



**COUNTY OF NEVADA
COMMUNITY DEVELOPMENT AGENCY**

950 MAIDU AVENUE, SUITE 170, NEVADA CITY, CA 95959-8617
(530) 265-1222 FAX (530) 478-5799 <http://mynevadacounty.com>

Sean Powers, Agency Director

Agricultural Commissioner

Building Department

Environmental Health

Planning Department

Dept. of Public Works

**NEVADA COUNTY BOARD OF SUPERVISORS
Board Agenda Memo**

MEETING DATE: May 1, 2018

TO: Board of Supervisors

FROM: **Alison Barratt-Green, County Counsel**
Sean Powers, CDA Director

SUBJECT: Review of draft ordinance and related issues regarding long-term cannabis cultivation regulations and provide direction to staff

RECOMMENDATION: Review and discuss draft ordinance regarding County cannabis cultivation regulations, review impact of the California Environmental Quality Act (CEQA), consider options for temporary licenses and provide further direction to staff.

FUNDING: N/A. This work reflects tasks related to ongoing work administered through multiple budgets.

BACKGROUND: On April 11, 2017, the Nevada County Board of Supervisors approved a contract with MIG to facilitate an independent and impartial process of gathering community input regarding the development of long-term cannabis regulations. MIG assisted in forming and delivering a stakeholder process to be known as the Community Advisory Group (CAG). Beginning on May 23, 2017, and ending on December 19, 2017, the CAG held ten public meetings and received input for the County's long-term cannabis cultivation regulations.

During the CAG process, significant changes occurred with State regulations. Building from the passage of Proposition 64 in the November 2016 election, revised emergency regulations were released by the State in June 2017 (SB-94) and November 2017 (Emergency Medicinal and Adult-Use Cannabis Regulations).

On January 9, 2018, the Board received the CAG recommendation report and did not take any significant cannabis policy actions. The report contained a substantial amount of information and the intent was to allow the Board to review the information and come back for additional discussion. The only action taken at that meeting was determining the CAG process complete and dissolving the CAG. Attached for review is the CAG recommendation summary table for quick reference.

On February 13, 2018, and March 6, 2018, the Board received presentations and provided direction to staff regarding new long-term cannabis regulations for the unincorporated area of the County. Among other

things, the Board directed staff to prepare a draft cannabis cultivation ordinance for review at its first meeting in May and to consider options for issuing temporary licenses. A copy of the Executive Summary with the Board's direction is attached.

Since that time, staff has also reviewed the potential changes to the County's cannabis regulations and evaluated the level of CEQA documentation that would be required for the new cannabis cultivation ordinance. As part of SB94, the State enacted a new CEQA provision, which allows local agencies to adopt cannabis regulations using an 'exemption' if the County's cannabis regulations requires discretionary permits. Under a discretionary permit process, each cannabis cultivation permit would be required to comply with CEQA before the permit could be issued. This includes requirements to mitigate any project specific impacts as well as countywide cumulative impacts that would likely occur as a result of the new regulations. Requiring each project to conduct its own, individualized CEQA analysis would significantly increase the time, cost and complexity of obtaining cannabis permits and significantly impact staff's ability to process all development permits (cannabis and non-cannabis) in a timely manner. In other words, although the County could invoke this "exemption" for purposes of adopting its own regulations, doing so would simply "kick the CEQA can down the road" and create a process that is significantly more burdensome for both staff and applicants. Therefore, after significant discussion and review of various CEQA options, staff is recommending that the County take a more traditional approach and prepare a Countywide environmental impact report (EIR) prior to adopting the new proposed regulations. Staff will provide a further explanation of the CEQA process and the issues to be addressed in the proposed EIR on May 1st.

