



COUNTY OF MENDOCINO

DEPARTMENT OF PLANNING AND BUILDING SERVICES

860 NORTH BUSH STREET • UKIAH • CALIFORNIA • 95482
120 WEST FIR STREET • FORT BRAGG • CALIFORNIA • 95437

BRENT SCHULTZ, DIRECTOR
PHONE: 707-234-6650
FAX: 707-463-5709
FB PHONE: 707-964-5379
FB FAX: 707-961-2427
pbs@mendocinocounty.org
www.mendocinocounty.org/pbs

MEMORANDUM

DATE: AUGUST 4, 2020

TO: HONORABLE BOARD OF SUPERVISORS

FROM: BRENT SCHULTZ, PLANNING AND BUILDING SERVICES DIRECTOR

SUBJECT: CURRENT CANNABIS CULTIVATION ORDINANCE PHASE 1 AND 2 PROCESS UPDATE AND A POTENTIAL RE-DIRECTION TO A CANNABIS LAND USE ORDINANCE

Board of Supervisor Previous Direction

On June 16, 2020, the Board of Supervisors provided direction to the Department of Planning and Building Services, to continue exploring options with the California Department of Food and Agriculture (CDFA) and the California Department of Fish and Wildlife (CDFW). The Board's direction was to make the current system more functional, to continue processing permits through the current system, and also to produce specifics on what a land use based permitting system would be like, as opposed to the current cultivation permit system.

Communications with California Department of Fish and Wildlife (CDFW) — Referral Process for Sensitive Species Review

Over the course of the last 2+ years, County staff has been working with CDFW to develop a policy agreement pursuant to 10A.17.100(A)(2), which requires consultation with CDFW for each application related to a defined, objective set of criteria that applications can be reviewed against to avoid impacts to sensitive species and natural communities. The intent of this section of the ordinance allows for the development of a mutual policy between the County and CDFW, which if established, would not require CDFW consultation on all Phase 1 and Phase 2 applications. This would reduce the formal, lengthy referral consultation to CDFW, currently creating a significant bottleneck in issuing cultivation permits. Phase 3, as presently written, requires that CDFW is sent all referrals for Sensitive Species review.

In the past few weeks, County and CDFW staff have discussed developing a "Pilot Policy" agreement. County and CDFW staff had a meeting in late July continuing discussions regarding the Draft Sensitive Species Pilot Policy (See Attachment A). County staff is currently waiting for feedback on the County's proposed Pilot Policy documents. However, at our last meeting, CDFW staff stated they believe all Phase 1 permittees and applicants would require changes to their cultivation activities in order to achieve a less than significant impact to sensitive species. Staff is also working on prioritizing active applications and refining the referral process to maximize efficiency. Staff estimates that by late summer, the County and CDFW may be able to finalize a Pilot Policy allowing County staff to complete Sensitive Species review with the goal to not need to refer all applications to CDFW. This Pilot Policy, however, would not eliminate the considerable amount of work required to complete Sensitive Species review; it would simply allow the County to have control over when the review would be completed. There is no estimate presently of the time required to complete a Sensitive Species review. It may create a significant workload for which no cost recovery has been identified or considered.

Even if County staff conducted the Sensitive Species review, there will be cultivation sites that will not demonstrate a “less than a significant impact” to Sensitive Species which is required within 10A.17.100(A)(2). Without a way to condition the cultivation sites, applications will be denied.

California Environmental Quality Act (CEQA) Issues: Communications with California Department of Food and Agriculture (CDFA) – Cal Cannabis Licensing Division

Background

Over one year ago, CDFA requested that Mendocino County provide site specific CEQA information, which would ultimately be in the form of a CEQA Checklist (referred to informally as “Appendix G”) to support each Mendocino County cannabis cultivator’s Annual State Cannabis Cultivation License application. This process was never anticipated when the Cannabis Ordinance was adopted by the County in 2017.

