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**MEMORANDUM**

**DATE:** DECEMBER 12, 2016

**TO:** GENERAL GOVERNMENT COMMITTEE

**FROM:** MICHAEL MAKDISI, DEPUTY COUNTY COUNSEL

**RE:**

- (1) ORDINANCE CREATING CHAPTER 2.76 ESTABLISHING THE OFFICE OF COUNTY HEARING OFFICER
- (2) ORDINANCE CREATING CHAPTER 1.08 ESTABLISHING PROCEDURES TO ISSUE ADMINISTRATIVE CITATIONS AND PENALTIES FOR ANY VIOLATION OF COUNTY CODE
- (3) ORDINANCE AMENDING CHAPTER 8.75 RELATING TO PUBLIC NUISANCE ABATEMENT
- (4) ORDINANCE CREATING CHAPTER 8.76 ESTABLISHING NUISANCE ABATEMENT PROCEDURES SPECIFIC TO CANNABIS CULTIVATION
- (5) ORDINANCE AMENDING CHAPTER 9.31 RELATING TO CANNABIS CULTIVATION VIOLATION ENFORCEMENT MECHANISMS

**BACKGROUND AND SUMMARY:**

Chapter 8.75 of the Mendocino County Code ("Code") provides the procedures that code enforcement officers use to abate nuisances caused by any violation of the Code or as otherwise declared. Chapter 8.75 was created by ordinance 4183 in 2007, and revised in 2009 through ordinance number 4177. In September of 2009, Chapter 8.75, as it now reads, was adopted in its entirety by ordinance number 4227, which completely replaced the prior version of the code.

Although Chapter 8.75 can be used by anyone with authority to enforce the Code, Chapter 8.75 is particularly important to the Department of Planning & Building Services

("Department"). The Department has a division dedicated to code enforcement and makes regular use of the procedures in Chapter 8.75, which are fundamental to achieving code compliance and nuisance abatement by the Department. The Department has achieved a moderate amount of success using the current procedures in Chapter 8.75, but they are unwieldy, insufficient and inefficient. Accordingly, the Department has researched alternatives to the current code enforcement procedures in an effort to propose a more robust and effective system that is also more manageable and efficient. The current proposals stem from this research.

In coordination with the County Counsel's office, the process of amending Chapter 8.75 expanded to a major revision that now includes the revision of an additional Chapter and the proposal of three new chapters. The proposals include: amendments to Chapter 8.75; the addition of Chapter 2.76 relating to hearing officers; the addition of Chapter 1.08 establishing an administrative citation procedure; the addition of Chapter 8.76 addressing nuisances caused by cannabis cultivation; and a minor revision to Chapter 9.31, relating to cannabis cultivation, for the purpose of changing a reference from Chapter 8.75 to Chapter 8.76.

Central to reshaping the code enforcement framework is revising and reorganizing Chapter 8.75. Chapter 8.75 currently includes a process for administrative penalties, but such process is limited and unnecessarily complicates the process of achieving actual nuisance abatement by the County of Mendocino ("County"). Therefore, the proposed amendments remove the administrative penalty section from Chapter 8.75; however, Chapter 1.08 will maintain the County's ability to issue penalties for violations that rise to the level of a nuisance, and also will provide a procedure that is not limited to nuisance level violations. Proposed Chapter 1.08 will apply to any violation of the code. Creating a separate chapter under the General Provisions title of the Code for Chapter 1.08 will create a clear alternative procedure for anyone with Code enforcement responsibilities, including the Department, which may be applied on its own or in conjunction with any other code enforcement mechanism.

The law regarding cannabis cultivation is changing. In light of these changes, the Board of Supervisors ("Board") requested that nuisance abatement procedures specific to cannabis cultivation be considered while revising the code enforcement laws. The Sheriff's Office has historically handled the abatement of nuisances related to cannabis cultivation. Although the Sheriff has had some success in the abatement of such nuisances, a more expedient process, tailored to address the unique circumstances surrounding cannabis cultivation, would enhance the effectiveness of the County's ability to abate such nuisances and would more likely deter future code violations. Proposed Chapter 8.76 sets out a nuisance abatement procedure that is more expedient than the procedures set out in Chapter 8.75. Chapter 8.76 also incorporates the administrative citation process set out in proposed Chapter 1.08 with additional provisions that allow for the simultaneous use of both procedures. Creating a separate chapter applicable to nuisances caused by cannabis cultivation allows for appropriate tailoring specific to such nuisances. A separate chapter will also help avoid confusion when applying the provisions in Chapters 8.75 and 1.08.

Furthermore, the cannabis laws are in a state of flux; creating a separate chapter will make it easier to adapt the Code as the cannabis laws change.

