A Tradition of Stewardship
A Commitment to Service

Agenda Date: 2/2/2016
Agenda Placement: 6J

NAPA COUNTY BOARD OF SUPERVISORS
Board Agenda Letter

TO:	Board of Supervisors
FROM:	Minh Tran - County Counsel County Counsel
REPORT BY:	Susan Ingalls, Paralegal - 259-8152
SUBJECT:	Medical Marijuana Cultivation Ordinance (2nd Reading)

RECOMMENDATION

Second reading and adoption of an ordinance adding a new Chapter 8.10 entitled "Medical Marijuana Cultivation" to Title 8 of the Napa County Code.
ENVIRONMENTAL DETERMINATION: General Rule. It can be seen with certainty that there is no possibility the proposed action may have a significant effect on the environment and therefore CEQA is not applicable. [See Guidelines For the Implementation of the California Environmental Quality Act, 14 CCR 15061(b)(3)].

It has been determined that this type of project does not have a significant effect on the environment and is exempt from the California Environmental Quality Act under Section 15301 [See Class 1 (“Existing Facilities”)]; Section 15303 [See Class 3 (“New Construction or Conversion of Small Structures”)]; and Section 15311 [See Class 11 (“Accessory Structures”)]. See also Napa County’s Local Procedures for Implementing the California Environmental Quality Act, Appendix B.

EXECUTIVE SUMMARY

The ordinance adds a new Chapter 8.10 regulating medical marijuana cultivation to require that medical marijuana be cultivated only in appropriately secured, enclosed, and ventilated structures on legal parcels meeting certain criteria and by qualified patients or primary caregivers as those terms are defined therein.

On October 9, 2015, Governor Brown signed into law a suite of legislation regarding the Medical Marijuana Regulation and Safety Act, including Senate Bill 643 (McGuire), Assembly Bill 266 (Bonta), and Assembly Bill 243 (Wood). The legislation contains numerous provisions, including the creation of a new state agency: the Bureau of Medical Marijuana Regulation under the California Department of Consumer Affairs. It also defines medical cannabis as an agricultural product. These bills regulate medical marijuana in five distinct categories: manufacturing, dispensing, transportation, delivery, and cultivation. The first three areas will all be regulated by

various State agencies. The activities of delivery and cultivation will fall under local land use jurisdiction, which is the focus of this proposed ordinance.

On November 3, 2015, the Napa County Board of Supervisors received a presentation regarding medical marijuana from Director Morrison of Planning, Building, and Environmental Services. After receiving public comment, the Board provided the following guidance to staff for their preparation of an ordinance:

- Board supported a continued ban on dispensaries in unincorporated areas.
- Board supported the personal growth of medical marijuana for qualified patients and caregivers.
- Board supported the allowance of delivery of medical marijuana to unincorporated areas.

Staff has prepared an ordinance that allows for the cultivation of medical marijuana up to 25 square feet per legal parcel within appropriately secured, enclosed, and ventilated structures. The ordinance expressly prohibits outdoor cultivation and marijuana dispensaries. It is the intent of this ordinance to preserve the County's ability to regulate marijuana cultivation under the new state law and to prevent the State from becoming the "sole licensing authority" for purposes of cultivation. Nothing in the ordinance will prohibit the delivery of medical marijuana conducted in compliance with state law to qualified patients in unincorporated areas.

FISCAL IMPACT

Is there a Fiscal Impact? No

ENVIRONMENTAL IMPACT

ENVIRONMENTAL DETERMINATION: General Rule. It can be seen with certainty that there is no possibility the proposed action may have a significant effect on the environment and therefore CEQA is not applicable. [See Guidelines For the Implementation of the California Environmental Quality Act, 14 CCR 15061(b)(3)].

It has been determined that this type of project does not have a significant effect on the environment and is exempt from the California Environmental Quality Act under Section 15301 [See Class 1 (“Existing Facilities”)]; Section 15303 [See Class 3 (“New Construction or Conversion of Small Structures”)]; and Section 15311 [See Class 11 (“Accessory Structures”)]. See also Napa County’s Local Procedures for Implementing the California Environmental Quality Act, Appendix B.

BACKGROUND AND DISCUSSION

Background of Medical Marijuana Legislation

In 1996, the voters of the State of California approved Proposition 215, codified as California Health and Safety Code Section 11362.5 and entitled “The Compassionate Use Act of 1996 (CUA).” The CUA is limited in scope, in that it only provides a limited immunity and defense from criminal prosecution for certain crimes related to the possession and cultivation of marijuana by qualified patients and their primary caregivers. The CUA does not address the land use or other impacts that are caused by the cultivation of medical marijuana and it does not create a constitutional right to obtain marijuana.

