



**Cultivation of Cannabis for Personal Use
Board of Supervisors – April 21, 2020
PROPOSED ORDINANCE AMENDMENTS**



Presentation Overview

- Proposed amendments and presentation are limited to cultivation of cannabis for personal use. Nothing in the amendments relates to the commercial cannabis program enacted through Measures N, P, Q, R, and S.
- Overview of the existing ordinance addressing the cultivation of cannabis for personal medicinal use.
- Overview of current State law regarding cultivation of cannabis for personal use.
- What are other counties doing?
- Overview of the amounts of cannabis produced per plant and uses of cannabis.
- Overview of proposed amendments.
- Sheriff and District Attorney

Multi-Department Collaboration and Planning Commission Recommendation

- Proposed amendments to the cultivation of cannabis personal use ordinance today are the result of a collaborative effort with input, review, and support by:
 - Planning and Building Department, which includes Code Enforcement Unit
 - Sheriff's Office
 - District Attorney's Office
 - Chief Administrative Office
 - County Counsel's Office
- April 9, 2020: Public hearing before the Planning Commission with unanimous recommendation of the Planning Commission to adopt the proposed amendments as presented by staff. Planning Commission also recommended that the Board of Supervisors review the policy in a year.

Existing County Ordinance

Section 130.14.260 (“Ordinance 5000”)

- 200 square feet per patient for cultivation of medicinal cannabis for personal use.
- Depending on zone, up to 600 square feet with 3 medical patients as “collective” cultivation:
 - Lots zoned R1, R20,000, R1A, R2A, and R3A: 200 square feet
 - Lots zoned RE and RL: 400 square feet
 - Lots zoned AG, FR, LA, and PA: 600 square feet
- Ordinance 5000 never provided for “collective” cultivation for more than 3 patients.
 - “Not more than three persons may collectively cultivate medical cannabis for their personal use Each person’s plants or area of planting shall be clearly marked to identify the individual who is responsible for those plants.”
- Allows cultivation by a “primary caregiver” for up to 3 patients. “Primary caregiver” is someone who has “consistently assumed responsibility for the housing, health, or safety” of a patient.
- Enforcement efforts have confirmed significant abuse under current ordinance that is supplying the black market.
- Legitimate medical authorization and square footage allowances are not easily determined and significantly delay enforcement.

Existing State Law

Limit on What County **Must** Allow

- Health and Safety Code section 11362.2 (Prop 64)
 - County “shall not completely prohibit” the cultivation of 6 plants “inside a private residence, or inside an accessory structure to a private residence located upon the grounds of a private residence that is fully enclosed and secure.”
 - Thus State law gives the right to cultivate 6 plants indoors per residence.
 - Per “residence,” not per person.
- Section 11362.2 does not distinguish between cannabis grown for medicinal use or recreational use.
 - Section 11018 defines “cannabis” for purposes of section 11362.2 and the definition makes no distinction based on the “use” of the cannabis.

Existing State Law

What Choices Can the County Make?

While County must allow 6 plants indoors per residence:

- County “may completely prohibit” outdoor cultivation.
 - Section 11362.2(b)(3)
 - If cannabis becomes legal under federal law, section 11362.2(b)(4) provides that the County could no longer ban outdoor cultivation of 6 plants for personal use.
- County may allow outdoor cultivation in some zones with larger parcels, but prohibit it in other residential zones with smaller parcels.
- County may impose outdoor cultivation limits based on the number of plants and square footage, which would generally keep plant sizes smaller.
- County may “enact and enforce reasonable regulations” addressing the cultivation of the 6 plants for personal use.
 - Section 11362.2(b)(1)

Existing State Law

Are Limits for Medical Cannabis Different?

- Section 11362.2 does not differentiate between cannabis grown for medicinal or adult recreational use.
- Compassionate Use Act (Prop 215 in 1996) “provides an affirmative defense to *prosecution* for the crimes of possession and cultivation” for a patient or primary caregiver “who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.”
 - *People v. Kelly* (2010) 47 Cal.4th 1008
 - Compassionate Use Act did not give a “right” to cultivate plants for medical use similar to Prop 64. It provided an affirmative defense during a criminal prosecution of charges for possession and cultivation.



Existing State Law

Are Limits for Medical Cannabis Different?

