



OFFICE OF COUNTY COUNSEL
INTER-DEPARTMENT MEMORANDUM

TO: El Dorado County Planning Commission
FROM: Jefferson Billingsley, Deputy County Counsel
DATE: June 26, 2023
RE: Agenda of: July 13, 2023
Continued Public Cannabis Study Session
Legistar No.: 23-1032 (*continued*)

The purpose of this memorandum is to provide information and background for this continued cannabis public study session. The public study session is a result of the litigation in *El Dorado County Growers Advocacy Alliance v. El Dorado County Board of Supervisors, et al.* In November of 2021 petitioners, El Dorado County Growers Advocacy Alliance (Grower's Alliance), filed an action challenging the County's implementation of its commercial cannabis program. The case has now been resolved and as part of that process the El Dorado County Board of Supervisors (Board) directed the Planning Commission to hold a public study session to identify issues related to implementation and functionality of the County's cannabis regulations. The Planning Commission was further directed to recommend to the Board of Supervisors whether changes to County cannabis regulations should be considered. The study session is an opportunity for the former petitioners, the cannabis industry, public, and other County departments and agencies to give input on the current cannabis regulations. Once the Planning Commission has concluded the session, a report and recommendation should be sent to the Board of Supervisors, which will be considered at a public Board meeting. If the Board determines that changes to the ordinances are warranted, direction will be provided to staff to pursue changes through the statutory ordinance revision process. If so directed, the cannabis ordinance will return to your Commission for specific revisions and recommendations for adoption by the Board.

June 8, 2023 Study Session

The Planning Commission took public comment and engaged in an in-depth discussion of ordinance revisions proposed by the Grower's Alliance. Members of the cannabis industry generally spoke in favor of revisions and a member of the public spoke in opposition to consideration of changes to the ordinance. Some discussion items involved impacts or cross departmental issues with the Sheriff's Office. These issues were not discussed in depth as representatives of the Sheriff's Office were not in attendance.

As a reminder, the Board of Supervisors directed this study session to gather input and for the Planning Commission to form recommendations for the Board. In compliance with Policy A-3 and Section

130.63.020 of our Ordinance Code, revisions to the Zoning Ordinance only take place following Board adoption of a Resolution of Intention (ROI). If the Board does adopt the ROI, staff would need to further study any proposed changes before bringing any specific language to your Commission for consideration.

In light of the Board direction, the individual suggested revisions from the Grower's Alliance previously discussed are not repeated here. The focus of this report is the policy areas/themes that emerged from the first day of the public study session. The report and recommended action are framed around general policy areas so your Commission can discuss, consider, and make recommendations on these themes for the Board of Supervisors to consider for official action. Again, the Board has not committed to any action other than the public study session.

Policy Areas/Themes

Below are summaries of the general policy considerations that arose during the June 8th discussion. These are framed in the form of questions for ease of potential recommendation areas to be presented to the Board.

1. Should the setbacks of the cannabis ordinance be reevaluated?

Setback issues arise in two areas of cannabis regulation. For cultivation sites, the regulations require a setback of 800 feet from a property line. For all cannabis businesses, setbacks of 1500 feet from a list of designated sensitive community receptors are required. As was discussed on the 8th, waivers and approval of lesser setbacks are available to applicants that owned their property prior to November 6, 2018, if the lesser setback can meet the purposes of the regulations. There was various discussion as to whether lesser setbacks should be considered or if the current "grandfathered" waiver process should be available to all applicants regardless of when the property was purchased. As was also discussed, the cultivation setbacks can make it difficult to find a parcel of sufficient size to meet the setback requirements. It is recommended that this policy question be discussed, and your Commission decide on a recommendation to the Board as to whether or not setbacks of the cannabis ordinance should be reevaluated. As with all items considered during the study session, the recommendation could be to consider policy changes or that no action or change is recommended.

2. Should cannabis canopy limits be expanded?

Another theme from the cannabis industry was a desire to have an allowance for larger grow area (canopy) for each of the allowed cultivation zones. A related request to defer to the state definition of "premises" would allow more than one cannabis activity area on a single parcel. The theme of potential deference to state guidelines is discussed further below regarding Sheriff's Office issues. Currently our ordinance allows a maximum of two acres of total canopy coverage. The potential expansion of the maximum size of cultivation sites is a critical policy issue for your Commission to consider and to decide on a recommendation to the Board.

