Hannah L. Nelson
Attorney at Law

31452 Airport Road, Fort Bragg, CA 95437

(707) 962-9091 - hannahnelson@hannahnelson.net

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

May 31, 2021

Re: Agenda Item 3a June 2, 2021- CCAO

Honorable Supervisors,

I write specifically to address the need for passage of a local land use-based discretionary permit ordinance for the unknown number of Phase 1 and Phase 2 applicants that are willing and able to comply with environmental and other detailed safeguards that 10A.17 intended to apply to but currently may have no clear mechanism for. As I have indicated previously, I believe adjusting to a truly land use-based system is not only the correct method for protecting our environment, but also is an important step in the direction of acknowledging that cannabis must be treated with parity. While there is much to discuss regarding whether standards within a land use-based system are being equally applied to cannabis as is with hemp and other agricultural crops, and there is a great need for discussions regarding the potential to de-couple land use-based environmental issues from other aspects of regulation for cannabis licensing and the need for overarching state level reforms of cannabis licensing with respect to CEQA irrespective of the state Provisional license crisis,[1] the focus of this memo is to support the creation of a discretionary permit process applicable to existing operators at this moment in time and to address an argument that some have posed that 10A.17 may be able to simply be modified to help the County address conditioning of permits for Phase 1 and 2 applicants.

While I am an attorney, I have intentionally written this memo without much reference to specific legal citations. I am confident that County Counsel can advise the Board on the legal sufficiency behind my statements. More importantly, my reasoning and conclusions, while rooted in law, are of a pragmatic nature. I wanted the Board and the public to be able to focus on the arguments without getting bogged down in legal citations.

The County has asserted under 10A.17, it cannot attach conditions to the approval of the permit and as a result, the system is a pass/fail process rather than one that would allow for issuance IF the conditions were agreed to and met. Sadly, it is likely that a legal tome could be written as to whether 10A.17 allows for or prohibits conditioning. However, in order to get to the current, practical reasons why timely passage of a land use-based discretionary ordinance is critical for existing operators, one need not go down that rabbit hole. Instead, we can simply move on to the essence of the argument by those who advocate for simply amending the current ordinance (10A.17) to effectuate requiring conditions, rather than passing a new ordinance.

[1] See, Origins Council CEQA Report that I helped author, the James Moose Memo and my individual paper on Mendocino County and CEQA, all which can be found at http://originscouncil.org/ceqa/

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To be clear, these solutions are not intended to apply to Phase 1 or 2 applicants who would not be able to meet the standard of less than significant impact, or that would want to conduct activities that are not already allowed under the current ordinance. Rather, I am limiting this discussion to whether those that could meet the stringent rules of 10A.17 BUT FOR the pass/fail nature of the County's processing system. In other words, the focus of this memo is regarding those that would "make it through" if the permit were conditioned and to address which specific method of conditioning could actually help at this time for those that are willing to adhere to the requirements as envisioned in the Mitigated Negative Declaration (MND) issued by the County.

My recommendations for a new land use-based ordinance as the preferred method of dealing with the particular cohort described above, is specifically in conjunction with my strong belief that every resource and effort must continue to be employed to process those Phase 1 and Phase 2 applications that can "make it through" under the current system without the need for conditioning. This means concurrent efforts to continue to streamline the processes by removing duplicative and unnecessary provisions and procedures that are not directly required the ordinance, the MND, or were already directed by the Board to be removed from the ordinance, but have not been. Efforts to implement a new ordinance if passed, must not drain the staff bandwidth and resources needed to continue to process applications under 10A.17. Additionally, any new ordinance must prioritize, on a continual basis, each of these categories of Phase 1 and 2 applicants (those that do not need a method of conditioning their project in order to "make it through" under 10A.17 and those that would otherwise be eligible if they had a method of conditioning), since these state provisional license holders are subject to drop-dead timelines with respect to completion of the additional site-specific review required by CDFA in order to keep their license. While we cannot count on the extension of the Provisional licensing system, or any specific potential extension period under current consideration by the legislature, it is likely that any extension would be either insufficient or would continue the pressure of a breakneck speed to get those licenses to the finish line. At this point, the two methods envisioned for the site-specific CEQA compliance in Mendocino County are through the Appendix G process or through the issuance of a discretionary permits. Under the Appendix G method, a site-specific CEQA compliance review may not even be submitted to the county for assessment and certification until after the local annual permit has issued. Under the discretionary permit process, referrals to outside agencies and other lengthy site-specific studies and analyses must be conducted. Either way, it all will take time and we will likely be continuing to try to beat the clock with respect to the end of Provisional licensing. As such, **we have an urgency to utilize the most efficient methods of conducting the requisite steps to ensure fulfillment of our environmental commitments.**