In 2003, the Legislature enacted Senate Bill 420 also known as the Medical Marijuana Program (MMP) which was

codified in the California Health and Safety Code commencing with Section 11362.7. That legislation was enacted to clarify the scope of Proposition 215 and to provide qualified patients and primary caregivers who cultivate marijuana for medical purposes with a limited defense to certain specified State criminal statutes.

Neither the CUA nor MMP confer on qualified patients and their caregivers the unfettered right to cultivate or dispense marijuana anywhere they choose. Further, neither the CUA nor MMP require or impose an affirmative duty or mandate upon local governments, such as Napa County, to allow, authorize or sanction marijuana cultivation or the operation and establishment of facilities dispensing medical marijuana within its jurisdiction. Health and Safety Code Section 11362.5(b)(2) provides that the CUA does not supersede any legislation intended to prohibit conduct that endangers others. Health and Safety Code Section 11362.83 expressly allows cities and counties to adopt and enforce ordinances that are consistent with Senate Bill 420.

Health and Safety Code Section 11362.81(d) authorizes the Attorney General to “develop and adopt appropriate guidelines to ensure the security and non-diversion of marijuana grown for medical use by patients qualified under” the CUA. On August 25, 2008, California Attorney General Edmund G. Brown issued “Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use” (“the Attorney General Guidelines”), which established regulations intended to ensure the security and non-diversion of marijuana grown for medical use by qualified patients. Nothing in the Guidelines imposes an affirmative mandate or duty upon local governments, such as Napa County, to allow, sanction or permit the establishment or the operation of facilities cultivating or dispensing medical marijuana within their jurisdictional limits.

As recognized by the Attorney General Guidelines, the cultivation in any location or premises without adequate security increases the risk that surrounding homes or businesses may be negatively impacted by nuisance activity such as loitering or crime.

Marijuana remains an illegal substance under the Federal Controlled Substances Act (21 USC Section 801 et seq.) and it is classified as a Schedule I Drug, which is defined as a drug or other substance that has a high potential for abuse, that has no currently accepted medical use in treatment in the United States, and that has not been accepted as safe for use under medical supervision. The Federal Controlled Substances Act makes it unlawful, under Federal law, for any person to cultivate, manufacture, distribute or dispense, transport, or possess with intent to manufacture, distribute or dispense, marijuana. The Federal Controlled Substances Act does not exempt the cultivation, manufacture, distribution, dispensation, transportation, or possession of marijuana for medical purposes.

However, Section 538 of the Consolidated and Further Continuing Appropriations Act of 2015 prohibits the Department of Justice from expending funds in connection with enforcement of any law that interferes with California's ability to "implement [its] own State law that authorizes use, distribution, possession, or cultivation of medical marijuana."

Enactment of the Medical Marijuana Regulation and Safety Act

On October 9, 2015, Governor Brown signed into law a suite of legislation known as the Medical Marijuana Regulation and Safety Act (the "Act"), including Senate Bill 643 (McGuire), Assembly Bill 266 (Bonta), and Assembly Bill 243 (Wood). The legislation contains numerous provisions, including the creation of a new state agency: the Bureau of Medical Marijuana Regulation under the California Department of Consumer Affairs and a comprehensive dual licensing program which will eventually govern the licensing and control of all medical marijuana businesses in the state. These bills regulate medical marijuana in five distinct categories: manufacturing, dispensing, transportation, delivery, and cultivation. Most importantly for local jurisdictions, the Act contains anti-preemption language and preserves the local jurisdictions' ability to regulate or ban outright these activities.

The Act defines "Delivery" as the commercial transfer of medical cannabis or cannabis products from a dispensary to a primary caregiver, a qualified patient, or a testing laboratory. Under Business and Professions Code section 19340, a county must by ordinance explicitly prohibit delivery. If a county does not adopt an ordinance prohibiting delivery, then deliveries will be solely regulated by the State. Jurisdictions that allow delivery may impose a tax on each delivery transaction.

Cultivation involves the planting, growing, harvesting, drying, curing, grading, or trimming of cannabis. Health and Safety Code section 11362.777 establishes a Medical Cannabis Cultivation Program as part of the dual licensing scheme created by the Act. This section prohibits a person from submitting a state cultivation license if the cultivation applied for would violate the provisions of any local ordinance or regulation. If a county does not have an ordinance regulating or prohibiting the cultivation of marijuana, then the California Department of Food and Agriculture will become the sole permitting authority for medical marijuana cultivation in that county. Finally, this section exempts personal cultivation by a qualified patient of an area not exceeding 100 square feet from state cultivation permit requirements. Staff modeled the amount of personal cultivation allowed by ordinance from this statute in order to bring a proposed ordinance consistent with existing law.

The Act has established a March 1, 2016 deadline for local agencies to enact regulations for cultivation else cede permitting authority to the State.

Issues Surrounding Cultivation of Medical Marijuana

The cultivation of medical marijuana raises several potential issues.

