

**OFFICE OF THE COUNTY COUNSEL
COUNTY OF NEVADA**

ALISON A. BARRATT-GREEN, COUNTY COUNSEL
AMANDA S. UHRHAMMER, ASSISTANT COUNTY COUNSEL
JAMIE L. HOGENSON, DEPUTY COUNTY COUNSEL
KATHRYN E. JACOBS, DEPUTY COUNTY COUNSEL
SCOTT A. MCLERAN, DEPUTY COUNTY COUNSEL
RHETTA K. VANDER PLOEG, DEPUTY COUNTY COUNSEL



ERIC ROOD ADMINISTRATIVE CENTER
950 MAIDU AVENUE, SUITE 240
NEVADA CITY, CA 95959
TELEPHONE (530) 265-1319
FACSIMILE (530) 265-9840
county.counsel@co.nevada.ca.us

July 15, 2016

Honorable Board of Supervisors
Eric Rood Administrative Center
950 Maidu Avenue
Nevada City, CA 95959

DATE OF MEETING: July 26, 2016

SUBJECT:

AN URGENCY ORDINANCE ADDING SUBSECTIONS G-IV 5.2.W, G-IV 5.4.C.4, G-IV 5.4.E.4, G-IV 5.4.H.14, G-IV 5.4.L, G-IV 5.10.C, G-IV 5.10.D, G-IV 5.10.E, G-IV 5.10.F, AND G-IV 5.15.D TO ARTICLE 5 OF CHAPTER IV, AND AMENDING SUBSECTIONS G-IV 5.2.V, G-IV 5.3.F, G-IV 5.4.C, G-IV 5.4.C.3, G-IV 5.4.E.1, G-IV 5.4.E.2, G-IV 5.4.F, G-IV 5.4.H, G-IV 5.4.H.9, G-IV 5.4, G-IV 5.7.F, G-IV 5.7.G, G-IV 5.8.B, G-IV 5.9.A, G-IV 5.9.B, G-IV 5.9.C, G-IV 5.9.E, G-IV 5.9.F, G-IV 5.10.A, G-IV 5.11, G-IV 5.12.A, G-IV 5.13, G-IV 5.14, G-IV 5.15.C, G-IV 5.16, G-IV 5.17, G-IV 5.18 OF ARTICLE 5 OF CHAPTER IV, OF THE NEVADA COUNTY GENERAL CODE REGARDING MARIJUANA CULTIVATION REGULATIONS (4/5ths AFFIRMATIVE VOTE REQUIRED)

RECOMMENDATION: (a) Introduce and adopt the attached proposed Urgency Ordinance repealing the outdoor cultivation ban, adopting interim cultivation regulations and updating enforcement and penalty provisions, and (b) authorize the Board's Marijuana Subcommittee to work with staff on developing a process for collecting stakeholder input and providing recommendations for permanent marijuana cultivation regulations.

FUNDING: Not applicable.

BACKGROUND: On May 8, 2012, the Board of Supervisors passed and adopted Ordinance 2349, An Urgency Ordinance Adding Article 5 to Chapter IV of the Nevada County General Code Regarding Medical Marijuana Cultivation ("Cultivation Ordinance").

In January, 2016, in response to increased complaints and new state legislation, the Board of Supervisors passed and adopted an Urgency Ordinance No. 2405, Amending Article 5 of the Nevada County General Code Regarding Medical Marijuana Cultivation. Ordinance 2405 banned outdoor cultivation of marijuana. In addition to the passage of

Ordinance No. 2405, the Board of Supervisors passed Resolution No. 16-038 seeking to place provisions related to the outdoor cultivation ban on the June 2016 ballot. This was Measure W. In response to public confusion related to the consequences if Measure W should fail to pass, the Board of Supervisors passed Resolution 16-082 in February 2016. By adopting this Resolution the Board committed to repeal the outdoor ban and implement alternative cultivation regulations if Measure W were to fail, and that it would do so at the next available meeting after the results of the election were certified. On June 7, 2016, Measure W failed to pass. The election results were certified on July 19, 2016.

To honor the Board's commitment to repeal the outdoor ban and implement alternative cultivation regulations, the Chair of the Board appointed two Supervisors to serve as a Marijuana subcommittee. The Marijuana subcommittee was charged with meeting with marijuana cultivation stakeholders and to make recommendations on interim cultivation regulations.