PBS has worked this last year with CDFA to develop the CEQA Checklist, which is attached to this memorandum as Attachment B. CDFA requires that for every ministerial County Cannabis Cultivation Permit issued, a CEQA Checklist must be completed in order to document the evaluation of the site and activities to demonstrate that the environmental impact is within the scope of the Program’s Mitigated Negative Declaration (MND), in accordance with Section 15168(c)(4) of the State CEQA Guidelines. The CEQA Checklist is required to be reviewed and approved by CDFA prior to the applicant receiving an Annual State Cannabis Cultivation License.

Alternatively, without the County providing a CEQA Checklist the applicant will be responsible for the preparation of an environmental document in compliance with CEQA that can be approved or certified by CDFA (See California Code of Regulations Title 3. Food and Agriculture Division 8. Cannabis Cultivation Chapter 1. Cannabis Cultivation Program § 8102 (r)(2)). Many Mendocino County Cannabis Cultivation permit holders and permit applicants have provisional licenses with the State, which expire on January 1, 2022. In order to transition to an Annual State Cannabis Cultivation License these Provisional License holders must have CDFA approved site specific CEQA review.

Current Efforts

County staff and CDFA representatives have a final CEQA Checklist template form, of which the County has provided two (2) completed samples to CDFA for review. In late June 2020, CDFA reviewed these sample CEQA Checklists and are requiring substantial additional information for the “Project Description” on each cultivation site (Attachment C to this memorandum – May 29, 2019 Memo from CDFA to Local Agencies). The Annual State Cannabis Cultivation License application and the County issued Cannabis Cultivation Permit application materials have never required this level of detail for the project description that CDFA is now requesting; therefore, a site specific and unique project description would need to be created for each application and requires information that is not contained in County permit records. County staff has determined that completing a CEQA Checklist for each cultivation site, including the comprehensive project description—to the satisfaction of CDFA—is the functional equivalent (in regard to staff time) of a discretionary permit, but with no cost recovery.

County staff estimates that one completed CEQA Checklist, as required by CDFA, with a detailed project description will take County staff 16-40 hours to complete per application. This includes research, writing and review, prior to providing the checklist to the applicant so they can attach it to their Annual State Cannabis Cultivation License application. Mendocino County has issued approximately 275 permits. Staff estimates, writing and issuing 275 CEQA Checklists could require 11,000+ staff hours at a cost of hundreds of thousands of dollars, without a mechanism for cost recovery nor would it guarantee approval for an Annual State Cannabis Cultivation License. This particular level of review was never contemplated when the original ordinance was adopted.

Summary

There is no quick solution for our current ministerial ordinance and process difficulties. Even with the Pilot Policy for the Sensitive Species review with CDFW, staff time and cost associated with the review is still not known. Over 800+ applications have yet to receive their Sensitive Species review, which is required per 10A.17.100(A)(2). Furthermore, PBS is unable to quantify how many applicants are actually capable of demonstrating a less than significant impact for each component of the checklist, given that mitigations cannot be applied to alter the determination.

CDFA will not issue an Annual State Cannabis Cultivation License, without site specific CEQA. The County's CEQA Checklist solution, can only be written for permitted individuals within our Cannabis Cultivation Permitting Program, who have gone through all the reviews and referral processes outlined within our ordinance. Based on our discussions with CDFA, they require a comprehensive project description within each CEQA Checklist which PBS staff estimate will take 16-40 hours to complete per application. This is the functional equivalent (in regard to staff time) of completing site specific review as would be done under a discretionary permit, but with no cost recovery.

The CDFW Sensitive Species review Pilot Policy and the CDFA CEQA Checklist solution both require significant staff time to complete. Presently, there is no identified cost recovery method under our current ministerial program. These processes will also be difficult for our permittees and applicants to navigate, with no guarantee that their cultivation sites will ultimately pass site specific environmental review. Furthermore, because Provisional State Licenses expire January 1, 2022, PBS staff has no confidence that sufficient time remains for active permittees and applicants in the County's Cannabis Cultivation Permitting Program to obtain all necessary approvals for an Annual State Cannabis Cultivation License to be issued.

