



OFFICE OF COUNTY COUNSEL
INTER-DEPARTMENT MEMORANDUM

TO: El Dorado County Board of Supervisors
FROM: Jefferson Billingsley, Deputy County Counsel
DATE: July 31, 2023
RE: Agenda of: September 12, 2023
Public Cannabis Study Session
Legistar No.: 23-1501

The purpose of this memorandum is to provide information and background for this cannabis public study session. The study session is a result of the litigation in *El Dorado County Growers Advocacy Alliance v. El Dorado County Board of Supervisors, et al.*, Case No. 21CV0161. In November of 2021 petitioners, El Dorado County Growers Advocacy Alliance (Grower's Alliance) and several other parties, 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 your 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 has completed the study session and, as directed, provides this report with recommendations to your Board regarding potential changes to County cannabis regulations. 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. Your Board may determine if changes to the ordinances are warranted, and if so, provide further direction to staff to pursue changes through the ordinance amendment process. Each of the cannabis ballot initiatives contained language through which your Board retained discretion to make further changes to County cannabis regulations without further voter approval. If your Board directs legislative changes, the cannabis ordinance would go to the Planning Commission for specific text revisions based on that direction and then return to your Board for final adoption. These recommendations reflect the Planning Commission's conclusions following the study sessions, they are not binding and if directed, the Commission would review all evidence and testimony as part of future consideration of specific text changes.

June 8 and July 13, 2023, Planning Commission Study Sessions

On June 8th, the Planning Commission took public comment and engaged in an in-depth discussion of ordinance revisions proposed by the Grower's Alliance and heard comment from other industry members and the public. Members of the cannabis industry generally spoke in favor of the revisions and a member of the public spoke in opposition to consideration of changes to the ordinance. A listing of the "bullet points" from the Grower's Alliance suggested edits may be found as

Attachment 23 to the Planning Commission agenda. In light of the Board's direction regarding the study session, the numerous suggested revisions from the Grower's Alliance and others were compiled into general policy areas and further discussed by the Planning Commission on July 13 in consideration of preparation of this report.

This memorandum focuses on the policy themes distilled from the Planning Commission study sessions. These policy themes, along with the recommendations from the Commission are detailed below.

Policy Areas/Themes

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, measured property line to property line, are required. As the Planning Commission discussed, 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. The Planning Commission discussion revolved around 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.

The Planning Commission unanimously (5-0) agreed to recommend that this policy question be considered by your Board. The Commissioners noted that a review of the setbacks makes sense as the County begins to experience actual (instead of merely hypothetical) legal cannabis operations.

2. Should expanded cannabis canopy limits be considered?

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 consistent comment was that the canopy limits did not appear to be tied to any particular policy rationale. A related but discrete item is an industry desire to defer to the state definition of "premises" as opposed to our current language which defines the premises as a single legal parcel.

The Planning Commission contemplated whether there is a policy rationale for the existing canopy limits assuming expanded cultivation areas would not otherwise negatively affect neighboring parcels. The Commission members unanimously agreed that this policy question should go to your Board for consideration.

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 indoor propagation activities. Staff takes no issue with a portion of the approved cultivation area being used for indoor propagation, but this would require changes to the current code regarding the use of indoor facilities where outdoor cultivation is allowed.

The Planning Commission members unanimously agreed that this policy question should be recommended for consideration by your Board.

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

Under the current regulations, most manufacturing and processing activities are not allowed on the cultivation parcel and must take place off site. Advocates would like to see increased integration to allow for other cannabis related activities on the same parcel as the cultivation. 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.

The Planning Commission voted to recommend this discussion item with an expressed limitation as to only nonvolatile processing activities that are similar to what would be allowed for traditional agricultural activities should be considered. The vote on this recommendation was 4/1 with Commissioner Vegna voting no.

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 and Winery Ordinances. Ranch Marketing authorizes certain commercial activities on agricultural parcels, including holding special events and onsite sales and consumption subject to a compatibility review. State law authorizes the Department of Cannabis Control to issue a temporary event license to allow a temporary cannabis event where the onsite sale and consumption of cannabis goods is authorized. Your Board 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 Right to Farm, the establishment of Agricultural Preserves, or any other provision of our 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 voted to *not* recommend that your Board consider ordinance changes to make Ranch Marketing opportunities available to the cannabis industry. The vote on this recommendation was 3/2 with Commissioners Harkin and Boeger voting no (they would recommend changes in this area).

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 the state licensing requirements. There is no legal impediment to this "dual track" approach; indeed, it is contemplated by state law.

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.

Recognizing that law enforcement topics are beyond the subject matter expertise of the Planning Commission, the Commission unanimously voted to defer contemplation of these issues and to forward consideration of these issues on to your Board without a recommendation. The Commission further recommended that the Sheriff's Office be requested to provide feedback for your Board's consideration.

The Sheriff's Office has provided a written response on these policy changes (Exhibit B) and will be provided notice of this study session and an invitation to comment as recommended by the Planning Commission.

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

A. Tax Structure/Rates: 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 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 your Board 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.

The Planning Commission unanimously voted to pass on a recommendation that the BOS consider a change to the tax structure and that your Board consider a discussion of existing cannabis tax rates in light of current market conditions and actions taken by the State on cannabis taxation issues. Your Board has discretion to set cannabis tax rates within the ranges of Measure N; a higher rate would require voter approval.

B. Countywide EIR: Advocates requested preparation of a countywide cannabis environmental impact report. The concern is that environmental review for individual cannabis projects is a barrier to market entry. This is a policy and a budgetary and resource issue for your Board to consider.

The PC unanimously recommended this item for consideration by your Board with three caveats: 1) that there are available resources (both fiscal and staff) to consider the item; 2) that any

environmental document be fully funded by the industry; and 3) that individual site review remain part of the CCUP process.

In a related environmental issue, similar budgetary and resource issues will have to be considered when contemplating potential changes to the County's existing cannabis ordinance as a result of this study session. Prior changes to the County's ordinance were processed under a CEQA statutory exemption for local cannabis regulations which has now sunset. Some of the policy considerations from the Planning Commission (particularly items 1-5) would require further environmental review as part of the ordinance revision process as they could potentially expand environmental impacts of cannabis cultivation.

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

During the study session some procedural changes to streamline the permitting process were discussed. These did not impact policy issues and were procedural clarifications staff generally agreed were helpful:

A. The annual operating permit should issue when the conditions of approval for the Cannabis Conditional Use Permit (CCUP) are met, not upon the date of approval 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 conditions to be fulfilled prior to the actual start of operations.

B. The renewal of an annual operating 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.

The PC unanimously recommended these process items for consideration by your Board.

Next Steps

This report summarizes the results of the study session, compilation of input received, and the recommendations of the Planning Commission. As directed by the Planning Commission, staff consulted with Chair Nevis on the preparation of this report to your Board.

By your Board directing the Planning Commission study session and holding today's cannabis discussion, the County's obligations under the settlement agreement resolving the litigation in *El Dorado County Growers Advocacy Alliance v. El Dorado County Board of Supervisors* are met. There was no commitment to legislative changes by your Board as part of the settlement process, only to complete the study session process.