- Health and Safety Code section 11362.77
 - Enacted as part of the Medical Marijuana Program Act (“MMPA”) in 2004.
 - A “qualified patient or primary caregiver may also maintain no more than six mature or 12 immature cannabis plants per qualified patient.”
 - “Counties and cities may retain or enact medicinal cannabis guidelines allowing qualified patients or primary caregivers to exceed the state limits set forth in subdivision (a).”
- But, section 11362.77 is “not a guarantee but merely an outer limit on how much medical marijuana a qualified patient or caregiver may ordinarily possess without prosecution.”
 - *County of Tulare v. Nunes* (2013) 215 Cal.App.4th 1188, 1203
 - *Kirby v. County of Fresno* (2015) 242 Cal.App.4th 940, 968



Existing State Law

Are Limits for Medical Cannabis Different?

- “[W]e conclude that the provisions of section 11362.77 do not create an express statutory ‘right’ to personally cultivate medical marijuana that is beyond the reach of local land use regulations. Therefore, any such ‘right’ is subject to the authority of local governments to hinder, inconvenience or ban the cultivation of medical marijuana through zoning and land use ordinances.”
 - *Kirby v. County of Fresno* (2015) 242 Cal.App.4th 940, 969-970
- Thus, while a medical cannabis user has affirmative defenses available in a criminal prosecution that a recreational user of cannabis does not, a medical cannabis user does not have the “right” to cultivate more than 6 plants indoors.

Can the County Allow More Than 6 Plants for Medicinal Use?

- Section 11362.2 gives a “right” to 6 plants indoors, but also states: “No more than six living plants may be planted, cultivated, harvested, dried, or processed within a single private residence, or upon the grounds of that private residence, at one time.”
 - This 6 plant maximum does not distinguish between cannabis grown for personal or medicinal use.
 - At the same time, section 11362.77 and other provisions of the Compassionate Use Act provide an affirmative defense to a criminal charge for cultivation or possession when grown for personal medicinal use.

State's Position if a County Allows for More Than 6 Plants for Medicinal Personal Use

- Staff Counsel for the California Department of Food and Agriculture, which is responsible for regulating commercial cultivation of cannabis has stated, “any person growing in excess of six plants without a state license is subject to penalty pursuant to Health and Safety Code section 11358.”
 - The California Department of Food and Agriculture is not distinguishing between cannabis grown for medicinal use. Interprets the 6 plant limit as the statutorily imposed distinction between cannabis cultivated for “personal use” versus “commercial use.”
 - In addition to creating a right to 6 plants indoors for personal use, Prop 64 enacted the State's commercial cannabis program.
 - This position has also been stated at a recent cannabis forum.
- “In the Department's experience regulating and licensing cannabis cultivation, it can be confusing to the public if local jurisdiction limits on personal grows exceed those in the state statute.”

State's Position if a County Allows for More Than 6 Plants for Medicinal Personal Use

- If County continues with its existing ordinance, State agency has indicated that cultivation in excess of 6 plants could be subject to “criminal action” unless the patient obtains a State commercial license, which would subject the grower to the State regulations for commercial cultivation and significant costs:
 - Outdoor cultivation site with up to 25 mature plants has a State application fee \$135 and annual State license fee of \$1,205.
 - Mixed-light cultivation site with 2,500 square feet or less of total canopy has a State application fee of at least \$340 and annual State license fee of \$3,035.
 - These fees do not include County costs or fees.
- Benefit of a State commercial license is that the cannabis would be part of the track and trace system, thus would preclude cannabis grown for “personal use” from entering the black market.



What Are Other Counties Doing

- Counties either allow for a certain plant count or square footage amount
 - Three counties allow for 200 sq. ft. or more for personal medical cultivation - all have to be on a parcel that is one acre or more
 - Five counties allow for more than six plants outdoors for personal medical cultivation
- The rest of the counties have moved to six plants or 100 sq. ft. outdoors or less or indoors.
- Tried to contact the counties allowing more
 - Counties contacted having the same discussions



What Are Other Counties Doing

- Few counties are continuing the true collective model outdoors (six counties)
 - Two counties allow for 500 sq. ft. (total) for five patients
 - Two counties allow for 24 plants (total) for two patients
 - One county allows for 72 plants (total) for four patients
 - One county allows for 200 sq. ft. (total) for two patients
- Instead a few counties allow for a total of XX plants period no matter the number of patients