While the current ordinance COULD be amended to more specifically require a discretionary process for Phase 1 and Phase 2 applicants who might want to opt-in, there are two major practical and legal considerations as to why passing a new ordinance would be much better for achieving the purpose.

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It is worth noting that the current ordinance, 10A.17, actually includes at least one mechanism to condition a local annual cultivation permit: Compliance Plans. However, it is also true that those compliance plans were not intended to cover all aspects of environmental impact issues. As a result, it would be desirable to have an explicit "conditioning" process applicable to the issues related to the environmental impact of each project. Here are the two main reasons why a simple modification of the current 10A.17 ordinance would not suffice at this moment in time:

1. The amendment of 10A.17 would require new CEQA review.
2. Due process would prevent the mandatory application of the amendment to anyone with a "vested" interest, which is likely to include many of the Phase 1 and 2 applicants any amendment was intended to assist.

With respect to the first issue of new CEQA review, any amendment to the existing ordinance in such a substantial way would require a NEW CEQA analysis. The analysis would take time and involve a review of those portions of the MND that might be applicable to the amendment. Only after that analysis could the county come to a determination as to whether: (a) this project (the amendment to the ordinance) is a minor modification to the original ordinance analyzed in the MND and is therefore fully covered by the MND; (b) the amendment is a new project but it is categorically exempt; or (c) the amendment is a new project and a new ND, MND or EIR must be prepared. While under any scenario, a legal challenge may extend only to the newly proposed project (modification of ordinance) and current Phase 1 and 2 applicants may continue to be processed under the existing Phase 1 and 2 provisions, it is doubtful that it would be wise for the county to rely solely on the prior Initial Study/ MND for such substantial amendments. Therefore, at a minimum, a new study would have to be conducted. In the context of the state Provisional licensing crisis, every added month is critical.

With respect to the second issue, there has been an increasing awareness in legal cases that applicants have a "vested" interest in the permit after years of paying taxes and making substantial investments based on licensing requirements, and therefore due process and equitable principles of law apply to those applicants. Recently, these principles have been at issue with respect to the rights of provisional license holders in the context of denial for annual licenses. There has been a recognition that regardless of an agency's position that no appellate procedures are necessary in the denial of a license, a property right exists and therefore, agencies will be better situated if they implement constitutionally mandated due process rather than confront litigation. Here, the due process prohibition on retroactive application of additional obligations would likely result in any amendments to 10A.17 only on a voluntary basis. This could leave the county with the messy issue of whether its handling of the permitting process to date was proper. While it might be argued that applicants would overwhelmingly "volunteer" for the applicability of the amended ordinance to their file, the fact is, conditional permits that encompass the environmental issues that the county treated as

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pass/fail under Phase 1 and Phase 2 would not be compulsory for those groups. While it's true that a new ordinance would also be voluntary with respect to Phase 1 and 2 applicants, the ordinance itself would not create a mandate of conditions that would be applied to existing Phase 1 and 2 applicants after-the-fact. A new ordinance should explicitly allow for those Phase 1 and Phase 2 applicants who WANT to be subjected to the conditions of a new land use-based discretionary permit process to be eligible to go through the mandatory requirements under a new system without complicating the existing ordinance with such mandatory requirements which may not be properly imposed on existing applicants under the old ordinance.

Together, these pragmatic issues, combined with the very complicated history and contentiousness surrounding the existing ordinance and the MND it rests upon, which would have to be reevaluated at least to the extent the environmental provisions would apply to the group of people the modifications were intended to serve, lead me to the practical conclusion that a new land use-based discretionary permit ordinance is the correct and most efficient manner of proceeding to address this specific issue (the best method of providing a way to condition permits for Phase 1 and 2 files) at this moment in time.

Thank you for your consideration on this narrow topic.

Hannah L. Nelson