive-in/drive-through component because no such component was proposed.

Exhibit 9: 6/4/2021 Letter from Mendocino County Senior Planner Sam “Vandy” Vandewater, with attached previous correspondence, explaining that Kure Wellness’s authorization of a temporary COVID-19 drive-through component had been revoked. The “previous agreement” initially allowing the drive-through was not included with Emerald Law’s letter, but is attached to this Staff Report as Attachment G. This authorization was always temporary in nature and was not granted until well after 6/1/2018 (the Covid-19 state of emergency not being declared in California until 3/4/2020).

Emerald Law’s cover letter and the undated “Declaration of Russell Green” (Attachment E of the Zoning Administrator Staff Report), both submitted with the application for AP_2023-0015, assert that Kure Wellness operated a drive-in in conjunction with their cannabis dispensary at 800 Mendocino Drive prior to 10/17/2017. Note that the declaration of Mr. Green contains no statement that the drive-through was a part of any application made to or issued by the Department of Planning and Building Services. It provides no evidence relevant to the criteria of Section 15025(e). While the applicant may have previously allowed customers to pull up the drive and have cannabis products delivered to the vehicle, either before or after the issuance of AP_2017-0109, that permit did not include use of any drive-through.

As detailed further in the Staff Report prepared for the Zoning Administrator hearing, staff reviewed the site and permit history for the property in question, including all permits, to determine if there was any evidence of prior existence of a drive-through. Staff could find no such evidence. The applications for BL_2015-0110, AP_2017-0109, and CFBL_2017-0010 **did not** include information that a drive-in or drive-through window was already part of, or proposed to be part of, the premises, and consequentially the approval of AP_2017-0109 did not authorize one. As such, Kure Wellness does not meet the criteria of Section 15025(e)(1) as having received a permit for a premises including a drive-in or drive-through window “*which was disclosed on the local application.*” Section 15025(e)(2) would require Kure Wellness to have submitted an application to the County prior to June 1, 2018, including information that a drive-through was already in use or proposed. As noted above, this information was not included in the application for AP_2017-0109, and if it had been, additional review of the proposed drive-through would have been conducted. As no application was made to the County before June 1, 2018, that included information about the use of a drive-through, Kure Wellness does not meet the criteria of Section 15025(e)(2).

The proposed project is **not** consistent with the California Code of Regulations, nor can it be conditioned to resolve the inconsistency.

ASSERTION OF PRIOR EXISTENCE OF DRIVE-IN

In the hearing before the Zoning Administrator, the applicants asserted that prior to the COVID-19 authorization, the property had been operating a drive-in component “openly and notoriously” for years, even in its prior use as a bait shop. There was significant public comment attesting to this, though a review of Planning and Building Services records showed no drive-in or drive-through on the property. Attachment A to this memorandum is the Staff Report for the Zoning Administrator hearing, which details the lack of documentation of a drive-through further. Staff does not feel confident making a determination of whether a prior drive-in was present as was described by the applicants and in public comment at the Zoning Administrator hearing, but do not feel it is relevant to the denial of the Administrative Permit. Staff does feel confident stating that any such use would necessarily have been nonconforming and possibly unpermitted.

As detailed above, Staff has not found any evidence of prior authorization or use of a drive-in or drive-through in any permit records for the property. California Code of Regulations require that a drive-in or drive-through has received approval by the local agency, which has not occurred.

In allocating Code Enforcement resources, Mendocino County is complaint driven and typically will not seek

out violations when no complaint has been received and no clear hazard to human or environmental health exists, but this should not be construed as tacit approval of these noncompliant uses. Additional flexibility was afforded during the COVID-19 pandemic, but again this should never have been construed as a permanent allowance, and this allowance was made after the date stated in the relevant State regulations.

RECOMMENDED MOTION

Adopt a resolution denying the appeal and upholding the Zoning Administrator's denial of Administrative Permit Modification (AP_2023-0015), requesting authorization for a drive-through window for an existing cannabis dispensary, located at 800 Lake Mendocino Dr, Ukiah; APN: 168-224-31; and authorize Chair to sign same.

ATTACHMENTS:

- A. Zoning Administrator Staff Report with Attachments
- B. Public Comments from Zoning Administrator hearing
- C. Appeal dated June 30, 2023
- D. Draft Resolution Denying the Appeal