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**TO: Board of Supervisors**

**FROM: Matthew Kiedrowski, Deputy County Counsel  
Michael Makdisi, Deputy County Counsel**

**DATE: February 7, 2017**

**SUBJECT: Recommended Changes to Certain Enforcement Provisions  
in sections 10A.17.140-10A.17.160**

Dear Honorable Board Members,

In January 2017, the Board of Supervisors ("Board") adopted ordinances that made certain changes to the County's code enforcement procedures, including changes specific to cannabis cultivation. Following the adoption of these changes, the County Counsel's Office undertook a review of the enforcement procedures currently in the proposed Chapter 10A.17, specifically sections .140 through .160. County Counsel identified a few changes that are the subject of this memorandum. Attached to this memorandum is an excerpt of these sections, showing proposed changes to the versions prepared in response to direction given by the Board on January 24, 2017.

Changes to 10A.17.140:

This section deals with violations and penalties. The proposed changes create consistency and clarity with the recently adopted administrative citation and penalties sections, Ch. 1.08, as well as consistency with the changes currently proposed for section 10A.17.150.

- Changes title to "penalties" from "enforcement", to clarify the content. General enforcement is addressed in section 10A.17.160
- Clarifies that re-inspections would be by a third party inspector
- Clarifies language regarding civil penalty action consistent with new Ch. 1.08
- Removes language regarding assessments of penalties because penalty assessments are now detailed in Ch. 1.08 to which this section cites
- Clarifies time of termination consistent with language and timing now provided for in section 10A.17.150

Changes to 10A.17.150:

This section deals with due process when terminating a cultivation permit. The changes proposed in this section are based in part on the possibility that the implementation of Ch. 8.76 (abatement procedure for nuisances caused by cannabis cultivation) may be necessary after a cultivation permit has been terminated. Providing an Order to Show Cause when terminating a cultivation permit helps retain the functionality of Ch.8.76, which depends in part on short timelines.

- Clarifies title to reflect focus of the section and identify the form of due process
- Modifies the form of due process from an optional appeal to an automatic Order to Show Cause, providing consistency and functionality with Ch. 8.76.
- Identifies the manner in which service of notice is to be given
- Delineates the substance required in the Order to Show Cause
- Clarifies how Hearing Officers will be used, and that hearings will default to the Agricultural Commissioner in the absence of a Hearing Officer
- Delineates the hearing procedures, including timelines, manner in which hearings will be conducted, representation by attorneys, order of presentation at hearing, and effect of failure to appear
- Clarifies the determination to be made after hearing, effective date, and service of determination on permittee.

Changes to 10A.17.160:

This section deals with enforcement generally, including when a public nuisance may be declared. The proposed changes provide clarity in light of recent changes to the law, and also clarify and limit the basis for declaring a nuisance.

- Changes title and divides section into two appropriate, but related, subsections
- Changes language regarding general enforcement of Ch. 10A.17
- Clarifies and limits the basis on which public nuisances may be declared.  
Limiting the basis for declaring a public nuisance as proposed provides clarity with regard to the intended purpose of issuing permits, consistency with recent changes to State law, and addresses the concerns about enforcement regarding current cultivation in light of the anticipated gap between application and issuance of permits, especially during the transitional period immediately following adoption of Ch. 10A.17 and Ch. 20.242.

#### **Section 10A.17.140 – Cultivation Site Inspections: Violations and Enforcement Penalties**

–If the Third Party inspector determines that the site does not comply with the requirements established by this Chapter, the inspector shall serve notice to the permit holder and the Agricultural Commissioner with a written statement identifying the items not in compliance, and may suggest action(s) that the permit holder may take to cure the non-compliance(s). Personal delivery or mailing the written statement to the mailing address listed on the application by regular mail, plus three (3) days after date of mailing, shall constitute delivery. The time frame allowed for the permit holder to take appropriate actions to cure the non-compliance will be the shortest feasible time frame as determined by the inspector. The Agricultural Commissioner's office may amend the time frame if deemed inappropriate. A re-inspection by the Third Party inspector will be required to confirm and document the curative measure(s) taken by the permit holder. It is the responsibility of the permit holder to facilitate the above mentioned re-inspection by the end of the allowed timeframe. Failure to request re-inspection by the Third Party inspector or to cure any items of non-compliance shall initiate an un-scheduled compliance inspection from the Department of Agriculture. Inspection fees shall be charged to the permittee for any additional compliance inspections required beyond those regularly scheduled and enumerated in Section 10A.17.080. All additional inspection fees shall consist of the hourly rate for an inspector from the Department of Agriculture for the travel and inspection time plus the standard IRS mileage rate for travel distance. The fees shall be paid in accordance with Section 10A.17.030 (E).

