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

Re: Mendocino Cannabis Program, Phase 1 and 2 applicant priority in the Commercial Cannabis Activity Ordinance (CCAO)

Dear Supervisors:

We write on behalf of the Mendocino Cannabis Alliance to reinforce the appropriateness, both in terms of law and good public policy, of allowing all cultivators with applications pending under Phase 1 and 2 to be given a 60-day early enrollment window in the Commercial Cannabis Activity Ordinance (CCAO) before new project proponents could apply. In a related fashion, to allow those Phase 1 and 2 applicants to convert their existing applications into CCAO applications in this exclusive application window (as recommended by the County's Planning Commission), and to provide priority processing for converted applications regardless of when submitted.

A question was raised arguing that to do so might represent an illegal advantage given to the Phase 1 and 2 applicants, or conversely an improper disadvantage to potential new applicants in the CCAO. The law does not support such an assertion.

It is a given that a County may not deprive a person of equal protection of the laws. (U.S. Const. amend XIV; Cal. Const. art 1, section 7.) The equal protection doctrine does require that a county treat *similarly situated* persons in a like manner. In fact, creating different categories for different treatment is not only lawful, but is an important tool for land use planning when there is a legitimate governmental purpose.

Regulatory classifications can and do differ and without running afoul of the doctrine. Local governments have a wide police power latitude to enact land use regulations that are fair and take into account the different positions and regulatory status of variously situated landowners and permitting applicants. (See, e.g., *Village of Euclid v. Amber Realty Co.* (1926) 272 U.S. 365, 388, 47 S.Ct. 114 (regarding zoning ordinances), and *Miller v. Board of Pub. Works* (1925) 195 Cal. 477, 486.) The situation that Phase 1 and 2 applicants are in here – having long been “in line” and having invested significant time, effort, and financial expenditures to advance applications that have been pending before the County for years – are easily and rationally distinguishable from potential future Phase 3 applicants that are not similarly situated.

Newcomers to cannabis permitting in Mendocino County who argue that they cannot be treated differently are not entitled to deference from a legal perspective. Being a potential applicant for a new permitting process is not a "suspect class" warranting special protection. Requiring them to wait until the existing applicants pending from Phase 1 and 2 to be processed first under the CCAO would not trigger a "strict scrutiny" kind of legal review, such as would be required if the distinction was based on race, national origin, ethnicity or gender. (*Engquist v. Oregon Dept. of Agriculture* (2008) 553 U.S. 591, 596, 128 S.Ct. 2146.)

If challenged, this type of distinction would be analyzed under the "rational-relationship test," where a court would review the different classifications of applicants, as proposed. (*Weber v. City Council* (1973) 9 Cal.3d 950, 958; *Candid Enters., Inc v. Grossmont Union High Sch. Dist.* (1985) 39 Cal.3d 878, 890.) The test would be easily supported under these circumstances as bearing a rational relationship to legitimate government purposes. These purposes would include, for example, fairness and predictability for businesses that have expended significant money and time in reliance on County rules previously issued, encouraging continued investment by those same businesses, and increasing the survival rate of such enterprises already invested in the community.

Further, prioritizing the Phase 1 and 2 applicants is good public policy that is good for business. As the old adage goes, "Certainty is the mother of investment." It would support an effort by Mendocino County to promote a healthy and vibrant business community by allowing the existing cultivation permit applicants to continue on the path they have already embarked upon in good faith, and NOT by yanking the rug out from under them and telling them that because the first regulatory structure turned out to be an abject failure, that they've now lost their place in line and have to start over.

We are not writing, however, to rehash the ways in which Phase 1 and 2 has failed applicants who have been working for years to obtain County and State cultivation approvals, but rather we are writing to assure the County that it can and should offer modest processing accommodations to applicants who are willing to abandon an ever-changing, uncertain Phase 1 and 2 process for a clearer and better-defined new ordinance. Mendocino Cannabis Alliance's support for allowing Phase 1 and 2 applicants to voluntarily transition to the CCAO should not be interpreted as support for or an excuse to abandon Phase 1 and 2 applicants who stay in line. Phase 1 and 2 applicants are entitled to due process and equal protection of the laws, just like other classes of applicants who are similarly situated.


Thank you for considering our analysis and recommendations.

Sincerely,

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