Given the Board's commitment and desire to repeal the ban on an expedited basis, it was determined the best course would be to seek an interim ordinance on an urgency basis. It was explained to the stakeholders that any urgency ordinance would require passage by the Board of Supervisors by a 4/5ths vote. It was also explained that, in order to avoid any delay by triggering a lengthy CEQA compliance process, the proposed interim regulations would need to be very modest with respect to the size of allowed grow areas. It was also explained that the Board would be working on developing more comprehensive permanent regulations based on input and discussion with all stakeholder interests.

The Marijuana subcommittee met with the stakeholders on three separate occasions: June 15, June 27 and July 12. Proposals were exchanged between the subcommittee and the stakeholders, but consensus was not reached. Shortly after the June 27 meeting, the subcommittee received written proposals from 4 cultivation groups which were considered, together with the verbal representations made at the subcommittee meetings, in developing the proposed Urgency Ordinance. On the afternoon of July 19, 2016, the stakeholders submitted a document entitled "Nevada County Cannabis United-Recommendations."

RECOMMENDATION FOR INTERIM REGULATIONS:

The purpose of this proposed ordinance is to make several substantive and technical amendments to the Cultivation Ordinance, including a repeal of the outdoor cultivation ban. Highlights of the proposed regulations are as follows:

A. Cultivation

- No cultivation would be allowed in residential zones (R1, R2, and R3)

This was generally agreed upon by most of the stakeholders in the stakeholder meetings and appropriately protects the County's higher density, smaller parcel residential areas from the odors, noise and other potential nuisance associated with marijuana cultivation in residential neighborhoods. This is also consistent with the results of the Measure W election, which reflect that precincts in residential areas consistently voted in favor of Measure W.

- Residential-Agricultural (R-A) areas: Under the County's General Plan ("GP") R-A zoning is allowed in areas with a GP designation of Residential, Estate and Rural. Within the Residential and Estate GP designations, the single-family dwelling is of primary importance and agricultural uses are secondary. Within the Rural GP designations, agricultural operations and natural resource-related uses and residential uses are of equal importance. After considering stakeholder input, the Marijuana subcommittee recommends that the same distinction be taken into consideration in developing the interim nuisance regulations applicable to R-A properties. The subcommittee recommends that marijuana cultivation be allowed on certain parcels within this zone, and that R-A parcels with a GP designation of Rural be treated the same as other Ag parcels.

For R-A parcels with a General Plan designation of "Residential" and "Estate", the proposed interim regulations are as follows:

- No Cultivation on Parcels equal to or less than 5 acres
- Parcels greater than 5 but less than 10 acres: 12 plant maximum, indoors only
- Parcels greater than 10 but less than 20 acres: 16 plant maximum, with a maximum of 12 plants indoors and a maximum outdoor grow area of 800 sq. ft.
- Parcels greater than 20 acres: 25 plant maximum, with a maximum of 12 plants indoors and a maximum outdoor grow area of 1000 sq. ft.

The subcommittee goal was to significantly limit cultivation in the more densely populated areas, especially on the smaller parcels, while still allowing cultivation on the larger parcels. These parcel designations are found in neighborhoods considered generally to be more residential in nature.

For AG, AE, FR, TPZ, and R-A with a General Plan designation of Rural:

- No Cultivation on Parcels equal to or less than 2 acres
- Parcels greater than 2 but less than 5 acres: 12 plant maximum, indoors only
- Parcels greater than 5 but less than 10 acres: 12 plant maximum, indoors or outdoors with a maximum outdoor grow area of 600 sq. ft.

- Parcels greater than 10 but less than 20 acres: 16 plant maximum, with a maximum of 12 plants indoors and a maximum outdoor grow area of 800 sq. ft.
- Parcels greater than 20 acres: 25 plants maximum, with a maximum of 12 plants indoors and a maximum outdoor grow area of 1000 sq. ft.

This recommendation takes in consideration the suggestions from stakeholders that grows should be allowed and area sizes increased in the rural, agricultural areas while still limiting the larger grow areas to the larger parcels. Allowing outdoor grows in these areas is also consistent with the results of the Measure W election, which reflect that precincts in agricultural areas consistently voted “no” on Measure W.

Other Considerations

CEQA: Despite the number and size of unauthorized marijuana grows in this County, the County’s approved marijuana cultivation regulations have historically allowed for only limited marijuana grows designed to allow individual patients and their primary caregivers to cultivate for personal medical use. The County’s current baseline condition for CEQA evaluation purposes includes a ban on all outdoor cultivation.

