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MEMORANDUM

DATE: April 26, 2021
TO: Board of Supervisors
FROM: Christian M. Curtis, County Counsel CMC
SUBJECT: Attorney Client Communication - Cannabis Ordinance Procedural Issues

I wanted to write you to provide legal advice and analysis on a few issues related to the cannabis cultivation ordinance continued from April 19 to April 27. During the meeting on April 19, I mentioned that the changes being discussed might require that the ordinance be sent back to Planning Commission for further comment. Having looked at that issue, and a few related items, I wanted to write you to share my analysis and recommendation.

New Modifications Regarding Land Use Must be Sent Back to Planning Commission

The primary issue that we've been looking at is whether the current changes to the ordinance need to be sent to the Planning Commission before the Board can adopt the ordinance. This requirement stems from Government Code section 65857, which reads:
The legislative body may approve, modify or disapprove the recommendation of the planning commission; provided that any modification of the proposed ordinance or amendment by the legislative body not previously considered by the planning commission during its hearing, shall first be referred to the planning commission for report and recommendation, but the planning commission shall not be required to hold a public hearing thereon. Failure of the planning commission to report within forty (40) days after the reference, or such longer period as may be designated by the legislative body, shall be deemed to be approval of the proposed modification. (Gov. Code § 65857.) This statute was last amended in 1973 to add the phrase "not previously considered by the planning commission during its hearing," (Stats 1973 ch 600 § 1.) Since then, there have been a surprisingly small amount caselaw or commentary on this section.

In looking at whether the changes contemplated here would require referral to the planning commission, we look at three things. First, we consider whether the proposed modification is something to which the processes in Government Code section 68587 would apply at all. Planning commission review is only necessary when an ordinance exercises certain powers, including "[r]egulat[ing] the use of buildings, structures, and land as between industry, business, residences, open space, including agriculture . . ." (Gov. Code § 65850.) The current proposed ordinance contains some regulations that fall under this rules (e.g., the zoning table) as well as changes that do not (e.g., removal of certain licensing requirements under 10A.17). If the Board modified a portion of the ordinance that wouldn't have had to go to the planning commission in the first instance, it does not appear to us that the modification, by itself, would require referral back to the commission.

Second, we look at whether the change constitutes a "modification" or "amendment" of the proposed ordinance. (Gov. Code § 65857.) On its face, the language used in the statute could refer to *any* change in the ordinance, even minor tweaks in phrasing. At least one case, however, has indicated that this requirement applies only to a "substantial modification . . ." (*Tracy First v. City of Tracy*, 177 Cal. App. 4th 1, 12 (2009).) We think that court likely interpreted the statute correctly, but it offers minimal guidance as to when a modification is "substantial." Additionally, given the tangential nature of this comment in the opinion, it is possible that a different court might choose to ignore the language about modifications being substantial as "dicta." Accordingly, even the most conservative reading of whether a change is substantial carries a certain amount of risk.

Third, we look at whether the modification was "previously considered by the planning commission . . ." (Gov. Code § 65857.) Like the last term, this phrase appears to have significant ambiguity. On the one hand, it is possible to read this phrasing narrowly to mean that any exact wording not previously in front of the commission would need to be sent back. On the other hand, it could also be read broadly to mean that any discussion of the proposed topic would be sufficient. We have found very little caselaw on this issue and have not had time to obtain and review the legislatively history. All we really know with certainty is that the Board does not have to refer an ordinance back if they adopt only one of several recommended rezones. (*Millbrae Asso. for Residential Survival v. Millbrae*, 262 Cal. App. 2d 222 (1968).) Given the materials we've reviewed, we believe that, to qualify as "previously considered," the commission would not have to have considered the exact language contemplated, but would need to have had a meaningful discussion of the proposed change.

I am Recommending that Changes to the Zoning Table and Rangeland be Sent Back to the Commission

Given the above, I am recommending that the proposed changes to zoning table (eliminating the indoor and mixed light uses) be referred back to the planning commission. Similarly, while it is a closer call, I recommend that the proposed change to what is allowed in rangeland (i.e. a required finding of previously soil previously disturbed for cultivation) be referred back as well. Although the commission did have general discussions over the zoning table and what to allow in rangeland, these changes are sufficiently novel that I believe that referral back to the commission is required. There is a certain amount of judgment involved, but on balance we don't believe that the discussions at the commission were sufficient to characterize these changes to be "previously considered."

Additionally, I am recommending a certain amount of caution given the consequences of an erroneous decision. If the Board didn't send the ordinance back to the commission, it's possible that no one might challenge it or that a court might take a liberal reading of section 65857. If, however, a Court ruled that the Board made an error, the remedy may be to invalidate the ordinance and require the Board to start over. That result, however, would most likely occur *after* June 30, meaning that the County would lose the opportunity to take advantage of the statutory CEQA exemption. Given the significant adverse consequences of having no new ordinance in place soon, it may be prudent to avoid anything that gives rise to a successful procedural challenge.