What Are Other Counties Doing

- Where does this leave El Dorado County compared to the other counties for outdoor personal medical cultivation
 - No county allows for 600 sq. ft. No matter the amount of patients.
 - No county allows for 200 sq. ft. per patient for multiple patients in a collective model
 - Three counties allow for 200 sq. ft. or more for one patient (5% of the counties)
 - Five counties allow for more than six plants for one patient (8% of the counties)
- Currently, El Dorado County allows for more sq. ft. outdoors than any County – four counties allow for plant counts that could be larger
- The proposed rule changes would still put El Dorado County on the more lenient side only 13 counties allowing six plants outdoors and eight allowing more – a large majority allow only indoor growing



Senate Bill 34

- Beginning March 1, 2020, cannabis retailers may provide free cannabis or cannabis products to qualified medicinal patients or their primary caregivers. This change is due to the adoption of Senate Bill 34, which also exempts these donated items from excise, sales and use, and cultivation taxes.
- Licensed cultivators, manufacturers, distributors, retailers, or microbusinesses may designate cannabis or cannabis products that they hold in their inventory for donation. Items designated for donation may only be provided to a medicinal patient or primary caregiver through a licensed retailer.
- A main point of this free cannabis is that it has moved through the track and trace system. The end consumer knows what is in the cannabis and knows that it was not part of the black market.



Marijuana Plants

- El Dorado County's climate is conducive to cultivating large marijuana plants. The average marijuana plant cultivated outdoors in El Dorado County can expect to yield 2-3 pounds of processed marijuana, on a conservative side. Less experienced cultivators may yield less, one pound per plant, while more experienced cultivators may yield more, 8-10 pounds per plant. The vast majority of marijuana cultivated in El Dorado County is cultivated outdoors.
- Indoor marijuana plants produce less processed marijuana, approximately 1/4-1/2 pound, although you would be able to cultivate throughout the year.
 - Information was obtained from speaking with sophisticated and experienced marijuana cultivators and law enforcement officers who are considered experts in marijuana.



Marijuana Plants

- El Dorado County's climate has proved to be a productive climate to cultivate marijuana. Issues that can arise when cultivating marijuana or any crop are rodents, deer, mold, pesticides, chemical mistakes, over or under watering and other problems can arise.
 - The vast majority of these issues can be avoided with proper education and knowledge. Local hydroponic stores are helpful and educational. If a plant dies it is commonly when the plant is young and early in the season so the plant can be replaced and a large harvest can still be expected.
 - Local marijuana cultivators have stated, "If you can grow a tomato plants, you can grow a marijuana plant."



Marijuana Plants

- Marijuana Plants Cultivated in El Dorado County:





Marijuana Plants

- Strains of marijuana plants:
 - There are more than 750 different types of marijuana strains available.
 - Each marijuana strain has different characteristics.
 - They vary in size, levels of THC, levels of CBD, drought tolerance, etc.
 - Different strains have different effects on the user.
 - With the technology available people are able to grow larger plants that have more usable marijuana with desired traits. For example someone looking for a marijuana plant high in CBD and low in THC there are large producing plants available. The strains are available in seed form or commonly in clones.



Marijuana usage

- Marijuana usage varies depending on the users and how it is used:
 - DEA identified a typical marijuana joint consists of $\frac{1}{4}$ gram of marijuana. Heavy marijuana smokers claim to use $\frac{1}{2}$ gram of marijuana in a joint. The amount of marijuana used can depend on the THC level of the marijuana.
 - If a heavy marijuana user smokes three $\frac{1}{2}$ gram joints a day 365 days a year they would use 1.2 pounds of marijuana a year. Marijuana strain's and THC level should also be considered. Marijuana is often sold by the single gram at dispensaries.



Marijuana usage

- Marijuana used in edibles:
 - Marijuana is usually combined with butter or an oil prior to consumption. A common amount of marijuana to be used is 28.5 grams of marijuana to one pound of butter. With a normal size cookie this would produce approximately 80 cookies.
 - Amount used will depend on strength of THC or CBD.



Marijuana usage

- The length of time effects are felt can range from 2-10 hours.
 - Based on THC levels
 - How much you consume
 - Body weight and body fat percentage
 - Metabolism
 - Tolerance
 - Whether or not you have eaten recently
- Smoking or vaping. The effects peak around 10 minutes after consumption and typically last 1 to 3 hours, though they can linger for up to 8 hours.
- Eating. The effects of edibles usually peak around 2 hours after consumption and can last up to 24 hours.
- Dabbing. Similar to smoking, the effects of dabbing usually last 1 to 3 hours. If using a high THC concentrate, you could feel the effects for an entire day.



