



A Tradition of Stewardship
A Commitment to Service

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NAPA COUNTY BOARD OF SUPERVISORS Board Agenda Letter

TO: Board of Supervisors

FROM: David Morrison - Director
Planning, Building and Environmental Services

REPORT BY: David Morrison, Director, Planning, Building & Environmental Servi - (707) 253-4805

SUBJECT: Direction on preparation of an ordinance to address commercial cannabis

RECOMMENDATION

County Counsel and Director of Planning, Building and Environmental Services seek direction from the Board of Supervisors on the preparation of an ordinance to maintain the status quo by prohibiting commercial cannabis, and on holding community outreach meetings regarding commercial cannabis in early 2020.

EXECUTIVE SUMMARY

On August 27, 2019, the Board of Supervisors directed staff to discuss with the State the effects of the expiration on December 4, 2019 of the County's cannabis moratorium, and to return with a report and options to address those effects, if any.

Based on staff's analysis and discussions with State officials, staff believes that the existing County Code would effectively prevent any applicant from initially obtaining a state license for commercial cannabis. However, through a process of appeal to the State, the outcome would be less certain. Although staff believes the County would likely prevail if such an appeal occurred, the issue has not been tested and the decision is not guaranteed. In addition, the County would incur significant litigation costs in defending the County Code.

Staff recommends that an ordinance be prepared amending the County Code to explicitly prohibit commercial cannabis uses. In order to have an ordinance in place prior to the moratorium expiration, the ordinance would have its first reading on October 15, 2019, and the second reading on October 22, 2019. The ordinance would become effective following 30 days, on November 21, 2019.

Staff also recommends that the County begin holding a series of public outreach meetings on cannabis beginning in January 2020.

FISCAL & STRATEGIC PLAN IMPACT

Is there a Fiscal Impact?

No

County Strategic Plan pillar addressed:

Collaborative and Engaged Community- Engage the public with County programs and resources to promote even greater understanding and a stronger sense of community.

Vibrant and Sustainable Environment - Develop a balanced approach to growth based on data-informed decisions.

ENVIRONMENTAL IMPACT

ENVIRONMENTAL DETERMINATION: The proposed action is not a project as defined by 14 California Code of Regulations 15378 (State CEQA Guidelines) and therefore CEQA is not applicable.

BACKGROUND AND DISCUSSION**History**

In February 2016, the Board of Supervisors adopted an ordinance banning the outdoor cultivation of cannabis in the unincorporated area and only allowing indoor cultivation of cannabis. In November 2016, California voters passed Proposition 64, which legalized the personal cultivation, possession, and use of small amounts of cannabis by persons age 21 or older. Proposition 64 granted California residents age 21 and older the right to cultivate up to six cannabis plants for personal use indoors and authorized local jurisdictions like the County to determine how many - if any - of those six plants could be grown outdoors by local residents. Following Proposition 64's passage, the California Legislature has passed and continues to consider additional legislation relating to cannabis cultivation, possession, and use. As a result of this massive overhaul of state law, the Napa County Board of Supervisors decided to re-evaluate its existing cannabis ordinances and explore potential policy changes consistent with Napa County voters' approval of Proposition 64.

On April 4, 2017, the Board of Supervisors selected Supervisors Gregory and Ramos to serve on an ad hoc committee - later named the Cannabis Roundtable - with representatives from each city and town within Napa County. The goal of the Cannabis Roundtable was to learn more about the legalization of adult use, the State's regulatory framework, and how local municipalities can work together to find consistencies in developing local ordinances. The Cannabis Roundtable held three meetings consisting of panelists discussing all aspects of cannabis regulation, and the Roundtable members toured three commercial cannabis facilities in Oakland.

At the November 14 and 21, 2017, meetings, the Board received a report from staff and from fellow Board members on the Cannabis Roundtable and discussed various aspects of cannabis regulation. The Board prioritized two cannabis-related issues that it sought to address over the next year: (1) ensuring access for medical cannabis patients and County residents by considering allowing the six plants allowed by law to be grown outdoors; and (2) exploring the possibility of allowing one or more types of commercial cannabis businesses to

locate and operate within the unincorporated county.

On January 23, 2018, the Board discussed and provided direction to staff regarding various policy considerations related to the development of an ordinance to allow the outdoor cultivation of cannabis for personal use.

On June 19, 2018, the Board approved the first reading and notice of intent to adopt an ordinance allowing the outdoor cultivation of cannabis for personal use. The ordinance was adopted by the Board on July 10, 2018, and it became effective on August 9, 2018.

On August 28, 2018, the Board engaged in a discussion regarding commercial cannabis activities. In the event that the municipalities within the County did not provide for sufficient access to recreational cannabis through the allowance of one or more recreation cannabis retailers, the Board directed staff to return to a future Board meeting with a proposed ordinance allowing a commercial cannabis retailer in the unincorporated area. (Currently there is only one dispensary in all of Napa County. The dispensary is located within the City of Napa and is limited to medical patients. Two additional dispensaries are licensed by the State to begin operation in the City of Napa, but they do not appear to have opened for business yet. These two additional dispensaries also would only be licensed to serve medical patients.)