- The July 2014 article in the journal "Bioscience" estimated that marijuana requires approximately 1.4 acre feet of water per acre of planted crop. Cultivation in some areas of the county, where water is already strained due to the ongoing drought, may exacerbate local groundwater conditions.
- Cultivation of medical marijuana on slopes of more than 5 percent would require approval of an Erosion Control Plan, to ensure the protection of water quality.
- Estimates on the yield of marijuana vary greatly, however, a general average seems to be one ton per acre. The October 2015 spot index for medical marijuana in California was $1,600 per ounce. Thus, conservatively, medical marijuana could generate gross revenues of $3.2 million per acre, which far exceed the $24,000 that could be generated by cabernet grapes (4 tons per acre at $5,923 per ton).
- Because of the value of the crop, the cultivation of medical marijuana can create security concerns, leading to greater law enforcement efforts.
- Marijuana plants grown outdoors, as they begin to flower and for a period of two months or more during the growing season, produce an extremely strong odor that is offensive to many people and detectable far beyond property boundaries. This strong smell may create an attractive nuisance, alerting persons to the location of the marijuana plants, thereby creating a potential risk of burglary, robbery, armed robbery, assault, attempted murder, and murder.
- Fertilizers and pesticides, both legal and illegal, used when marijuana is grown outdoors may unreasonably increase the concentration of such chemicals in storm water runoff thereby impacting local creeks, streams and rivers. Such pollution may negatively affect water quality for downstream users, harm ecosystems, and impact threatened or endangered species.
- Water for marijuana grown outdoors may be illegally diverted from local creeks, streams, and rivers, thereby unreasonably depriving downstream users of beneficial water sources. Such diversions may also impact water supply, harm ecosystems, and negatively affect threatened or endangered species.

Summary of November 3, 2015 Board Hearing:

On November 3, 2015, the Napa County Board of Supervisors received a presentation regarding medical marijuana from Director Morrison of Planning, Building, and Environmental Services. After receiving public

comment, the Board provided the following guidance to staff for their preparation of an ordinance in order to satisfy the March 1 deadline:

- Board supported a continued ban on dispensaries in unincorporated areas.
- Board supported the personal growth of medical marijuana for qualified patients and caregivers.
- Board supported the allowance of delivery of medical marijuana to unincorporated areas.

Proposed Medical Marijuana Ordinance Discussion

The proposed ordinance expressly prohibits any outdoor cultivation and marijuana dispensaries per the Board's direction. It is the intent of this ordinance to preserve the County's ability to regulate marijuana cultivation under the new state law after March 1, 2016 and to prevent the State from becoming the "sole licensing authority" for purposes of cultivation. Nothing in the ordinance would prohibit the delivery of medical marijuana conducted in compliance with state law to qualified patients in unincorporated areas. Staff worked with County Counsel, Planning, Building and Environmental Services, the Sheriff, the District Attorney's Office, and Health and Human Services for guidance and recommendations in drafting the ordinance. In summary, the proposed ordinance does the following in Title 8 Health and Safety:

1. Allows for the personal cultivation of medical marijuana up to 25 square feet of cultivated area per legal parcel.

- Only by a qualified patient or primary caregiver residing full-time on premises.
- Cultivation shall be within appropriately secured, enclosed, and ventilated structures as further defined in the proposed ordinance.
- Cannot be in greenhouses or "hoop houses".
- Permitted only on parcels with single-family residential units and not on parcels with apartments and other multi-family dwellings.
- The sale of any medical marijuana grown under this ordinance is prohibited.
- Outdoor cultivation is prohibited.

2. Dispensaries continue to be banned, and now expressly so in Title 8 of the County Code. The purpose and intent of the definition of a "dispensary" in section 8.10.20 is to prohibit both stationary and mobile dispensaries from operating within the County, including any human-powered mobile dispensary. This definition also incorporates any potential type of dispensary delivery service hub.

3. Board direction was to not expressly prohibit deliveries and no such prohibition is contemplated by any provision of the proposed ordinance. A qualified, licensed dispensary operating in full compliance with all local and state laws from within another jurisdiction shall be able to make deliveries to qualified patients residing within Napa County.

Any cultivation not in compliance with the provisions set forth in the ordinance are declared to be a public nuisance subject to abatement and administrative penalty under existing provisions of the County Code.

On January 26, 2016, the Board opened the public hearing and received public comment. After closing the public hearing, the Board discussed the ordinance and read non-substantive changes into the record. The Board then introduced the ordinance, read the title, waived reading the balance of the ordinance as modified and declared its intention to adopt the ordinance at the next regularly scheduled hearing or as soon thereafter as possible. The ordinance is now before the Board for formal adoption.

County Counsel recommends adoption of the Ordinance.

SUPPORTING DOCUMENTS

A . Redlined version showing changes read into record at Meeting

B . Final Ordinance

CEO Recommendation: Approve

Reviewed By: Helene Franchi