



Cultivation of Cannabis for Personal Use

Update to Board of Supervisors
February 23, 2021



Presentation Overview

- Overview of former ordinance addressing the cultivation of cannabis for personal medicinal use
- Overview of existing ordinance addressing the cultivation of cannabis for personal use and Board's direction upon passage
- Overview of current state law regarding cultivation of cannabis for personal use
- Assessment of peer counties' personal use policies
- Overview of the amounts of cannabis produced per plant and uses of cannabis
- Staff recommendation

Direction Upon Passage

- April 9, 2020: Public hearing before the Planning Commission with unanimous recommendation to adopt the proposed amendments as presented by staff. Planning Commission also recommended that the Board of Supervisors “review the policy in a year.”
- May 5, 2020: Second reading and unanimous passage by the Board of Supervisors with direction to staff to return to the Board in January 2021 to discuss creating an ad hoc committee to review the ordinance.

Multi-Department Collaboration

- Amendments in May 2020 and recommendation today were the result of a collaborative effort with input, review, and support by:
 - Planning and Building Department, including Code Enforcement Unit
 - Sheriff's Office
 - District Attorney's Office
 - County Counsel's Office
- For reasons that will be discussed in more detail, staff do not recommend formation of an ad hoc committee at this time. Staff recommend the Board receive and file this report and that no formal action be taken today.
- The item today involves only the personal use cannabis ordinance and does not involve the County's commercial cannabis program or ordinances.

Former County Ordinance

Section 130.14.260 (“Ordinance 5000”)

- Allowed 200 square feet per patient for outdoor cultivation of medicinal cannabis for personal use. Outdoor cultivation was not allowed for recreational use.
- Depending on zone, up to 600 square feet with three medical patients (200 square feet per patient) 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
- Allowed cultivation by a “primary caregiver,” which is someone who has “consistently assumed responsibility for the housing, health, or safety” of a patient.
 - Ordinance 5000 never provided for “collective” cultivation for more than 3 patients.
- Enforcement efforts confirmed significant abuse under current ordinance supplying the black market. Legitimate medical authorization and square footage allowances are not easily determined and significantly delayed enforcement.



Current Ordinance: Section 130.42.100

- Removed 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 (Prop 64).
 - Ordinance no longer requires 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.
- Allows a primary caregiver to cultivate for a patient consistent with the limitations of state law and subject to the 6 plant limit.
- Maintains regulations for screening, setbacks, odor control, security, residency requirements, and property owner authorization.



Current Ordinance: Section 130.42.100

- Imposes state plant 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 additional legal residence, but only 6 could be outdoors and the remaining plants must be indoors.
- With exception of multi-unit residential (RM) zones, all 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.
 - Cultivation on multi-unit residential (RM) is indoors only.



Current Ordinance: Section 130.42.100

- Provides opportunity for 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 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.



Current Ordinance: Limited Enforcement in 2020

- In response to concerns expressed that some medical users had already planted their garden for the 2020 grow season before final passage of ordinance, the ordinance limited enforcement for the 2020 grow season.
- Ordinance provided that, through December 1, 2020, the new ordinance would not be enforced against “cannabis cultivated exclusively for personal medicinal use provided that the cultivation commenced prior to May 6, 2020, in full compliance with all of the provisions of Section 130.14.260 of the El Dorado County Code as it read prior to the adoption of the Ordinance enacting this Chapter 130.42.”
- Limitation on enforcement automatically repealed on December 1, 2020.
- If a grow complied with the prior ordinance and there was no evidence of cannabis sales, no enforcement actions were taken in 2020 against growers who claimed to have planted before May 6, 2020 for personal medicinal use.
 - Code Enforcement allowed all growers to remove plants and come into compliance with prior ordinance. Sheriff’s Office allowed the same unless there was evidence of commercial sales of the cannabis.

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 right to cultivation of 6 plants grown 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.”

Existing State Law

What Choices Can a County Make?

