Victoria Davis - Comments to the Planning Commission Re: Feb. 1 Planning Commission Meeting Agenda Item 6c Case OA_2018_0001, Amendment to the Mendocino County Code Medical Cannabis Cultivation Site Regulations

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From: david drell <wece@sbcglobal.net>
To: "davisv@mendocinocounty.org" <davisv@mendocinocounty.org>
Date: 1/29/2018 11:54 AM
Subject: Comments to the Planning Commission Re: Feb. 1 Planning Commission Meeting Agenda Item 6c Case OA_2018_0001, Amendment to the Mendocino County Code Medical Cannabis Cultivation Site Regulations
Attachments: PlanComRL Com2-1-18Word.docx

Dear Chair Holtkamp and Planning Commissioners;

Please see the attached comments from the Willits Environmental Center on Agenda Item 6c of Thursday's February 1, 2018 Planning Commission meeting regarding proposed changes to the Mendocino County Code, Medical Cannabis Cultivation Site Regulations. The essence of our comments are in the first two pages, with supporting background discussion in the last five pages.

Thank you for your careful consideration of these comments. Please feel free to contact me at 459-2643 if you have questions regarding these comments.

Yours,
Ellen Drell, for the Willits Environmental Center

January 25, 2018

From: Willits Environmental Center
630 South Main Street
Willits, CA 95490
707-459-4110
wece@sbcglobal.net

To: Chair Holtkamp and Members of the Mendocino County Planning Commission
Department of Planning and Building Services
860 North Bush Street
Ukiah, CA 95482
Attention: Victoria Davis, davisv@mendocinocounry.org

Re: February 1, 2018 Meeting Agenda Item 6c Case# OA-2018-0001, Amendment to the Mendocino County Medical Cannabis Cultivation Code Chapter 20.242.040 (B), Table 1, and (D) having to do with regulations regarding the expansion of existing cannabis cultivation sites on the Rangeland Zone District (RL)

Dear Chair Holtkamp and Members of the Commission;

The following are comments of the Willits Environmental Center on the above cited subject.

We urge the Planning Commission not to approve proposed Resolution OA_2018_0001 regarding changes to the Mendocino County Code: Chapter 20.242.040 Existing Cannabis Cultivation Sites, specifically 20.242.040 (B) Table I and 20.242.040 (D), Exhibit A.

We agree that CEQA allows for an Addendum to be made to a previously adopted Mitigated Negative Declaration (MND) if minor technical changes to a project are proposed or if none of the conditions described in CEQA Guidelines Section 15162 calling for a Subsequent EIR/MND have occurred. However, we feel that neither of these circumstances exist in this case.

First, the proposed changes are neither minor nor technical, as we describe in more detail below. Despite the fact that the issue is a footnote to a Table in the Ordinance, the proposed change has the potential to significantly impact the environment and to trigger additional cumulative impacts.

Secondly, the supporting documents before you do not support the “Whereas” assertion number four of the proposed Resolution which states that “none of the conditions described in CEQA Guidelines Section 15162”... which call for a Subsequent EIR/MND... “will occur”. In particular, #1 of those conditions that supposedly “will not occur” (on page 3 of the Draft Addendum) is a substantial increase in the severity of previously identified significant effects. We show below that the proposed change, which would remove the County’s discretionary oversight of the expansion of cannabis cultivation

sites, as much as 4-fold, on an unknown number of properties in the RL zone, (which zone the MND specifically excludes from new cultivation operations), clearly falls into the category of potentially increasing the severity of previously identified significant effects.

Nor do the supporting documents support the Findings on page 4 of the Draft Addendum. In particular, Finding #1 states that no major revisions to the MND are needed due to increased severity of previously identified effects. Finding #3 a) states that there will not be significant effects not already discussed in the MND; and Finding #3 b) claims that previously examined effects will not be more severe. None of these Findings is justified by the supporting documents.