Proposed Amendments

- Updates the Findings in light of existing State law.
- Makes the Declaration of Facts explaining why the ordinance will become effective immediately upon final passage by the Board of Supervisors to protect the public peace, health, and safety:
 - Absent these findings, ordinance would become effective 30 days after final passage, which would likely prevent enforcement this grow season or delay enforcement until plants have reached maturity. Mature plants pose greater health risks to the public by increasing the use of crime to protect the plants, providing greater coverage for armed protection of the plants, and increasing health risks from asthma and other conditions.
- Did not reduce the public involvement process even as an urgency ordinance:
 - April 9, 2020: Public hearing before Planning Commission
 - About 75 attendees via zoom
 - April 21, 2020: First Reading before Board of Supervisors
 - May 5, 2020: Second Reading and Final Passage before Board of Supervisors



Proposed Amendments

- Removes limitation to medical use cannabis because existing State law allows for 6 plants for (1) medicinal use; or (2) recreational use by adults over the age of 21.
 - Ordinance will no longer require individuals to disclose whether they are growing for medicinal use and enforcement officials will not have to verify whether a medical card or prescription is valid or used in multiple locations.
- Still allows a primary caregiver to cultivate for a patient consistent with the limitations of State law and subject to 6 plant limit.
- Updates definitions, including removing references to medical use cannabis.
- Maintains regulations for screening, setbacks, odor control, security, residency requirements, and property owner authorization.



Proposed Amendments

- Imposes limit of 6 plants per residence.
 - Limit is 6 plants at a time, not per year, thus could have multiple harvests or 6 plants outdoors in the summer and then 6 plants indoors in the winter.
- Limits the number of plants grown outdoors to 6 per parcel.
 - A single parcel with a secondary dwelling unit or accessory dwelling unit could have 6 plants per residence, but only 6 could be outdoors and the remaining plants must be indoors.
- Limits cultivation on multi-unit residential (RM) to indoors only.
- All other residentially zoned parcels can cultivate the 6 plants indoors or outdoors.
 - Consistent with State law, “indoor” cultivation includes “an accessory structure to a private residence . . . that is fully enclosed and secure.”
 - Outdoor cultivation includes the use of a greenhouse, hoop-house, glass house, conservatory, hothouse, or other similar structure.



Proposed Amendments

- Provides the opportunity for the County to implement registration for outdoor cultivation if continued black market grows thrive and significant County resources are required to ensure compliance.
 - “Any registration program shall not require an individual to disclose whether cannabis grown under this section is for medicinal use.”
- Provides that any violation of any other County Code or State regulation committed to facilitate cultivation of cannabis is a violation of this section.
- Increases the opportunity to work with property owners to bring a property into compliance when a tenant cultivates cannabis without the property owner’s consent or knowledge.
- Allows abatement to begin 96 hours after first notice.
- Removes escalating fine and uses a set fine.
- Requires a remediation plan to bring a property back into pre-cultivation conditions, such as illegal grading and damage to water supply.



Benefits of Proposed Amendments

- **Allows outdoor cultivation in all zones except multifamily residential.**
 - Outdoor cultivation allows for greater yield per plant than indoor cultivation.
 - Recognizes legitimate use of the existing ordinance by many individuals with medical needs.

- **Imposes objective 6 plant limit regardless of use.**
 - Allows enforcement officials to easily determine whether a personal cultivation grow is compliant with the County ordinance without the need to investigate or verify whether a particular grow is for legitimate medical use or whether a medical card is valid or used in multiple locations.
 - Provides clarity to the public and enforcement officials as to what is legal, which allows for expedited enforcement before plants reach maturity.
 - Aligns County ordinance with 6 plant limit in Prop 64 consistent with State's position that a commercial license is required to grow more than 6 plants even for medicinal use.
 - Removes limit in existing ordinance of a maximum of 3 patients per garden.



Benefits of Proposed Amendments, *cont.*

- **Avoids use of square footage limits for outdoor cultivation.**
 - Compliance of plant numbers is easy to determine and avoids delays in enforcement caused by having to obtain access to property to measure cultivation areas.
 - Avoids delay in enforcement from disputes about cultivation square footage area.
 - Allows a user to grow larger plants.
- **Regulates regardless of use and thus does not require medical registration program.**
 - Medical community has expressed privacy concerns with registration based on medical needs.
 - Registration program would have significant County costs.
 - County lacks funding and staff to implement a “waiver” program to provide exceptions for greater number of plants for medical use, even if tied to registration. Fees to provide for such a program, including inspections for compliance, would likely be significant.
- **Provides an avenue to more effectively and safely combat the black market, which is necessary for the success of a legal market.**