Draft Ordinance

Attached for the Board's review, discussion and further direction is a draft ordinance which will be presented and discussed on May 1st. The draft ordinance reflects a significant overhaul and comprehensive rewrite of the County's existing cannabis regulations to align with the Board's direction and current State law. Among other things, changes to the draft ordinance include:

- Removing or reducing cannabis cultivation in residential areas and allowing increased cannabis cultivation in the AG, AE and FR zones, including commercial cultivation for medical purposes.
- Eliminating the existing set of regulations intended for personal and/or cooperative cannabis cultivation and replacing these regulations with a three-tier system based on the nature of the cultivation activity at issue (personal, commercial or non-remuneration cultivation), to align with current State law.
- Adding requirements for certain discretionary land use permits (for the property on which cultivation will occur) and an annual regulatory permit (for the cannabis operation). This facilitates issuance of local authorizations and align cannabis regulations with regulations applicable to other commercial activities.
- Updating definitions and other technical requirements to align with current State law and addressing environmental impacts related to cultivation.
- Revising and increasing penalties for failing to comply with County cannabis regulations including increased fines, permit revocations and criminal penalties.

Staff has also prepared comparison chart, which contains a side-by-side comparison of past County ordinances and initiatives, the CAG recommendations and the draft ordinance. A copy of the comparison chart is attached for the Board's information.

Due to the significant changes between existing County regulations and the draft ordinance, it was infeasible to prepare a readable redline version reflecting all of the changes. To assist the Board in reviewing this draft, we have identified significant additions to the regulations as red text. In addition, we have identified additional decision points for the Board. These decision points are highlighted in yellow and further discussed below.

Cultivation Area Sizes for Commercial Cannabis Cultivation in AE, AF and FR Zones:

On March 6th, the Board provided some guidance on this issue; specifically that no commercial cultivation should be allowed in R1, R2, R3 or RA zones and that the maximum cultivation area for the AG, AE and FR zone should not exceed 10,000 square feet. The Board requested that staff return with more specific recommendations regarding a tiered parcel size/cultivation area size structure for the AG, AE and FR zones. After considering the direction of the Board at the last meeting, staff recommends the following tiered structure for commercial cultivation on AG, AE, FR parcels:

Parcels of greater than 2 acres up to 5 acres:

Indoors: a maximum of 500 square feet of Canopy

Mixed-Light and Outdoors: Commercial Cannabis Cultivation is prohibited.

Parcels of greater than 5 acres up to 10 acres:

Indoors, Mixed-Light, Outdoors or a combination of said methods: a maximum of 2,500 square feet of Canopy

Parcels of greater than 10 acres up to 20 acres:

Indoors, Mixed-Light, Outdoors or a combination of said methods: a maximum of 5,000 square feet of Canopy

Parcels of greater than 20 acres:

Indoors, Mixed-Light, Outdoors or a combination of said methods: a maximum of 10,000 square feet of Canopy

The proposed cultivation area sizes are consistent with our understanding of Board discussions regarding the desire to preserve neighborhoods while providing cultivation areas which align with the state license types contemplated by the Board. This issue is highlighted at page 11, section 1.5 of the draft ordinance.

Minimum Parcel Size for Outdoor Personal Cultivation in AG, AE, FR and TPZ Zones:

At the March 6th meeting, the Board briefly discussed the minimum parcel size that should be required for outdoor personal cannabis cultivation. During this discussion the Board discussed a range of possible minimum parcels sizes, from one to three acres. We are seeking final Board direction on this issue to eliminate the range and establish a minimum parcel size in these zones for outdoor Personal Cultivation in AG, AE, FR and TPZ zones. This issue is highlighted at page 8, Section 1.4 of the draft ordinance.

Definition of “Sensitive Site” For Purposes of 1000 Foot Setback Requirement:

Per Board direction, the draft ordinance requires a setback of at least 1,000 feet between cultivation areas and “Sensitive Sites.” Current State law requires a setback from schools, daycare centers, and youth centers. Historically, the County’s definition has also included school bus stops, school evacuation sites, churches, parks, and youth-oriented facilities as “Sensitive Sites” which should receive the benefit of this larger setback requirement. The County may, but is not required to, develop its own definition of Sensitive Sites.

At the March meeting, the Board requested that staff provide a side-by-side comparison of the types of uses that are subject to the “Sensitive Site” setback under State law and those that are subject to this setback under the current County ordinance, so that the Board can provide final direction on this issue. The state definition and our current County requirement are set forth below for the Board’s consideration. For purposes of discussion, the draft ordinance reflects the current County definition, but can be easily modified based on the Board’s direction. More specific definitions for each of these uses listed in the County’s ordinance are contained in the Definitions at Section 1.2, pages 2-7 of the draft ordinance.