As you recall, in the development of the MND, the actual Baseline conditions in the County which discussed the existing impacts of on-going cannabis cultivation, were never quantified zone by zone, or by any other method, or described in detail. Therefore, the mitigations, and in particular those that excluded new cannabis cultivation operations in certain zones including Forest Land (FL), Timber Production Zone (TPZ) and Rangeland (RL), were designed to prevent the existing conditions from worsening under the new Ordinance. This justified the Base Line as a starting condition.

Nevertheless, the proposed change to the MND and the Ordinance before the Commission now would allow expansion of existing cannabis cultivation in the RL zone with a simple zoning clearance (ZC). The proposed change would essentially remove County Planning and Building Services (PBS) oversight of potential environmental impacts and discretionary conditioning of permits for expansion of cannabis cultivation in that zone.

Thirdly, the discussion and proposal before you fails to mention that CEQA actually provides for a hierarchy of situations and remedies. The Commission has been presented with an all-or-nothing choice: the situation either requires a “Subsequent” MND, or, if the proposed change is minor and technical with no environmental impacts, it can be “corrected” with a simple Addendum to an existing MND. In fact, CEQA provides for a middle path. CEQA Guideline Section 15163 allows for a targeted Supplemental MND to review one or more particular potential impacts that might result from a specific change to a project. This path gives decision makers the benefit of analysis and mitigation but avoids the time and expense of a full Subsequent MND.

As stated above, we urge the Planning Commission not to pass the proposed Resolution which calls for an Addendum to the MND with the proposed change to (B) Table I and associated language at (D). Instead, we recommend that Table I with the double asterisk footnote and the language at (D) be left as written, recognizing the importance of the existing language because of the benefit it provides in protecting the natural resources in the RL zoning District, and because the existing language supports the legal validity of the MND and the County's CEQA process.

If, however, the Commission is convinced that this proposed change warrants consideration, we recommend that the commission postpone consideration of this

change until after the June 30, 2018 deadline for existing cultivators to apply for a permit to cultivate in Phase I, or whatever date is determined for the deadline. By waiting until all Phase I applicants have applied, the County will know how many potential cultivation site expansions there might be, and therefore be in a position to assess the impacts of the proposed change.

In any case, we feel strongly that this proposed change to the MND and Ordinance could have significant impacts to the environment, that the statements in the Resolution are inaccurate and not supported by facts, and that are the Findings on page 4 of the Draft Addendum are likewise inaccurate and not supported by facts. After seeking legal advice, we feel strongly that both CEQA Guidelines and case law, for example Save Our Neighborhood vs. Lishman (2006) and Mani Brothers Real Estate Group vs. City of Los Angeles (2007), clearly indicate that this proposed change must undergo a Supplemental MND analysis as described in CEQA Guideline Section 15163.

BACKGROUND

We are sorry to be back before the Planning Commission on the issue of Rangeland protection, which was an important element for the approval of the Mitigated Negative Declaration (MND) for the County's Medical Cannabis Ordinance. Although it was understood that changes would need to be made in the Ordinance as the mechanics of the permitting process were worked out, we had hoped that the fundamental tenants of the law would be unmolested at least through Phase I.

The cannabis growing community has been very much involved in working with the County to clarify, streamline and modify elements of the Ordinance such as specific facility uses, definitions, fees, etc. at Planning and Building Services, which we support whole heartedly. However, the issue before you today, whether or not to allow expansion of existing cultivation on Rangeland as much as fourfold without County discretionary oversight. i.e. with a simple zoning clearance, (ZC), appears to be the result of pressure on the Board of Supervisors by some cultivators to eliminate the burden of having to ensure protection of the environment at the County level when a cultivator on RL desires to expand his/her operation. It is not the result of an error in the Ordinance or MND.