3. Should changes to propagation rules be considered?

Advocates requested an allowance be made for a “scaled” propagation that allows a designated and proportional percentage of the grow area to be used for propagation activities. There is also a stated desire to use hoop/green housing as propagation areas. Staff takes no issue with a portion of the approved cultivation area being used for cultivation but the logistics of propagation (i.e., use of greenhouses and artificial lighting) involve policy considerations and potential changes in uses on cultivation sites.

4. Should expanded uses be considered on agricultural cultivation sites?

Under the current regulations, manufacturing and processing activities are not allowed on the cultivation parcel and must take place off site. Advocates would like to see more integration of cannabis activities which would allow for other cannabis related activities on the same parcel as the cultivation. It must be noted that state law restricts full vertical integration of cannabis activities. This raises policy considerations of whether activities that do not typically occur in rural areas should be allowed for cannabis operations. Currently lower intensity manufacturing uses (Type N-infusion and Type P-packaging and labeling licenses) are allowed within Commercial and Agricultural zones. Typically, manufacturing uses that have the potential to create nuisances to sensitive receptors are confined to Industrial and Commercial zones.

5. Should any aspects of Ranch Marketing be available to cannabis cultivators?

There was a general discussion of treating cannabis more akin to an agricultural crop or product for purposes of the County’s Right to Farm and the Ranch Marketing Ordinances. Our Right to Farm Ordinance reflects the Civil Code and prohibits commercial agricultural operations conducted within accepted customs and standards of the agricultural industry on agricultural land from being declared a public or private nuisance. The Ranch Marketing Ordinance authorizes operators that meet designated requirements to conduct certain commercial activities on their parcel, including holding special events and onsite sales and consumption. Ranch marketing, winery, and visitor-serving uses are permitted on certain agriculturally zoned parcels, subject to a compatibility review to ensure that the establishment of the use is secondary and subordinate to the agricultural use and will have no significant adverse effect on agricultural production. These uses are required to be on parcels of 10 acres or more and must have a minimum of 5 acres of permanent agricultural crop in production or 10 acres of annual crop in production that are properly maintained.

State law authorizes the Department of Cannabis Control to issue a temporary event license to allow a licensed cannabis event organizer to hold a temporary cannabis event where the onsite sale and consumption of cannabis goods is authorized at the location indicated on the license during the dates indicated on the license. The Board of Supervisors recently adopted Ordinance No 5177 that made various changes to the Winery Ordinance and the Ranch Marketing Ordinance. The voter initiative and current language of our Cannabis Ordinance prohibits cannabis from being treated as an agricultural crop or product for purposes of our Right to Farm Ordinance, the

establishment of Agricultural Preserves, or any other provision of our Ordinance Code that defines or allows cultivation of crops or agricultural products.

While cannabis is not considered an agricultural product under state law for purposes of our local zoning laws, and its classification as a Schedule I drug under federal law prohibits purely agricultural treatment, comments revolved around whether any of the ranch marketing activities available to wineries, orchards, and other traditional agricultural crops should be available to cannabis cultivators. The Commission may want to consider whether to recommend to the Board to allow cannabis to be treated similar to an agricultural crop or product under our Right to Farm Ordinance or Ranch Marketing Ordinance.

6. Should policy changes that involve the Sheriff's Office be considered?

The Grower's Alliance suggested several revisions to cannabis regulations that directly or indirectly involve responsibilities of the Sheriff's Office. As a general matter, changes to make the El Dorado County background check process similar (or to defer) to the state's criteria were requested. The voter initiatives and our current ordinance describe the process and criteria by which the Sheriff's Office conducts background checks. This process has additional requirements and in general is more stringent than state licensing requirements. There is no legal impediment to this "dual track" approach, indeed it is contemplated by state law. While the County is allowed to have its own regulations, it is a policy consideration as to whether local rules could defer to the state background process or be further modified.