While a County must allow 6 plants per residence:

- County “may completely prohibit” outdoor cultivation.
 - Section 11362.2(b)(3)
 - But, if cannabis becomes legal under federal law, section 11362.2(b)(4) provides that the County could no longer ban outdoor cultivation for 6 plants for personal use.
- County may allow outdoor cultivation in some zones with larger parcels and prohibit it in other residential zones with smaller parcels.
- County may limit outdoor cultivation based on number of plants and square footage, which can generally keep plant sizes smaller.
- County may “enact and enforce reasonable regulations” addressing the cultivation of those 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 any amount of 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
 - 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).”
- 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 a County Allow More than 6 Plants for Medicinal Use?

- Section 11362.2 gives a “right” to 6 plants, 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, it arguably conflicts with section 11362.77 and other provisions of the Compassionate Use Act.

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.”
 - This position has also been stated at a recent cannabis forum.
 - The California Department of Food and Agriculture is not distinguishing between cannabis grown for medicinal use.
- “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

- 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.
- Thus, if the County continues with its existing ordinance, cultivation in excess of 6 plants could be subject to criminal prosecution unless the patient obtains a 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.
 - Application fee \$135 and License and Annual Renewal Fees \$1,205.
 - Indoor cultivation site with up to 500 square feet or less of total canopy.
 - Application fee \$205 and License and Renewal Fees \$1,830.
 - Mixed-light cultivation site with 2,500 square feet or less of total canopy.
 - Tier 1 – Application fee \$340 and License and Renewal Fees \$3,035
 - Tier 2 – Application fee \$580 and License and Renewal Fees \$5,200



Benefits of Current Ordinance

- **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.**
 - 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 and state's position that a commercial license is required to grow more than 6 plants even for medicinal 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.



Benefits of Current Ordinance

- **Avoids use of a square footage limits for outdoor cultivation.**
 - Compliance on plant limit is easy to determine and avoids delays in enforcement caused by having to obtain access to measure cultivation areas.
 - 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.
 - County lacks funding and staff to implement “waiver” program tied to registration and 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.**



Peer Counties Assessment

- 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 remaining 50 counties have moved to six plants or 100 sq. ft.
 - Most allow only indoor cultivation.



Peer Counties Assessment

- 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



Peer Counties Assessment

- Where did 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)

- El Dorado County had allowed for more sq. ft. outdoors than any County – four counties allow for plant counts that could be larger



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.



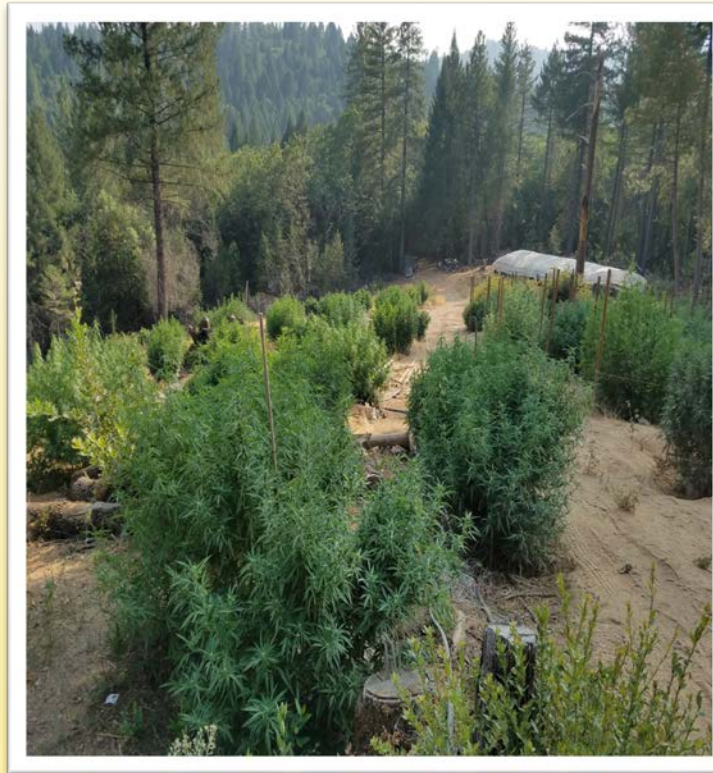
Marijuana Plants

- 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.

In Summary

- Seeking Board direction on next steps with the previously discussed Cannabis Personal Use Ad Hoc Committee
- Staff do not recommend formation of an ad hoc committee at this time. Staff recommends the Board receive and file this report and that no formal action be taken today.