Recommended Land Use Ordinance Re-Direction for Cannabis

County staff recommends the following concerning re-direction of the Cannabis Cultivation permitting process:

- Do not reopen Phase 1 and close Phase 2 (reopening Phase 1 would compound and increase existing challenges with Sensitive Species reviews and CEQA Checklists).
- Repeal and replace with a provision to sunset 10A.17 and 20.242 within three (3) years (Transition Period) of the adoption of a Land Use Ordinance for Cannabis Cultivation, or at the time of termination of Provisional State Cannabis Cultivation Licenses (presently January 1, 2022).
 - During the Transition Period, current Phase 1 or Phase 2 permittees and applicants could either continue to pursue CDFW and CDFA approvals, or they can transition to the new ordinance which would be a discretionary permit process. (See transition section for details.)
- Establish a New Chapter in Title 22 to regulate Commercial Cannabis Cultivation.
 - Title 22 is the section of County Code that holds some of the more specialized land use activities and lives outside of the zoning code. These include Timber Production Zones, Archaeological Resources, Surface Mining and Reclamation, Floodplain, Agricultural Preserves and Williamson Act Contracts.
 - A discretionary permit process (Administrative Permit, Minor Use Permit or Major Use Permit) has referral deadlines to resource agencies including CDFW and is a well-established process. Referrals must be completed in a time frame of 14 days or less or it is assumed that no comments are forthcoming. There is a built in mechanism for CDFW review and a time limit they must meet. Additionally, CDFW gets a second review period during the circulation of any Initial Study, and have a minimum of 21 days, (occasionally up to 30 days) to review the Initial Study and provide comments. It is likely that most discretionary permits will require some form

of Biological or Botanical analysis for the review of County staff and resource agencies to provide an appropriate CEQA environmental determination.

- Discretionary permits run with the land not a person. This would eliminate the need for reassignment or renewal of County permits on an annual basis and only as specified in approving the discretionary permit, which will save significant staff time and streamline our County permit process.
- Moving to a discretionary permit for land use eliminates the need for issuance of a County Cannabis Cultivation Permit. This also eliminates the need to train staff to administer a complicated and unique regulatory system instead of building on their skills as land use planners.
- A discretionary permit could be conditioned to mitigate or avoid environmental impact to less than significant levels through conditions or mitigation measures placed on the permit. It also can be conditioned so that it is not effective unless or until the applicant demonstrates they have obtained an Annual State Cannabis Cultivation License and are in compliance with said License.
- Only the terms of the discretionary permit, regarding land use, as well as any other violation of County law would be enforced by the County.
- The County would create an ordinance that makes commercial cannabis cultivation without an Annual State Cannabis Cultivation License an administrative violation.
- If a permittee is in violation of the land use conditions or does not have an Annual State Cannabis Cultivation License to cultivate, the County would be able to revoke the permit, pursuant to conditions contained in the discretionary permit (i.e. use permit).

Transitioning Current Program Permittees or Applicants into a Land Use Based Ordinance

- Sunset 10A.17 and 20.242 in three (3) years, or at the same end date of Provisional Cannabis Cultivation Licenses by the State, and allow the following pathways for current Phase 1 or Phase 2 permittees or applicants:
 - Those with a Phase 1 or Phase 2 issued permit will be prioritized for a CEQA Checklist required by the State in order to be issued an Annual State Cannabis Cultivation License.
 - Those with a Phase 1 or Phase 2 issued permit and an Annual State Cannabis Cultivation License will be allowed to continue in the ministerial program for 3 years, in which the permittee will be required to submit an application for a discretionary permit prior to the three (3) year sunset date or other deadline as the Board may determine is appropriate. During those three (3) years (or other deadline determined by the Board), we recommend that the Board eliminate the annual County Cannabis Cultivation Permit renewal fee and allow permittees to apply that fee savings toward the discretionary permit application fee.
 - Those who are currently in application for a Phase 1 or Phase 2 permit can choose to either apply their initial application fee, in which they have already paid, toward a discretionary permit, or the applicant can choose to continue to work toward a Phase 1 or Phase 2 permit, acknowledging the limitations of the three (3) year sunset date and that there is no guarantee they will receive a ministerial permit or CDFA approved CEQA Checklist before the deadline. If the applicant chooses the latter option a discretionary permit is still required to be applied for during the three (3) year period.
 - Qualified Cannabis Equity Grant applicants have the opportunity to apply for fee waivers for Cannabis Cultivation permitting.

