



Mendocino County Board of Supervisors
501 Low Gap Road
Ukiah, CA 95482

December 6, 2020

Re: Agenda Item 5h for BoS Meeting 12/8/2020

Discussion and Possible Action Including Introducing and Waiving an Ordinance Amending Mendocino County Code Chapters 1.04, 1.08 and 16.30 Relating to Code Enforcement Procedures and Regulations, Including Administrative Penalty Increases Relating to Stormwater, Cannabis and Building Violations. (Sponsors: Planning and Building Services and County Counsel)

Honorable Supervisors:

We comment on 5h to express concern that the proposed amendments to these ordinances may conflict with 10A.17 and the Board's explicit direction concerning Compliance Plans issued with Cannabis Permits. We respectfully request that the Agenda Item be brought back for consideration by the Board only after an careful examination of potentially conflicting language and unintended consequences.

1. Potential unintended conflict with 10A.17.100 (C) (compliance plan approach to certain code violations of a commercial cannabis permit candidate) warrants a closer examination of the added language of the proposed ordinance changes.
 - a. We have seen many instances where current Code Enforcement has taken a reasonable approach to encouraging compliance as the goal. However, **laws must be evaluated for their potential to be applied, using the plain language of the statute, in a manner that might be contrary to current internal policy or implementation and must be analyzed without presumption that a "reasonable" and circumspect application will in fact be utilized.**

- b. Here, we have language proposed that **expands the purview of the NOV and Citation process¹ without a clear understanding or time for analysis to see if, in light of 10A17.A 100 (C), whether there is an unintended conflict in policy and the potential for implementation in conflict with how Compliance Plans were designed.** Specifically, there is a potential conflict in the procedure to give cultivators one year from the Cannabis Permit issuance date to apply for building permits for any structures used in the cannabis business that were not properly permitted. Furthermore, cultivators were explicitly told that entering into the cultivation permitting process would not automatically expose them to penalties for unpermitted structures, including non-cannabis structures.. Perhaps ultimately, language can be added to clarify that it is not the intent to reverse the codified procedures and intent behind Compliance Plans. But, the first question is whether there is absolute certainty that passing these amendments would not erode the Compliance Plan mechanism and the policy behind it?

We respectfully request the careful review of the ordinance language changes with the specific Compliance Plan issue in mind.

2. Given the County’s current position of having still not completed review of annual cultivation permit applications for the vast majority of files despite the fact that it has been 3 years and 7 months since the ordinance passed, it seems that the Supervisors would want to **avoid the appearance** that they are **simply trying to reduce its obligations to review all applications**. It also seems to be putting the cart before the horse to enact a law that could **potentially use minor building code violations to winnow out current applicants** in light of the Compliance Plan approach enacted and the fact that the County has repeatedly failed to keep track of its own files and whether applicants have already fulfilled their requirements.
 - a. Applicants have been paying yearly cultivation taxes despite not having been issued any annual permit and ~~given that~~ while facing the existential question of whether they will be able to maintain a State license given the CEQA debacle.
 - b. Despite frequent attempts to lay blame at the feet of the State, or unresponsive applicants, there is a substantial mass of application files that various iterations of the Cannabis program failed to keep

¹ Sec.1.08.060 (A): adding additional language including “or other Mendocino County law, or any law that is specifically adopted **or otherwise incorporated** into the Code” can be the basis of an Administrative Citation.

Sec.1.08.060 (F): adding in “**any building** or safety code, including but not limited to a violation of MCC Title 18” [building code violations] is subject to the specified fines.

and track properly. It is disingenuous after 3 ½ years to fail to publicly recognize that fact and not take responsibility for evaluating ALL related laws, enforcement actions, and processes in that context. The County is most definitely one of the parties at fault in the current state of affairs.

3. **The argument that may be made that these ordinances are immediately necessary to “go after” the bad actors and to deter future violations is belied by the simultaneous argument made by Staff, that these provisions do not expand any existing authority to target and prosecute violators.** If the authority already exists, why the race to expand them (Waive 1st Reading, no analysis with respect to the intersection of these provisions with the Compliance Plan approach)?
4. **Additional avenues and resources for enforcement exist currently.** Law Enforcement may investigate and the District Attorney may prosecute any person who is violating criminal and many environmental laws with respect to cultivation.² In fact, our District Attorney was adamant about being able to deny cultivation permits for applicants who were convicted of some of those crimes and on numerous occasions threatened to add conspiracy charges to amplify penalties for such crimes.

Current State laws provide for enforcement of Administrative Citations with far greater fines³ and budgetary resources for local jurisdictions to remedy environmental and other negative impacts of cannabis activity⁴. In fact, it is worth asking whether the County applied for grants under the Prop 64 Public Health and Safety Program for 2020-2023⁵ We point to these other avenues for enforcement and State funding, **not as blanket opposition to County Administrative procedures and levels set for fines**, but as an additional resource for pursuit of avenues of redress.

5. **Alternate service by mail provisions have previously been rejected by the Planning Commission and this Board and should be rejected again.** Staff proposes to amend Section 1.08.080 by removing a requirement for certified mail as an alternative to personal service and instead simply requiring first class U.S. postal delivery without return receipt. We greatly appreciate some of the other due process

²Section 11358, 11366.5.

³ See, in particular CA F&G Code Section 12025 which indicates fines for \$8000/day, \$10,000/day, and \$20,000/day. See, CA Penal Code Title 10, Crimes Against Public Health, CA Health & Safety Code

⁴ See, CA Rev. & Tax Code, § 34019

⁵ The Bureau of Cannabis Control (BCC) released and later extended the deadline for an RFP for local jurisdictions to apply for funding under this law. Letters of Intent were (amended to be) due May 1, 2020 and Proposals were (amended to be) due June 5, 2020.

considerations that were suggested, such as an expanded period of time to appeal and inclusion of procedural due process in line with State law, but given the nature of rural mail in general, the pandemic and recent slowing of U.S. mail services in particular, removing the certified mail requirement would be disastrous.

6. Section 1.08.030 (H) may be specifically intended to expand the capability of landowner responsibility. **Expansion of landowner liability is one thing, but the potential for ensnaring other “Responsible Parties” as defined, warrants further consideration.** A closer reading of other provisions concerning Responsible Party’s joint and several liability⁶ in conjunction with a careful reading of the definition of who a “Responsible Party” is, creates concern that **professionals that serve as “Agents” for purposes of filing building, grading and even assisting with cultivation permits, could be scooped up in liability exposure.** We want applicants to have professional assistance if it will help in the accurate and efficient filing and processing of such applications, particularly where there is technical knowledge involved. Our rural community already has a shortage of qualified professionals to assist applicants (engineers, etc.). Careful examination of the negative incentive created by additional liability for ANY “Responsible Party” as currently defined, should be considered.

7. **Proposed Section 1.08.060(H)(2)(a) contradicts this Board’s direction to maintain consistency with State law definitions regarding Immature Plants.** In fact, 10A.17 was specifically AMENDED to align its definition of Immature Plants with the State definition. This proposed section creates a completely different definition.

Conclusion

We respect the need to review and “cleanup” the NOV and Administrative Citation process and to create sufficient deterrence to encourage compliance rather than a flagrant violation of cultivation and other Mendocino County Codes. However, we believe that the proposed amendments fail to adequately consider the unintended consequences of enacting the language proposed. We respectfully request that the issues be carefully examined in light of our comments and returned to the Board after a specific analysis of those considerations has been conducted.

Thank you for your consideration.

Mendocino Cannabis Alliance

⁶ Sec. 1.08.060(H)(4)