Consequences of Missing the June 30 Deadline

As noted above, I am recommending a certain amount of caution given the possibility that a challenge might cause the County to lose the ability to pass a viable ordinance before the June 30 deadline. After that deadline has passed, any changes to the permitting scheme, including adoption of a new program like this one, will require environmental review under CEQA. Since some of the impacts of this requirement may not be obvious, I want to make sure that I outline them.

First, environmental review is likely to be a lengthy process. I can't say exactly how long with certainty, but I note that completing the EIR process related to wildlife services took approximately 3-4 years. My best guess is that we'd be looking at a similar timeline for a new cannabis ordinance, given how contentious this topic is. This will depend on a lot of factors outside of our control, but even under the best of circumstances, it may be 2 years before we see any new permits issued. If we receive any legal challenges to the EIR, 5 or more years would not be unthinkable.

Second, this time needed for enviornmental review may require that the County open up the existing Phase 3 to new cultivators. The current moratorium on Phase 3 will expire on 2/27/22. Per Government Code section 65858, this can be extended until 3/27/23. After that date, however, the Board will need to either enact a new ordinance, repeal Phase 3, or otherwise modify it. More importantly, keeping Phase 3 closed increases the County's vulnerability to an Equal Protection or Dormant Commerce Clause challenge. I've mentioned that the limitation to Phase 1 applicants is potentially vulnerable to the extent that it looks like its protectionist in nature and designed to prevent outsiders from starting businesses in Mendocino. We are already responding to a legal challenge from an Phase 1 applicant who lacked proof of prior, and my ability to defend that diminishes the longer the doors are closed to people from outside the County. Consequently, if no new ordinance is imminent, it may be prudent to end the Phase 3 moratorium to avoid legal challenge.

Third, if the County does open up the existing Phase 3, it is likely to compound some of the problems with Phase 1 and CDFA permits. Like Phase 1, the old Phase 3 is primarily ministerial in nature. Accordingly, it will suffer the same disconnect between local and state environmental review. Additionally, I am aware that the Board and the Department have previously identified undesired changes in Phase 3.

Fourth, if we don't have a new ordinance in place soon, the legacy cultivators who are denied permits under Phase 1 will have no pathway to permits. I believe that the program had estimated that approximately 90% of the 1,100 pending applications will be denied. Once that occurs, they will no longer be able to legally cultivate, and without a new permit option, they will have no pathway to resuming cultivation. If the Board reopens the old Phase 3, some of the legacy cultivators may be able to apply in that program, but only if they are in an appropriate zoning district. As a result, it's possible that the County may be limited to approximately 110 legal cultivators for the next 3-4 years.

Some of these impacts might be lessened by interim modifications to 10A.17, but those changes would also require additional environmental review. Because 10A.17 was based on a mitigated negative declaration, the County is somewhat limited in how much it can change without

triggering the need for an EIR. Even small changes may take a significant amount of time in order to allow the County to process an addendum to the ISMND. Since most Phase 1 applicants are likely to fail because of SSHR (which was a mitigation measure), it's likely that an EIR might be needed before the Board could create a pathway for them to legalize after June 30.

Lastly, I would just note that these consequences apply regardless of whether the County fails to act by June 30, passes an ordinance that is invalidated by Court action after June 30, or passes an ordinance that is subject to a successful referendum. Accordingly, given the limited window in which to act, there is a significant amount of reason to make sure to get things right. Because of that, I am recommending a fairly cautious approach on any procedural issues.

Timing if Sent to the Commission

If the Board decides to refer the matter back to the commission, the statute explicitly exempts the Commission from holding a new noticed public hearing. (Gov. Code § 65857.) Instead, the commission would merely need to meet to discuss the changes. Under the Brown Act, this meeting would still require an opportunity for public comment, but it could be noticed as a special meeting (24 hours in advance), instead of as a public hearing (10 days in advance).

Additionally, if the planning commission fails to finish with forty (40) days, it would automatically be construed as approval. By my math, this means that if the Board refers the ordinance back to the commission, it could reliably schedule for the matter to come back to the Board sometime on or after June 7, 2021. While very close to the statutory deadline, this would still allow the Board to enact the ordinance before the statutory deadline.

Equal Protection

Lastly, if the Board decides to go forward with the changes eliminating mixed light and indoor cultivation for Phase 3, I am going to recommend looking at a similar change for any Phase 1 cultivators not currently using those techniques. Existing cultivators using these methods could reasonably be grandfathered in, but there are potential Equal Protection issues if the legacy cultivators are permitted to install *new* indoor or mixed light cultivation while new businesses are not.

Conclusion

For the reasons above, I'm recommending that the proposed ordinance be referred to the planning commission for review to the changes to the zoning table and the required findings for rangeland.

I realize that I'm covering a fair amount of ground here, so please feel free to call or email with any questions that you may have. I'm also happy to answer any and all questions during the Board meeting, but I wanted to get you this analysis in advance.

CMC