If the non-compliance(s) are substantiated during the un-scheduled compliance inspection above, the Department of Agriculture ~~shall initiate a civil penalty action~~ may issue an administrative citation pursuant to Chapter 1.08 against the permittee for a violation of the specific portion of this chapter constituting the non-compliance and notify other public agencies or County departments, including the Department of Planning and Building Services, of these findings. The cultivation permit issued pursuant to this Chapter shall be in temporary "alert status" for possible action against the permit, pending a final compliance re-inspection from the Department of Agriculture within ten (10) days. This final re-inspection will be to determine whether or not the permit holder has cured all issues of noncompliance. Failure to request and facilitate this final re-inspection or to cure any items of non-compliance shall result in the issuance of a "Notice to Terminate Permit". The permit shall be terminated ~~immediately upon the expiration of any appeal period or, if an appeal to this determination and action is filed, per Section 10A.17.150, upon the final determination~~ after the hearing on the order to show cause pursuant to Section 10A.17.150 of the appeal. Any civil penalties assessed shall accrue daily, starting from the date where an unscheduled compliance inspection, as referenced above, is performed and the non-compliances are confirmed to the date whereby either: a) the non-compliances are confirmed, through a second unscheduled compliance inspection, to have been remediated or; b) the "Notice to Terminate Permit" is issued or any appeal, if filed, has run its course through the appeal process.

The County shall additionally notify any state license authority, as defined by the MCRSA, whenever the County cultivation permit has been terminated.

**Section 10A.17.150 – ~~Cultivation Site Inspections and Appeals~~Administrative Order to Show Cause**

~~(A) Issuance of Order to Show Cause. If a~~At the same time as issuance of a “Notice to Terminate Permit,” ~~is issued to a permittee by or as soon as practicable thereafter, the Agricultural Commissioner’s Office shall also issue a notice and order to show cause why the permit in question should not be terminated. Issuance may be completed by personal delivery, or by first class mail, postage prepaid and return receipt requested., the permittee may appeal said notice within ten (10) days after delivery. Personal delivery or mailing the written statement to the mailing address listed on the application by regular mail, plus three (3) days after date of mailing, shall constitute delivery. The appeal shall be made in writing, on a form provided by the Agricultural Commissioner’s Office. The fee for filing the appeal is \$100.00. The notice and order to show cause shall:~~

- ~~(1) Identify the permittee and the permit in question;~~
- ~~(2) Contain a statement describing the violations that caused the issuance of a Notice to Terminate Permit;~~
- ~~(3) Contain a description of the actions required to abate the violations;~~
- ~~(4) Notify the permittee that unless the owner or occupant abates the conditions, a hearing will be held to determine whether there is any good cause why the permit in question should not be terminated, which will be heard before a Hearing Officer, the Agricultural Commissioner, or the Commissioner’s authorized designee within the Agricultural Commissioner’s Office who did not also issue the Notice to Terminate Permit;~~
- ~~(5) Specify the date, time and location of the hearing to be held, or state that the date, time and location of the hearing will be specified in a subsequent notice, which will not be set for a date earlier than 5 days after personal delivery, or 10 days after mailing, of the notice specifying the date, time and location of the hearing;~~
- ~~(6) State that the permittee will be given an opportunity at the hearing to present and elicit testimony and other evidence regarding whether there is any good cause why the permit in question should not be terminated;~~
- ~~(7) Contain a statement that, unless the permittee abates the conditions causing the violations, or shows good cause why the conditions should not be abated, the permit in question shall be terminated.~~

~~The appeal shall be heard by a Hearing Officer using the procedures outlined in Chapter 8.75, as modified by the following provision:~~

~~(A) The appeal shall be heard by the Hearing Officer within ten (10) business days following the filing of the appeal. The Hearing Officer shall render a written ruling on the appeal within three (3) business days following the hearing.~~

~~(B) Use of Hearing Officers. Whenever the Agricultural Commissioner issues an order to show cause why a permit issued pursuant to this Chapter should not be terminated, the Agricultural Commissioner is authorized to use the services of a Hearing Officer pursuant to Mendocino County Code Chapter 2.76. Such use of a Hearing Officer shall be made whenever a Hearing Officer is available, and the Agricultural Commissioner shall coordinate with County Counsel to appoint and maintain at least one Hearing Officer to the extent possible. In the event that a Hearing Officer is unavailable, the duty to hear the appeal shall remain with the Agricultural Commissioner.~~

(C) Hearing Procedure.