State Definition of Sensitive Sites:

“School providing instruction in kindergarten or any grades one (1) through twelve (12), or a day care center or youth center as defined in section 26001 of the Bus and Professions Code...”

Current County Setback Requirements:

School, School Bus Stop, School Evacuation Site, Church, Park, Child Care Center, or Youth-Oriented Facility.

Registration Process for Personal Use cultivation:

Staff was asked to return with information about the potential for a registration process for personal use cultivation. If the Board opts to have a registration process, staff has provided language on page 8, section 1.4. If the Board chooses to require registration for Personal Use, staff contemplates using a simple online registration form designed to capture information about who is cultivating for personal use and where the grow is located. This information could aid in responding to citizen complaints.

Transport of Cannabis Off Cultivation Sites:

Staff was asked to return with proposals and information regarding the feasibility of allowing for a transporter license to ensure that cannabis could be transported from local properties to other allowed destinations. Currently, the State does not permit transport of cannabis off of a cultivation site by anyone other than a licensed Distributor. The state has two distribution licenses: Distribution Transport Only and Distribution. The Distribution Transport only license includes a subcategory for Self-Distribution.

Staff understands the concerns of local growers and the desire for a local transportation option that allows cannabis to be moved to other licensees as permitted by State law. To accommodate this concern, staff is recommending that commercial cultivators be authorized to obtain a Self-Distribution license so the cultivators may transport their own cannabis. This is an option allowed under State law. If the Board

chooses to allow cultivators to obtain this license type, staff has provided proposed language for Board consideration on page 12, Section 1.5E of the draft ordinance.

The right to transport could be included in the Annual Cannabis Permit upon request and would be allowed after the cultivator provides evidence that he or she has obtained the requisite state license. This recommendation allows a cultivator to move cannabis from their own sites into the commercial supply chain without having to use out of County licensees. At this time, staff has not drafted nor recommended regulations to allow for a full Distribution Transport license (which allows third parties to move cannabis) as staff felt this is more of a Commercial Supply Chain issue which would be best addressed in the next round of proposed regulations.

Personal Use Plant Count:

Staff is requesting clarification as to whether the 6 plants permitted under the Personal Use provisions are in addition to commercial cannabis grow allowances, or if they are permitted regardless of commercial cannabis grow sizes. Staff is recommending that 6 plants be permitted on any parcel in addition to any commercial cultivation which may be allowed, regardless of the size of the commercial cultivation area. State law requires commercial cultivators to place all cannabis produced under a commercial cultivation license into the track and trace program. This preclude cultivators from retaining any cannabis for personal use. If the Personal Use limits are allowed in addition to the Commercial Use, cultivators will have the option for cultivating for both personal and commercial purposes. This issue is highlighted at page 12, Section 1.5(B) of the draft ordinance.

Permit Limits:

The Board has not yet provided direction on this issue, but public comment has revealed significant concern that large corporations will come to the County and use volume to drive smaller cultivators out of business or take over the lands available for Commercial cultivation.

To address this concern and avoid the potential for monopolies, staff proposes to limit any individual or entity to 3 licenses and to limit the number of cannabis businesses in which one can have a financial interest in Nevada County. This is intended to ensure an equal playing field for all cultivators and help protect our small craft farms from being driven out of business by larger entities. This concept is also consistent with the anti-monopoly provisions under state law. This provision is highlighted at page 12, Section 1.5(H) of the draft ordinance.

Setback Easement:

Staff was asked to return to the Board with potential options for providing relief from setback requirements by offering a variance procedure, specifically to address oddly shaped parcels and those adjacent to inaccessible public park lands. One suggestion has been to allow for neighbor approval. However, this is problematic as neighbors can change frequently and relationships between neighbors can change quickly, placing both the residents of the area and the cultivator at risk of constant change and the potential for neighborhood disputes.