The Rangeland exclusion mitigation,(Mit 5), adopted in the final and approved MND was critical, along with the Forest Land (FL) and TPZ zone exclusions for new cannabis cultivation operations in making the MND legally defensible. The Baseline analysis in the MND, i.e. the description of existing conditions, did not quantify the impacts of existing cannabis cultivation in any zone, including in the zoning districts of special environmental and natural resource values. But, by excluding any new cultivation on FL, TPZ and RL, the decision-makers could reasonably assume that with the prohibition of new cultivation operations on these natural resource-rich zones, negative environmental impacts associated with additional grading, vegetation removal, road construction, additional water use, possible fire risk and demands on county services would at least not get worse.

After the approval of the MND and the adoption of the Ordinance and during the commencement of the permitting process, the Board of Supervisors was of course confronted with the details of implementation. The issue of existing cultivators' ability to expand a small operation of 2500 sq. ft to 5000 or 10,000 sq. ft. in the restricted zones was intermittently discussed without any clear resolution, consensus or clear understanding by the public or staff. The issue was ultimately set forth in Chapter 20.242 of the County Code, Section 20.242. 040 (B) Table I and the double asterisk footnote (**), and (D). County Counsel states in his memo to the Commission on this issue that neither the footnote nor (D) is the result of CEQA analysis, mitigation measure implementation or direction of the Board of Supervisors, implying that failure to trace this language to a particular discussion or direction from the Board makes the language a "mistake", (hence the need to "correct" it), and expendable. We disagree. Whatever the source of the Table I double asterisk footnote and (D), it became part of the approved MND and the Ordinance that was approved and passed by the Board. We feel it is a critical part, as we discuss below.

Table I, says: existing outdoor operations up to 10,000 sq. ft., and existing "mixed light" operations up to 10,000 sq. ft., and a nursery up to 22,000 sq. ft. on RL can all be permitted with a simple zoning clearance (ZC) from the County Planning and Building Services (PBS), assuming the applicant has met the other requirements of the Ordinance. Obtaining a permit for the same types of cultivation operations on the other two restricted natural resource-rich zoning Districts, FL and TPZ, requires an Administrative Permit, which process, among other things, notifies neighbors of the application and gives the County discretion to impose conditions on the permit if necessary.

This discrepancy in the level of oversight conducted by the County in permitting existing operations in the RL zone versus the FL and TPZ zones without any fact-based environmental findings to justify it was already troubling to us. It is our impression that this lessening of environmental oversight on RL was also the result of a number of cultivators on RL urging the Board to reduce the time and expense of their permitting process, and the Board's desire to process more permits.

Amidst the complexity of issues and pressures from competing interests, the difficulty in communicating these complexities between the Board of Supervisors and the PBS staff and the Ag. Department, co-ordinating with the on-going State processes, the myriad of micro-issues brought by the cannabis growers, the additional layers of special interests brought by the Working Groups, the County's desire to be collecting fees and everyone's genuine interest in having the Ordinance actually work to the benefit of the cultivators, the environment and the County as a whole, we at the WEC were willing to let the unjustified lessening of environmental oversight on the permitting of existing RL cannabis operations go unchallenged.

We felt that the Table I double asterisk footnote (**) would partially address that discrepancy and preserve the intent of the MDN, especially with regard to the Mitigation that excludes new cultivation operations on RL, and the basic validity of the County's CEQA review and adoption of the MND process. The double asterisk states that a permit

application for expansion of cultivation operations on RL, (as well as on FL and TPZ) requires an Administrative review process. That means neighbors would be notified, and potential impacts such as increased water use, grading, road construction, the need for additional facilities and/or County services would all be considered before issuing a permit. Table I, with the double asterisk footnote does not prohibit expansion of existing operations, but it does implement County oversight. We feel this is appropriate, justifiable and in fact legally required to maintain the validity of the CEQA review undertaken to approve the Ordinance.

We feel that the County is arguable already on somewhat slippery ground in allowing what could amount to a four-fold expansion (2500 sq.ft. to 10,000 sq.ft.) of existing impacts in zones that were assumed to be off-limits to new cannabis cultivation. One could argue that, depending on the number of applicants for permits to expand on FL, TPZ, and RL, that permitting expansion at all discredits the Baseline - the "existing conditions" at the time the MND was written, and which served as the basis for the MND to actually mitigate existing or potential future impacts.