While revising and creating Chapters 8.75, 8.76 and 1.08, County Counsel's office recognized the appropriateness of creating the Office of County Hearing Officer. Government Code sections 27720, et seq. provide the authority to delegate power to hearing officers and use their services to provide due process. However, this authority is premised on a county's creation of an Office of County Hearing Officer. The establishment of the office and the use of hearing officers as articulated in proposed Chapter 2.76 conforms to the requirements of state law, ensuring the County's continued use of hearing officers while clarifying their role and providing continuity amongst various provisions of the Code. Hearing officers will continue to be contractors for the County, not County employees, and they will play a key role in providing efficient and necessary due process under the revised Chapter 8.75 and the proposed Chapters 1.08 and 8.76.

### **SUMMARY OF PROPOSED CHANGES BY CHAPTER:**

#### CHAPTER 2.76 (Proposed):

Chapter 2.76 creates the Office of County Hearing Officer. This chapter may be applied to any provision when the Board decides to delegate authority to a hearing officer. As such, it will apply to code enforcement because code enforcement relies upon hearing officers to provide due process by conducting a range of administrative hearings. Key features include:

- ♦ The formal establishment of the Office of County Hearing Officer in conformity with Gov. Code §§ 27720 et seq. that authorizes the use of hearing officers upon resolution or ordinance by the Board.
- ♦ A system to appointment, contract with and use hearing officers. Appointment may be made by County Counsel or the Board, formalized by a contract.
- ♦ A provision that defaults the required hearing to the responsible board, agency, commission or committee when a hearing officer is not available.
- ♦ The qualifications, powers and responsibilities of a hearing officer.

#### CHAPTER 1.08 (Proposed):

Chapter 1.08 provides a new tool for code enforcement officers enforcing any provision of the Code. This chapter authorizes the issuance of administrative citations for Code violations, coupled with either a notice to cure or an administrative penalty. This chapter replaces the less inclusive and more difficult to use administrative penalties section currently found in Chapter 8.75. This chapter can be used by itself or in conjunction with any other code enforcement procedure. Key features include:

- ♦ The establishment of an administrative citation and penalty procedure applicable to any violation of the Code.

- ♦ A non-exclusivity clause permitting use in conjunction with other enforcement procedures.
- ♦ A penalties section that specifies the amounts permitted to be charged depending on the type of violation, scaled for repeat and uncorrected violations.
- ♦ A differentiation between violations that require a chance to cure from those for which a citation may include an immediate penalty.
- ♦ A description of the procedure that an enforcement officer must use when issuing a citation, including the information that must be included in the citation as well as the service procedures required when issuing the citation.
- ♦ An administrative appeal process for the purpose of providing due process to alleged violators who wish to contest their citations and penalty. This appeal process includes rules about when an appeal is permissible, to whom the appeal must be made and in what form, the subject matter that may be appealed and determined, the hearing procedures, service requirements respecting the notices involved with the hearing procedures, and a recognition of the right to judicial review of the administrative decision.
- ♦ Incorporation of the use of hearing officers as permitted by proposed Chapter 2.76.
- ♦ Enforcement mechanisms available to the County if the violator does not pay his or her penalties as required.

#### CHAPTER 8.75:

Chapter 8.75 sets out the abatement procedures by which the County can effectuate nuisance abatement. The proposed revisions re-center the focus of the chapter on actual abatement by the County, in part by removing the administrative penalties section, which will be replaced and enhanced by proposed Chapter 1.08. This revision also includes reorganizing the chapter to clarify the process, streamlining the abatement and cost recovery process, clarifying language and simplifying procedures. Key amendments include:

- ♦ Clarification about when a public nuisance may be declared and by whom.
- ♦ Clarification regarding the scope of the chapter, its intended use, and by whom.
- ♦ Clarification and simplification of the summary abatement language.
- ♦ The addition of a full description of the administrative abatement process, the central procedure in this chapter, along with a description of the information to be included in a notice and order to abate, and specific direction to abate a nuisance if not abated or appealed within the time prescribed.
- ♦ Clarification and modification of the service procedures, including an option for personal service.
- ♦ Complete removal of the administrative citation penalties provisions.
- ♦ Clarification regarding use of hearing officers, with reference to proposed Chapter 2.76.
- ♦ Clarification and enhancement of the appeal procedure, including timelines, notice provisions, and coordination between the parties, the hearing officer and County Counsel.
- ♦ Clarification of the hearing procedures, including an added provision allowing the use of attorneys at the appeal hearing.