Staff has identified two options for addressing this issue. First, staff has provided an option for allowing cultivators to obtain a setback easement from an adjacent parcel. By agreeing to the setback easement, a neighboring property owner could agree to absorb some of the setback requirement as part of their own property. The easement would be recorded against the two properties which would place potential future buyers on notice of the existence of the setback and avoid unnecessary surprises. This approach is consistent with how the County handles similar setback issues in other contexts, most notably the requirement to obtain a “no build” easement from an adjacent parcel to satisfy fire requirements for building that are located too close to a property line.

Second, staff has provided an option which would allow cultivators to apply for a variance to reduce any setback by up to 40%. The cultivator would be required to provide substantial evidence to support the need and justification for the variance under the County’s normal variance procedures, including evidence to support the very strict and limited findings that are required by State and local law.

If the Board chooses to implement either or both of these options, staff has included language for consideration on page 16, Section 1.6(D)(3) of the draft ordinance.

Setback Adjustment for State and Federal Parks:

Under the County’s current ordinance, a Park is defined to include state and federal park land and recreational areas. Parks are considered “Sensitive Sites” because of the presence of children and to mitigate potential conflicts between the public’s enjoyment of outdoor recreational activities on public lands and private cannabis cultivation activities on adjacent parcels. As noted above, the setback between Sensitive Sites and cultivation areas is 1000 feet. In public comment, one speaker has asked the Board to consider a variance to construct an Accessory Structure within a setback of less than 1,000 feet if the adjacent Park is state or federal park or recreational land and the portion of that property adjacent to the cultivation site is inaccessible and unimproved.

As a potential option to address this concern, staff has included language for Board consideration in the draft ordinance on page 16, Section 1.6(D). This option would allow a cultivator to apply for approval of a setback of less than 1,000, but not less than 300 feet in order to construct an accessory structure for commercial cannabis activities, but only if certain criteria are met, e.g., that the adjacent lot is inaccessible by people and is unimproved. Understanding that a state or federal park may later be improved, the setback would be no less than 300 feet to help preserve those lands and continue their protection as a “Sensitive Site”.

Transition Period:

Staff was asked to return with an option for a transition period to allow commercial cultivation to commence on sites with code violations. Staff has provided draft language that would allow a commercial cultivation permit to be issued while allowing up to two years to correct code violations in any structures other than those in which cannabis activities would occur. Structures used for cannabis cultivation would still be required to meet all code requirements prior to issuance of a permit. This would allow cultivators to enter the legal market while providing them with time to bring the property into compliance with County codes. This issue is highlighted at page 16, Section 1.6(E) of the draft ordinance.

Enforcement:

Staff was advised by the Board that any ordinance should contain strong enforcement provisions for violators. Currently, there is a fine structure in place that is based on a per plant calculation. Given the apparent shift to square footage and the changes in State law, staff is recommending adjustments to local cannabis regulations to increase fines and add permit revocation and criminal sanctions as potential penalties for violation of the new regulations. Among other things, staff recommends an increased penalty option of up to three times the amount of the permit fees for licensed cultivators, or \$1,000 per violation for unlicensed violators. Each penalty could be imposed per violation per day, up to a maximum of \$25,000 per violation per year. This approach is consistent with the penalties for cannabis violations under current State law. This issue is highlighted at page 22, Section 1.13 of the draft ordinance.

Options for Temporary Licenses

After careful review and consideration of potential options for a temporary licensing program, staff is not recommending that the County allow for temporary cannabis cultivation permits at this time. In developing this recommendation, staff considered the need for additional CEQA to allow for commercial cannabis activities or other changes to existing cultivation regulations, the limited duration of temporary permits, the likelihood that a temporary permit cannot mature into a permanent permit given the State's current regulations, the possibility that developing a temporary permit program will divert staff resources from the goal of completing permanent regulations as quickly as possible, and the overall time and cost required to develop a temporary permit program. Staff recommends that County resources remain focused on ensuring the permanent licensing program will move forward and be implemented as quickly as possible.