Now Table I says: We will allow existing operations on FL, TPZ and RL to expand with the knowledge that expansion could cause additional environmental impacts. But we will take that risk because we want and need more people to come forward and go through the permitting process. The double asterisks then says: However, in order to be sure we are not loosing additional environmental impacts on these zones, and changing the Baseline that buttressed the MND and Ordinance, we will lessen that risk by requiring an Administrative Permit for expansion in all three zones.

The WEC is willing to accept that rationale, and Table I with the double asterisk footnote as it is now written in the Ordinance. In agreeing to the existing language, all sides compromise. Cultivators in RL, like cultivators in FL and TPZ, will have their applications to expand undergo more scrutiny. The County may receive fewer applications to expand operations on RL (which actually coincides with the County's desire to direct future grows to more appropriate zones), and, though there will be increased risk of environmental impacts, those risks will be reduced due to County oversight.

Despite County Counsel's claim that this proposed change is merely a "correction" and a "non-substantive change", our experience with what is actually happening on the ground is very different. We have been receiving reports from around the County, in particular from inland areas, of cannabis operators establishing and expanding activities outside of and possibly within the permitting process. These operations are causing confusion, and distrust about the Ordinance, and in some cases environmental impacts, including possible water pollution.

Expansion of cultivation sites, previously small and discreet, are now fully visible with associated road construction, possible wetland filling, and in some cases new and expanded well drilling. The proposed "correction" of the double asterisk footnote to Table I (B) and associated language at (D) would mean that, assuming these operations are on RL and are expansions of existing operations, the applicant need only

demonstrate the expansion is located in the proper zone District. Neighbors sharing an aquifer, a well or spring, or a property boundary or other common resource would have no notice of the expansion, nor would the County or the public have a direct path to review potential impacts or impose mitigations that the applicant might have failed to consider or chose to ignore.

By simply leaving in place the Table I double asterisk footnote, and the language at (D), the County retains the option to put conditions on a permit for expansion on RL, as well as FL and TPZ, if necessary to protect the human and natural environment; neighbors enjoy the right to be notified; and the affected public has the opportunity to raise significant issues. If the proposed expansion does not have have significant impacts, the County has the option to expedite the process.

We feel strongly that the issue of expansion of RL cultivation operations could become more significant in the future, and it is important that the Ordinance preserve the clear intention of protecting the natural resources on RL, prohibiting new cannabis operations on RL and directing future cannabis cultivation away from RL (and FL and TPZ) to more appropriate zones with fewer potentially negative environmental impacts.

For example, there may be pressure to increase the maximum acreage allowed for the various Types of cannabis cultivation to align with other Counties and the State and thus open the door to larger expansions of pre-existing operations. The present window for existing growers to apply for permits could be extended, opening the door to even more applications to expand RL operations. Other conditions may change that could cause the number of applications to expand existing operations on Rangeland to increase. Once larger operations are established on RL, there could be increased demand to amend the Ordinance to allow the transfer of cultivation permits to new owners. Ultimately this could fuel a demand to open RL to new cultivation, a cumulative impact that needs to be considered.

In addition, removing the requirement for an Administrative Permit on RL expansions preferentially incentivizes permit applications for expansion, (or even claimed prior maximum square footage) on Rangeland. This preferential loosening of protections on RL, and thus this new incentive to expand RL operations, undermines the efficacy of Mitigation 5, the exclusion of new cannabis operations on RL, one of the most important mitigation measures in the MND which in turn allowed the County to make the finding that the Ordinance would have no significant negative impacts.

In summary, we urge the Planning Commission to reject the proposed Resolution calling for an Addendum to the MND and a change to Mendocino County Code Section 20.242.040 pertaining to Medical Cannabis Cultivation Sites.

Thank you for your consideration of these comments.

Sincerely,

Ellen Drell, for the Willits Environmental Center