Similarly, requests were made to have the definition of "owner" changed to mirror state law. Such a change would impact the scope of the parties involved with a cannabis business that would be required to undergo a local background check. In a somewhat related matter, there was also a request to loosen the availability requirements for the designated local contact for cannabis businesses. Again, the Sheriff's Office has yet to weigh in on these general areas, or the more detailed changes suggested by the Grower's Alliance. All of these items are combined into the policy question, should policy changes that involve the Sheriff's Office be considered?

Staff is informed that the Sheriff's Office is preparing a letter in response to the initial study session of June 8th. Once that letter is received, it will be attached to the July 13, 2023 agenda item for your Commission's consideration.

7. Should recommendations be made on other general policy considerations?

The voter approved ballot initiative approved taxation rates for commercial cannabis cultivation based upon either canopy square footage (currently used) or gross receipts as defined in the Revenue and Taxation Code. The initiative authorized the Board of Supervisors to set the rates based on either taxation method within the designated ranges of Measure N. County Counsel's office has spoken to the Treasurer Tax Collector for the perspective of her office. The Treasurer Tax Collector is not opposed to the Board of Supervisors considering a change from the canopy square footage structure to one based

on gross receipts. A gross receipts tax is easier to document, audit, and verify from a staff perspective and has worked well for other cannabis businesses in the County (such as retailers). From the Treasurer Tax Collector's perspective, gross receipts are generally easier to administer than the square footage structure which can entail a more detailed and staff intensive verification process. Of course, a change in the tax structure is ultimately a decision of the Board and your Commission should consider whether a recommendation is passed along as part of your report to consider this policy change.

Advocates requested preparation of a countywide cannabis environmental impact report. This is a policy and specifically a budgetary and resource request best directed to the Board of Supervisors. These same budgetary and resource issues will have to be considered by the Board when contemplating potential changes to the County's existing cannabis ordinance and any associated environmental impacts as well.

8. Is there a recommendation on issues of staff agreement?

During the initial study session, the Commissioners inquired as to whether there were areas of agreement between staff and the Grower's Alliance. It is staff's position that purely policy discussions are best left to the Planning Commission and ultimately the Board of Supervisors to weigh any potential changes. The items staff commented on are all procedural changes to streamline the process and to clarify processes within existing regulations. The following procedural/process clarifications were discussed:

- A. The annual operative permit should issue when the conditions of approval for the Cannabis Conditional Use Permit (CCUP) are met, not upon the date of issuance of the CCUP. With this change the annual permit would more realistically coincide with when business operations commence, not with the approval of the CCUP which typically requires lead time for the various condition to be fulfilled prior to the actual start of operations.
- B. The renewal of an annual operative permit should not require a resubmission of all the original application materials, just items that have changed. Staff does not require review of materials previously filed and reviewed, only a review of changed items or new conditions for compliance with the regulations.

Once policy direction is provided by the Board, staff is ready to carry out any legislative direction.

Follow up information from first session:

A final area of discussion was the use of portable toilets on cannabis cultivation sites. The use of portable toilets is detailed in Section 3(I) of the County's Onsite Wastewater Treatment Systems Manual and in Section 110.32.120 of the County Code. As verified by Environmental Management, a portable toilet may be used for a non-residential and limited use activity such as field labor operations. There is no permit requirement for temporary field labor operations, however the units must be emptied by a sewage hauler licensed by the County. Any use of portable toilets beyond temporary field labor would require a more permanent disposal facility and additional permitting by the County.

There are no related or required changes to the County's cannabis regulations related to this area of discussion.

As directed by your Commission, staff consulted with Chair Nevis on this staff report.

Recommended Action:

A. Provide direction on the following policy questions and authorize the Chair to coordinate with staff on preparing the report to the Board reflecting the Commission's action:

1. Should the setbacks of the cannabis ordinance be reevaluated?
2. Should cannabis canopy limits be expanded?
3. Should changes to propagation rules be considered?
4. Should expanded uses be considered on agricultural cultivation sites?
5. Should any aspects of Ranch Marketing be available to cannabis cultivators?
6. Should policy changes that involve the Sheriff's Office be considered?
7. Should recommendations be made on other general policy considerations?
8. Is there a recommendation on issues of staff agreement?

B. Due to the extended study session to solicit additional input, extend the time for the report to the Board by up to 90 days to ensure the deadlines of the settlement are met.

Alternative Action:

Commission Discretion