- ♦ Clarification of the hearing officer's determination, including a service requirement.
- ♦ Clarification and enhancement of language providing for abatement of a nuisance by the County after appeal.
- ♦ Revision of the costs recovery sections to articulate a clear, simple and straightforward process. Includes details about accounting and billing, timelines, a description of the process, service and notice requirements, a description of information to be delivered to responsible party, and an opportunity to contest the accounting of costs.
- ♦ Revisions of the cost recovery hearing process – hearing on accounting – which replaces the current lien hearing process. Includes timelines, service and notice requirements, hearing procedures, and determination to be made at the hearing, issuance of decision, and time to remit payment after decision.
- ♦ Amends and clarifies remedies to collect costs through special assessment and abatement lien after responsible party fails to pay. This includes a required resolution of the Board prior to special assessment, and details about how to effectuate the special assessment or notice and record the abatement lien.
- ♦ In addition to removal of administrative penalties section, also removes other sections that were either replaced or are no longer needed, including the sections previously titled, “failure of owner to abate or appeal” and “report and notice of lien hearing”.

#### CHAPTER 8.76 (Proposed):

Chapter 8.76 specifically addresses the abatement of nuisances caused by cannabis cultivation. The primary focus of this proposed chapter pertains to an expedited process of nuisance abatement, and also incorporates civil administrative penalties. The key feature to effectuating this process is the notice and order to show cause, followed by an automatic hearing, and substantially shorter deadlines. Instead of issuing a notice and order to abate with the option of appealing, as provided in Chapter 8.75, the automatic hearing process in this chapter reduces the number of steps and time necessary to get from notice of violation to actual abatement while still providing due process. Key provisions include:

- ♦ A provision providing the option to use the abatement procedures in Chapter 8.75.
- ♦ A full description of the expedited procedure that begins with the administrative order to show cause, including a description of the information required in the notice, and service requirements.
- ♦ A description of the automatic hearing procedures, which will be heard in front of a hearing officer as permitted by proposed Chapter 2.76, and includes a scheduling timeline of no less than five days after service of notice and order to abate. Parties may be represented by an attorney, but formal rules of evidence shall not apply. Hearing procedures also include a description determination by hearing officer and notice and service requirements of the decision.
- ♦ An enforcement provision that allows abatement of a nuisance by the County two days after service of the hearing officer's decision.
- ♦ A recovery of costs provision that places the cost of abatement on the responsible party to be recovering in the same manner as set out in Chapter 8.75.

- ♦ Incorporation of proposed Chapter 1.08 by reference, with additional provisions that allow for the simultaneous use of both the nuisance abatement and administrative citation procedures.
- ♦ Incorporation by reference to select sections in Chapter 8.75 as appropriate.

CHAPTER 9.31:

Chapter 9.31 is currently the primary Code section relating to cannabis cultivation. Chapter 9.31 currently references Chapter 8.75 for the abatement of nuisances caused by violations of Chapter 9.31. The only change proposed to this chapter is changing the reference from “8.75” to “8.76” to clarify that 8.76 applies.

**RECOMMENDATION:**

County Counsel recommends providing staff with direction as appropriate along with a referral to the Board of Supervisors for hearing on December 19, 2016, of the proposed changes to Chapters 8.75 and 9.31, and of the creation of Chapters 1.08, 2.76 and 8.76 of the Mendocino County Code.

These changes and additions will bring the Code into conformity with state law; will create a stronger, more effective and efficient code enforcement framework that allows a more tailored approach to addressing code violations and nuisances; will streamline the standard nuisance abatement procedure with a greater focus on actual abatement by the County; and will create additional procedures that can be applied throughout the code to any code violation, and that also specifically addresses the abatement of nuisances caused by cannabis cultivation.

These proposed ordinances have already been submitted to the Clerk of the Board to meet the time requirements for submittal to the Board, but any or all of these proposed ordinances may still be updated or withdrawn pursuant to any direction by this Committee.

**RECOMMENDED PROCEDURE FOR CONSIDERATION AND REFERRAL:**

The proposals in the memorandum build upon each other. Therefore, approving one but not another could lead to unintentional results. For this reason, County Counsel recommends that the Board consider these items in the order listed in the heading and in the following manner:

- (1) First consider referring item 1, creating Chapter 2.76 relating to the office of county hearing officer, to the Board of Supervisors;
- (2) If item 1 is referred, then consider item 2, creating Chapter 1.08 relating to administrative citations and penalties, otherwise continue this item and provide further direction to staff;

- (3) If item 1 is referred, then also consider item 3, amending Chapter 8.75 relating to public nuisance abatement, otherwise continue this item and provide further direction to staff;
- (4) If items 1-3 are referred, then consider item 4, creating Chapter 8.76 relating to nuisance abatement regarding cannabis cultivation, otherwise continue this item and provide further direction to staff;
- (5) If items 1-4 are referred, then consider item 5, amending Chapter 9.31 by changing the reference from 8.75 to 8.76, otherwise continue the item and provide further direction to staff.