On July 23, 2019, the Board received certification of sufficient signatures for the Napa County Commercial Cannabis Regulation Initiative (Initiative), which allows for commercial cannabis cultivation, and directed staff to prepare a report pursuant to Section 9111 of the Elections Code (9111 Report).

On August 20, 2019, the Board accepted the 9111 Report and adopted a resolution placing the Initiative on the March 3, 2020, Presidential Primary election ballot, for the purpose of enabling the people of Napa County to approve or reject the initiative. At the same meeting, the Board directed staff to schedule a discussion on the next agenda regarding the timeline and effort needed to prepare an ordinance to allow commercial cannabis uses.

On August 27, 2019, the Board directed staff to return with analysis and recommendations regarding the status of the County's commercial cannabis prohibition once the moratorium ends on December 4, 2019.

Moratoria

On December 5, 2017, the Board adopted a temporary moratorium prohibiting outdoor cultivation and commercial cannabis activities in the unincorporated area while studying these issues. On January 16, 2018, the Board extended the moratorium prohibiting commercial cannabis activities. It was extended again on November 13, 2018, until December 2019. The moratorium cannot be extended past December 2019.

On July 23, 2019, the Board adopted an interim urgency ordinance to establish a 45-day moratorium on the cultivation of industrial hemp. On August 27, 2019, the Board extended the hemp moratorium from September 6, 2019, to July 21, 2020.

State Law

Section 26055(f) of the Business and Professions Code requires every local jurisdiction to designate a contact person to serve as a liaison between the local jurisdiction and the three state agencies charged with reviewing and issuing commercial cannabis licenses. When a state regulatory agency receives an application for a commercial cannabis license, the regulatory agency is required to notify the contact person and ask whether the applicant complies with all local laws. The contact person can respond in one of three ways:

1. If the contact person confirms that the applicant complies with all local laws, then the regulatory agency continues with the licensing process.

2. If the contact person states that the applicant does not comply with local laws, the regulatory agency will deny the application.
3. If the contact person does not respond within 60 days, the state regulatory agency will assume the applicant is in compliance, and the application process will continue.

When the contact person states that the applicant does not comply, the State regulatory agency may ask for the local jurisdiction to cite the legal basis for their determination. In that scenario, the County would need to provide a specific ordinance or regulation that prohibits the specific activity requested by the applicant. The ordinance or regulation does not have to address cannabis directly, so long as it prohibits the specific activity at issue or otherwise renders the location or operation of the proposed cannabis business illegal.

If an application for a license is denied by the State, the applicant may request a hearing before the regulatory agency, in accordance with the State procedure for formal administrative hearings. The applicant may appeal the hearing decision to the Cannabis Control Appeals Panel, a five-member panel appointed by the Governor, Senate, and Assembly. Because this process is still being developed, it is unclear to what extent the County would incur staff time and monetary costs by participating in a hearing or appeal to defend the State regulatory agency decision.

A commercial cannabis license requires review under the California Environmental Quality Act (CEQA). If the appeal is successful, and the local jurisdiction has not conducted a CEQA analysis of the application's potential impacts, the State regulatory agency would require the applicant to prepare the necessary CEQA analysis. The State regulatory agency would assume the role as the lead agency, relying upon the applicant's analysis. The County would have the opportunity to comment on and/or challenge the regulatory agency's CEQA determination. This CEQA requirement also applies in all instances when an application is deemed in compliance with local laws, not solely when an appeal occurs.

County Code

Section 18.12.080 of the Napa County Code (Application of zoning district regulations) states the following:

- A. Except as provided in this title, commencing with Section 18.132.010, no building or other structure, or land, shall hereafter be used or occupied, and no building or other structure or part thereof shall hereafter be erected, constructed, moved or structurally altered except in conformity with all of the regulations herein established for the zoning district in which it is located.
- B. The regulations established by this title within each zoning district shall be minimum regulations and shall apply uniformly to each class or kind of building or other structure, or land.
- C. No commercial use shall be permitted of any property located in the unincorporated area of the county other than as is specifically authorized within the provisions of Title 18.

This section indicates that unless Title 18 (Zoning) specifically authorizes a commercial use, then the Code prohibits the use. This concept is generally referred to as "permissive" zoning; in other words, the zoning code must specifically allow the use for it to be permitted. Title 18 neither mentions nor specifically authorizes commercial cannabis uses.

In addition to the permissive prohibition on commercial cannabis in Title 18, Title 8 (Health and Safety) makes clear the County's intent that large-scale (i.e., commercial) cultivation of cannabis is prohibited in the unincorporated area.

Section 8.10.010 (Personal Cannabis Cultivation - Purpose and intent) states:

A. It is the intent of the board of supervisors to prohibit the large scale cultivation of cannabis in the unincorporated area of the county, while regulating the cultivation of limited amounts of cannabis for personal use as allowed by state law or for medical purposes to accommodate the needs of persons with an identification card and/or their primary caregivers, in order to protect Napa County's unique and sensitive environment, and to preserve the public peace, health, safety and general welfare of the citizens of, and visitors to the county.