The County’s regulations have never contemplated or authorized commercial cannabis activities or very large grow areas such as those that MMRSA is proposing to license. Therefore, the County has never studied nor disclosed to the public any of the potential environmental and other impacts that would result from allowing for commercial cannabis activity throughout the County as required by the California Environmental Qualities Act (“CEQA”). The potential impacts associated with any commercial activities include, but are not limited to, noise, traffic, air quality, waste disposal, water availability and quality, impacts on protected and threatened plants and animals and impacts on greenhouse gases. Prior to adopting regulations allowing for commercial activities, CEQA clearly requires that the County study, evaluate and disclose to the public what the potential impacts of the proposed commercial activity would be and to identify and implement feasible mitigation measures that will reduce the impacts to an insignificant level. Given the County’s existing topography, environmental factors, limited circulation system and other constraints to development in a rural County, the detailed CEQA compliance process could not be completed in the short time frame to which the Board committed.

Moreover, larger grow areas fall under the definition of commercial cannabis activity in the recently passed State regulations. Until the State lays out their own regulatory scheme to address commercial cannabis activities, we will be unable to craft any licensing or permitting structure about which we can be

confident that it will not be in conflict with the state regulations, thereby requiring additional revision. The State has not committed to rolling out their own regulations until January of 2018, a date believed by many to be ambitious, in part because the State also recognizes the need to complete a comprehensive CEQA analysis prior to adopting cultivation regulations

B. Enforcement

It has been clear since the passage of Ordinance 2349 in 2012, and Ordinance 2405 in 2016, that compliance has not occurred in any substantial manner. The current ordinance only provides for the enforcement by way of a protracted abatement procedure which imposes only abatement costs for violation of the ordinance. These abatement costs are very modest. This initial enforcement mechanism was modest to encourage and support voluntary and good faith efforts to comply with the County's regulations. Unfortunately, the existing penalties and enforcement mechanisms have had no measurable deterrent effect and the existing appeal process is often used as a means to delay compliance. As a result, non-compliant marijuana grows have increased in the County and the ability to timely abate nuisances has been constrained, making enforcement a constant challenge.

Other counties in California (Tehama, Butte, Lake, and Yuba) have incorporated the fine structure set forth in the California Government Code allowing for imposition of per violation/per day penalties. The imposition of the penalty structure will act as a more significant deterrent for violation and provide for greater recovery of costs related to enforcement of the ordinance.

The Government Code structure, which is incorporated into the subject ordinance, allows imposition of administrative penalties for violation of cultivation provisions as follows:

- \$100/per day/per violation for the first violation
- \$200/per day/per violation for the second violation within 12 months
- \$500/per day/per violation for any subsequent violation within 12 months

The proposed Urgency Ordinance would implement the same penalty structure being utilized by other counties and as allowed under state law. Part of this administrative penalty structure includes a due process hearing procedure to allow for the appeal of any penalties imposed. The proposed Urgency Ordinance would retain the same basic appeal structure that the County is currently utilizing for marijuana cultivation appeals, but would shorten certain time frames related to the time for filing an appeal and the deadlines for scheduling and hearing these appeals.

Given that we are already well into the grow season for this year, the Subcommittee recommends that the new enforcement and Administrative Penalty provisions be adopted immediately but that the implementation of these changes be delayed until January 1, 2017. This is to provide growers with ample notice of the new rules and another voluntary opportunity to comply with County regulations.

C. Future Intentions

As has been represented to the cultivation stakeholders, it is the intention to continue discussions related to long-term regulations pertaining to marijuana cultivation in Nevada County. This process is contemplated to include members of all segments of the community. This urgency ordinance is intended to serve as an interim ordinance which enables the Board to repeal the outdoor cultivation ban quickly, as promised, and replace the ban with reasonable cultivation regulations while we monitor the State's progress in the development of its own regulations. While the cultivation community has expressed frustration over the grow area sizes proposed, efforts were made to strike a balance between the desires of the cultivation community and the interests of other segments of the community while considering the environmental and safety concerns attendant with marijuana cultivation. The nature of the urgency ordinance and limitations imposed by CEQA require that larger grow areas be a discussion for the future. Toward this end, we also recommend that the Board authorize the Marijuana Subcommittee to work with staff to develop a process for collecting stakeholder input and providing recommendations for permanent marijuana cultivation regulations.

Initiated and approved by:

ALISON A. BARRATT-GREEN
County Counsel

ASU/ABG/ch
Attachments:

1. Proposed Ordinance
2. Redline of Proposed Amendments