(1) The Hearing Officer shall hold an administrative hearing to determine whether the violations identified in the Notice to Terminate Permit created a sufficient basis on which to terminate the permit in question. The hearing shall be held at the date, time and location indicated on the notice to permittee, which shall be no less than five (5) calendar days after personal service, or no less than ten (10) calendar days after mailing of all the notices required by this section.

(2) Parties may choose to be represented by an attorney; however, formal rules of evidence or procedure shall not apply. Any relevant evidence may be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. Nonetheless, any failure to make a timely objection to offered evidence constitutes a waiver of the objection. The Hearing Officer has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time.

(3) The hearing shall be conducted in the English language. The proponent of any testimony by a witness who does not proficiently speak the English language shall provide an interpreter who has been certified as an interpreter by either the State of California or the County of Mendocino.

(4) The person who issued the Notice to Terminate Permit shall first describe the acts or conditions constituting the violations identifying in the Notice to Terminate Permit and present evidence to demonstrate how the identified violations form a basis for terminating the permit in question. Thereafter, the permittee shall be given an opportunity at the hearing to present and elicit testimony and other evidence to show good cause why the permit should not be terminated.

(5) In the event that the permittee does not appear and present evidence at the hearing, the Hearing Officer may base his or her decision solely upon the evidence submitted by the person issuing the Notice to Terminate Permit.

(D) Determination after Hearing. The Hearing Officer shall consider the evidence presented by the parties, and shall issue a written decision and order that either affirms or reverses the determination to terminate the permit in question. Such decision shall be delivered to the permittee by personal delivery or by first class mail, postage prepaid and return receipt requested. The decision shall become effective when signed by the Hearing Officer and on the day the decision is personally delivered to the permittee, or five (5) days after the decision is mailed to the permittee.

**Section 10A.17.160 – Enforcement and Declaration of Public Nuisance**

(A) All of the remedies provided for in this Chapter, or elsewhere in the law, shall be cumulative and not exclusive for violations of this Chapter. ~~Any v~~Violations of this Chapter, include~~ing~~, but are not limited to failure to obtain and maintain in good standing any permit required by this Chapter, compliance with any required element on which a permit was issued pursuant to this Chapter, or any violation of the provisions of this Chapter where a permit is not required. The County may enforce this Chapter by using any applicable state or county law.

~~including, but not limited to County Code Chapters 1.08, 8.75 or 8.76, and may use either the administrative process to achieve code compliance or available civil remedies, such as injunctive relief. , shall be, and the same hereby is declared to be, a public nuisance and unlawful and shall be subject to injunction, abatement or any other administrative or civil remedy available to the County under the applicable state and county laws, including but not limited to those set forth in Mendocino County Code and MCRSA.~~

~~The County may abate the violations of this Chapter in accordance with the provisions of County Code Section 8.75 or by the prosecution of a civil action, including an action for injunctive relief.~~ The remedy of injunctive relief may take the form of a court order, enforceable through civil contempt proceedings, prohibiting the maintenance of the violation of this Chapter or requiring compliance with other terms.

~~The County may also abate the violation of this Chapter through the abatement process established by Government Code Section 25845.~~

(B) Any cultivation of cannabis in the absence of a permit issued pursuant to this Chapter is a public nuisance and may be abated by the County as a public nuisance in accordance with the provisions of either County Code Section 8.75 or 8.76 unless such cultivation either: is exempt pursuant to County Code section 10A.17.030; is otherwise in compliance with State Proposition 64 and all regulations adopted by the County related to cannabis for adult use pursuant to Proposition 64; or is being cultivated by an entity whose application for a permit pursuant to this Chapter has been submitted, accepted and is currently pending, and who has also submitted a sworn affidavit to the Agricultural Commissioner on a form prepared by the Agricultural Commissioner that includes, but is not limited to, an affirmation that they have met the requirements to obtain a permit or are actively in the process of fulfilling the requirements.