Allowances of Cultivation Size and Zoning

The Board will need to decide on Commercial Cannabis Cultivation allowances. Board direction is needed to finalize the zoning and cultivation size allowance that were started during the Phase 3 discussions. At the Board meeting on May 14, 2019, the Board had directed staff to move Phase 3 to a discretionary permit process. At the December 10, 2019 Board meeting, the Board referred the proposed table to the Cannabis Cultivation Ad Hoc for further discussion. Since that time, the Board has considered revising the tables for Commercial Cannabis Cultivation allowances under Phase 3 at their February 25, 2020 and June 16, 2020 meetings.

The Board considered the Ad Hoc recommendations at the February 25, 2020 meeting, where the item was continued to a future meeting date. The Ad Hoc recommendations were on the agenda for the June 16, 2020 Board meeting; however, the Board decided to postpone discussion of the table to a future date. Attachment D to this memorandum is the table presented by the Ad Hoc at the June 16, 2020 Board Meeting. No formal direction has been given to County staff on zoning and cultivation size for Phase 3. This information is required in order to move forward with drafting any proposed ordinance revisions.

Staff Recommendations

1. That the Board direct Planning and Building staff to combine some aspects of Chapters 10A.17 and 20.242 into one ordinance under Title 22 of the Mendocino County Code and return such ordinance to the Board for consideration as soon as possible. Any new ordinance shall be based on a discretionary permit approach for all future cannabis cultivation and related activities in the County. Furthermore, such ordinance should include sunset provisions for Phase 1 and Phase 2 applicants/permittees under Chapters 10A.17 and 20.242 and a process to transfer them into the new discretionary permit process under Title 22.
2. That the Board give direction on zoning and size allowances of Cannabis Cultivation using the Cultivation Ad Hoc's zoning table recommendations, Attachment D, as a starting point for the discussion.
3. During the Transition Period, the Board directs Planning staff on prioritization regarding processing existing permit holders and active applications.
4. That the Board give Planning staff direction on how to complete CEQA Checklist documents for CDFA. The following are options:

Option 1: Direct staff to subcontract CEQA Checklist completion services with an established fee adopted by the Board of Supervisors and paid by the applicant. The County's subcontractor would be responsible for preparing the full CEQA Checklist which includes the required comprehensive project description. The cost of preparation of the completed CEQA Checklist would be paid by the applicant.

Option 2: Direct PBS staff to create a process which would require the applicant to be responsible for hiring a qualified planning consultant to write a comprehensive project description and to submit it to the County to review and include in the County's preparation of a completed CEQA Checklist. Direct staff to establish a fee to pay for the time needed to review the applicant submitted project description and the preparation of the CEQA Checklist.

Option 3: The Board of Supervisors direct staff to prepare the CEQA Checklist (including the comprehensive project description), for current County permit holders (about 275) and allocate sufficient funding to pay for 11,000+ staff hours.

Attachments

- A. Draft Sensitive Species Review Pilot Policy
- B. CEQA Checklist—Mendocino County Cannabis Cultivation Permit CEQA Guidelines Section 15168 Review
- C. CDFA May 26, 2019 Memo to Local Agencies—CEQA Practice Recommendations from CDFA for Cannabis Licensing—Project Description Content—Version 2
- D. Cannabis Cultivation Ad Hoc Committee Legacy and Non Legacy Zoning Tables from June 16, 2020 Board of Supervisors Meeting