



Legislation Text

File #: 20-0382, Version: 2

Hearing to consider Title 130 Zoning Ordinance for the cultivation of cannabis for personal use, amending Zoning Ordinance Section 130.14.260 (Outdoor Medical Cannabis Cultivation for Personal Use). The proposed amendments will make the existing ordinance consistent with state law, which allows for the cultivation of no more than six cannabis plants per residence for either medicinal use or recreational use by adults over the age of twenty-one. The proposed amendments would no longer distinguish between cannabis grown for medicinal use versus recreational use by adults over the age of twenty-one and would instead impose consistent regulations for all cannabis grown for personal use. Staff is recommending the Planning Commission recommend the Board of Supervisors take the following actions:

- 1) Find that the adoption of the proposed amendments to Section 130.14.260 is not subject to the California Environmental Quality Act (CEQA) pursuant to Sections 15061(b)(3), 15060(c)(2), 15060(c)(3), 15305, and 15308 of the CEQA Guidelines;
- 2) Recommend approval of amendments to Section 130.14.260 of Title 130, Article 9 of the El Dorado County Ordinance Code entitled "Outdoor Medical Cannabis Cultivation for Personal Use" renumbered as Section 130.42.100 of Title 130, Article 4, and retitled as "Cultivation of Cannabis for Personal Use," with amendments; and
- 3) Find that the ordinance shall take effect immediately upon final passage pursuant to Government Code section 25123(d) in order for the immediate preservation of the public peace, health, and safety.

(cont. 03/26/20, Item #3)

DISCUSSION / BACKGROUND

On November 8, 2016, California voters passed Proposition 64, also known as the Control, Regulate and Tax Adult Use of Marijuana Act (AUMA), by a vote of 57.1% in favor and 43.9% against. Locally, El Dorado County voters rejected Proposition 64 by a vote 50.1% against and 49.9% in favor (these numbers include the cities of Placerville and South Lake Tahoe). Proposition 64 legalized the non-medical use of cannabis by persons 21 years of age and over and the cultivation of no more than six (6) living cannabis plants for personal use, subject to reasonable regulations adopted by local jurisdictions.

Under Health and Safety Code section 11362.1, it is "lawful" under California law to "[p]ossess, plant, cultivate, harvest, dry, or process not more than six living cannabis plants and possess the cannabis produced by the plants." Health and Safety Code Section 11362.2 provides, "Not 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." That section further provides that, while a County "may enact and enforce reasonable regulations to regulate" the cultivation of six plants for personal use, the County shall not completely prohibit persons from cultivating six plants for personal use "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."

The County's existing ordinance for cultivation of cannabis for personal use was enacted before Proposition 64 and Health and Safety Code section 11362.1. The proposed amendments seek to bring the ordinance into compliance with existing state law and provide clear standards that will allow for more efficient, effective, and safer enforcement. The Findings and Declaration of Facts in the proposed ordinance provide the factual basis explaining the need for the ordinance to become effective immediately upon final passage for the immediate preservation of the public peace, health, and safety so that enforcement efforts can begin before plants mature.

Proposed amendments to the existing ordinance addressing cultivation of cannabis for personal medicinal use, include the following:

Amendment - The amendment provides clarity as to what is legal and what is not, which is not done under the existing medicinal cannabis ordinance. In the proposed amendments, 6 plants "outdoors" on a legal parcel is the limit and there are no exceptions. Even if a parcel has a legal secondary dwelling unit or accessory dwelling unit (ADU), the ordinance allows only 6 plants outdoors on a legal parcel, thus any additional plants for additional residences on that parcel must be indoors. Because state law allows for six plants per residence regardless of whether the cannabis is used for medicinal or adult recreational use, consistent standards for cannabis grown for personal use would provide clarity and allow for more efficient and effective enforcement while preserving access to medicinal cannabis for qualified patients.

The above change is amending the 200 square feet (with one prescription or valid medical card), 400 square feet (with two prescriptions or valid medical cards), and 600 square feet (with three prescriptions or valid medical cards) personal medical cultivation rules. There are additional requirements that also have to be met for personal cultivation (e.g. setbacks, screening, etc.).

Amendment - If the cultivation of cannabis is a violation and is confirmed through visual inspection or imagery, a notice to correct and notice to abate may be simultaneously issued on a single form entitled "Notice to Correct and Abate," which would provide for abatement after expiration of no less than 96 hours from the date and time stated on the notice.

The amendment allows for both the correction and abatement notices to happen at once now that satellite or other visual imagery is available.