However, if the Board is inclined to consider temporary licenses for commercial cultivation, a licensing scheme that relies on the existing ordinance could be drafted quickly and adopted using an urgency ordinance. The urgency ordinance would require a 4/5ths vote of the Board. Potential terms for the temporary permit program would be as follows:

- Temporary permits would be allowed only in zones where the Board is now proposing to allow commercial cannabis (specifically AG, AE, and FR)
- Licenses would be limited to cultivation that complies with the County's existing ordinance, including limitations on grow sizes and setback requirements. The currently allowed cultivation areas depend on parcel size, but generally range from 6 plants or 300 sf on parcels between 2 and 5 acres to 25 plants or 1000 sf on parcels greater than 20 acres.
- The County would require only a minimal administrative license-type permit with written landowner consent. No land use permits to allow for permanent or long term cultivation would be issued.
- Permittees would be subject to an onsite inspection prior to issuance of the temporary permit and agree to a right of entry allowing County staff to conduct additional inspections at any time.
- Limit the total number of temporary permits (up to 100).

- Complete permit applications would be due by a date certain. If the number of applications exceeds the number of allowed permits, then permits would be allocated using a lottery system.
- Per State law, permits would be good for up to 120 days and automatically expire as of December 31, 2018, regardless of when issued. Under the State's current emergency regulations, a temporary permittee must file a completed application for permanent licensure prior to the expiration of this 120 period in order to obtain an extension on the temporary license. In order to file a completed application for permanent licensure, the applicant must obtain a local authorization for the permanent permit. At this time, it appears unlikely that applicants will qualify for a state extension of the temporary permit because the County will not be in a position to issue this local authorization before the end of the initial 120 day period.
- Permits would be issued 'at risk', meaning that issuance of a temporary permit would not entitle the holder to a permanent license or provide any guarantee or assurance that a temporary cultivation site will comply with future cannabis regulations.
- Permittees would execute a standard indemnification agreement committing to defend and indemnify the County for all risks and liabilities associated with issuance of the permit and any cultivation activities on the site. Permittees also would be subject to penalties for violating the terms of the temporary permit (including fines, immediate termination of the permit, report to the State, and abatement of the cultivation site).

Even under this limited temporary licensing program, there would be some legal risk to the County and the permittees for converting 'personal' grows into commercial ones without conducting any further CEQA analysis. As County Counsel has previously advised, the current ordinance was adopted using a CEQA exemption which means the level of CEQA review was very limited and assumed that the cultivation area sizes would be limited, no commercial activity, and all mitigations contained in the ordinance would be fully implemented. Increasing the allowed grow sizes, reducing setbacks and changing other existing ordinance requirements that were designed to mitigate impacts and support use of this CEQA exemption would increase the CEQA risk to the County.

If the Board directs staff to pursue a temporary licensing program as outlined above, County Counsel could return to the Board on May 22nd with a proposed urgency ordinance and, if adopted by a 4/5ths vote, staff anticipates issuing temporary permits no later than July 1. If the Board directs staff to make substantial changes to the existing ordinance requirements in order to accommodate a temporary permit program, then the process of adopting and implementing this program would take longer.

Next Steps

The County's objective is to develop a long term County cannabis ordinance that focuses on cultivation, protects neighborhoods, mitigates impacts, establishes appropriate activities for the County, and regulates an emerging commercial cannabis industry.

It should be emphasized that the attached document is a well-developed draft and staff has attempted to provide as much detail and substance as time allowed. Staff believes that there is sufficient detail in this draft to construct the project description necessary to begin the CEQA process. The CEQA process may

formally begin after the Board provides final policy direction and a majority of the Board accepts the draft and authorizes staff to proceed with the adoption process. However, the State has not yet issued final regulations related to any cannabis activities, the CEQA process may reveal new mitigation measures or other requirements that must be integrated into the draft ordinance and other issues may arise throughout the adoption process that require further changes and fine tuning of this draft before it can be presented to the Planning Commission and Board for approval.

There will be additional opportunities at future Board of Supervisors meetings and other meetings for the public to provide input on both the CEQA document and the County's long-term cannabis cultivation regulations. We will continue to monitor the ever-changing State cannabis regulations. There may be additional discussions with the Board to further refine the draft ordinance if other key decision points are identified.

Item Initiated and Approved by: Alison Barratt-Green, County Counsel
Sean Powers, CDA Director and

Submittal Date: April 20, 2018

Revision Date:

Attachments