B. It is also the intent of the board that nothing in this chapter shall be construed to:

[...]

2. Allow any form of commercial cannabis activity.

[...]

Analysis

Code Amendment

Staff believes that the County Code as currently written provides sufficient legal basis for the State to deny any commercial cannabis license application. The adequacy of the current Code's language was confirmed by Lindsay Rains, Licensing Manager for the California Department of Food and Agriculture (CDFA), on September 5, 2019 (see Attachment A). It should be noted that Plumas County has a permissive ban on some commercial cannabis uses, which the State has relied upon to deny license applicants. This approach was also confirmed verbally by Nicole Elliott, the Governor's Senior Advisor on Cannabis, in a phone conversation on September 5, 2019.

Based on our analysis and discussions with State officials, staff believes the permissive zoning in the Code and the lack of a CEQA determination would effectively prevent any applicant from initially obtaining a state license. However, if an applicant appeals the denial of a state license, the outcome would be less certain. There has not yet been an appeal of a denied application challenging the adequacy of a local jurisdiction's code prohibiting commercial cannabis uses. Although staff believes the County would likely prevail if such an appeal occurred, the issue has not been tested and the decision is not guaranteed. In addition, the County could incur significant litigation costs in defending the permissive zoning.

The State regulatory agencies operate under guidance from their individual legal counsel and from the Governor's office. As discussed previously, both the CDFA and the Governor's office have affirmed their acceptance of the County's permissive zoning prohibition. Although a shift in State policy does not appear likely in the near future, it is possible that the administration's guidance on this issue could evolve regarding the current support of permissive zoning.

To gain further perspective on this issue, staff has contacted other counties and the Rural County Representatives of California (RCRC) about the best approach to maintain the prohibition of commercial cannabis cultivation following the expiration of the moratorium on December 4, 2019. Approximately half of the 58 California counties currently prohibit commercial cultivation. All of them either explicitly ban commercial cultivation or are in the process of amending their code to include an explicit ban. (Fresno County currently has a permissive zoning code as it relates to commercial cannabis and is creating an explicit prohibition for the same reasons as staff outline in this report.)

Consequently, staff recommends that an ordinance amending the County Code to explicitly prohibit commercial cannabis uses be prepared to provide clarity and certainty. An explicit ban would provide clear guidance as to what

the County allows for the consideration of State regulatory agencies in making decisions about license applications and their appeals.

The moratorium on commercial cannabis expires on December 4, 2019. In order to have an ordinance in place to prohibit commercial cannabis uses prior to the expiration, the ordinance would have its first reading on October 15, 2019, and the second reading on October 22, 2019. The ordinance would become effective following 30 days, on November 21, 2019. The proposed ordinance would amend Title 8 (Health and Safety) of the County Code, which currently regulates cannabis activity. Since the ordinance is not amending Title 18 (Zoning), the Planning Commission is not required to consider the ordinance.

Public Outreach

On August 27, 2019, the Board discussed various topics related to commercial cannabis, including a pilot program for cultivation; inclusion in the Planning, Building, and Environmental Services (PBES) long-range work plan; the availability of public access to retail cannabis; and ensuring the continued prohibition of commercial cannabis after the expiration of the moratorium. Supervisor Dillon made a motion that staff discuss with the State and return with a report about the effects of the moratorium expiration and options to address those effects, if any. Supervisor Pedroza seconded the motion, which the Board unanimously approved. The Board took no further action.

The Board's direction on August 27, 2019, focused on the near-term concern of the moratorium expiration. There was no direction regarding the long-term position of the County on cannabis policy. The question of whether the County should allow commercial cannabis cultivation, manufacturing, and/or retail sales remains open. The Board was very clear, however, that any future discussion on cannabis needs to meaningfully engage the public and address the community's concerns.

Staff believes the issues of cannabis cultivation and retail access would benefit from broad, open, public participation, and a diverse and transparent discussion so the Board can be better informed before deciding what types of commercial cannabis activities may be allowed, where they may occur, and to what extent.

Requested Action

To maintain the status quo, staff seeks direction from the Board of Supervisors to prepare an ordinance explicitly prohibiting the commercial cultivation, manufacturing, and/or retail sale of cannabis in the unincorporated area. Staff recommends that the Board consider the ordinance for adoption at the October 15, 2019, regularly scheduled meeting.

With regard to future policy, staff recommends that the County begin holding a series of public outreach meetings on cannabis beginning in January 2020. The purpose of these meetings would be to provide information and to hear directly from the public their opinions regarding commercial cannabis activities. Upon completion of the public outreach meetings, staff would return to the Board of Supervisors in April 2019, with a summary of the comments received and recommendations regarding next steps.

SUPPORTING DOCUMENTS

A . Attachment A - Memo from CDFA

CEO Recommendation: Approve

Reviewed By: Leigh Sharp