Amendment - Would be able to give the responsible party in a violation case 96 hours to comply. The 96 hours allows for more time for the property owners to be noticed about the issue because they might not live in the area.

Currently the ordinance allows for 72 hours to come into compliance and then an additional 72 hours before abatement could occur.

Amendment - A fine is \$1,000 per day per violation if the violation is not corrected within the date and time stated on the notice to correct or notice to correct and abate.

This allows for one fine amount per violation per day now that the correction and abatement may be happening at the same time. Before it was \$500 per violation per day until the time had expired and it increased to \$1,000 per violation per day. This created confusion for staff and the public.

Amendment - A request for an administrative hearing must be made within three (3) calendar days of service of the notice to correct, administrative citation, or notice to abate and the hearing shall be held within five (5) business days of the request for a hearing.

Clarifies that a request for an administrative hearing must be made in three (3) calendar days and the hearing shall be held within five (5) business days of the request for a hearing.

Amendment - Satellite images of cannabis cultivation shall be admissible in an administrative hearing provided that there is evidence establishing the date and time the image was captured and the parcel for which the image was taken.

States that the new satellite imagery is now available to the County and it will be used in administrative hearings.

Amendment - Imposition of administrative fines may be delayed and a property owner may be permitted no less than fifteen (15) days to correct any violations other than removal of cannabis plants if all of the following conditions are met:

- a. The property where the cultivation is occurring is being rented or leased and a tenant is in possession;
- b. The property owner or agent provides written evidence that the rental or lease agreement prohibits the cultivation of cannabis;
- c. The property owner or agent did not know the tenant was illegally cultivating cannabis and no complaint, property inspection, or other information provided the property owner or agent with actual notice of the illegal cannabis cultivation; and
- d. The property owner demonstrates good faith efforts to remove the illegal cannabis plants within the time required in the notice to correct or notice to abate.

This amendment allows for property owners to get more time, which meet the above criteria, to work with the County to come into compliance.

Amendment - Remediation Plan. Before a civil code enforcement case is closed, the County shall approve a remediation plan that provides for remediation activities that will restore the site to predevelopment (pre-cultivation) conditions to the maximum extent feasible. The County may require a mitigation and monitoring plan subject to review and approval of a Hearing Officer or the Planning and Building Department. The plan shall address prevention of damage to soil, plant and animal life, and surface and subsurface water supplies, and shall include standards for documentation, reporting, and adaptive management. Failure to comply with a mitigation and monitoring plan shall constitute a subsequent violation of this section.

A remediation plan enables the County to have the violators bring the property back to the pre-cultivation environmental state. Many violating properties have environmental issues that not only affect the property but also surrounding properties and the watershed.

Amendment - Optional Registration. The County may implement a registration program for any person cultivating cannabis for personal use outdoors. The registration program may require up to annual registration with the County that includes the name and contact information of each person owning, leasing, occupying, or having control or possession of the premises and responsibility for the cannabis cultivated thereon and, if the person cultivating is not the owner, a copy of the written authorization and any such other information and documentation as the County determines necessary to ensure compliance with state law and this section. Any registration program shall not require an individual to disclose whether cannabis grown under this section is for medicinal use.

This amendment allows for, but does not require, the County to have a list of the legal personal

outdoor grows in the County. To this point, the County has no method to track the legal personal grows in the County. This has created significant delays in enforcement efforts. If registration is implemented, it cannot require an individual to disclose whether cannabis grown under this section is for medicinal use, thus it will remain consistent with privacy concerns expressed by the medical cannabis community.

Personal Cultivation in El Dorado County

Many different issues contributed to the proposed revisions of the personal cultivation ordinance for El Dorado County. The following are some of the larger issues that contributed to the revisions:

- In January 2019, the collective model of cultivation in Health and Safety Code section 11362.775 concluded in the State of California.
- The selling of the personal medical cultivation of 200 sq. ft., 400 sq. ft., and 600 sq. ft., on the black market.

The Sheriff's Office has observed the wide spread problem of cannabis being in the black market within El Dorado County. The black market for cannabis has been contributed to by the selling of cannabis purportedly grown pursuant to the existing personal medical cannabis ordinance. This includes individuals using one doctor prescription for cannabis at multiple personal medical cultivation sites as to allow for more cannabis to sell. With the large amount of personal medicinal cannabis allowed to be grown and no method to track it, this allows for a situation that contributes to the black market.

- County staff having issues with not knowing if cultivation sites are legal or illegal.

There is no official list or registration for staff to check to see if personal medical cultivation sites are legal. In addition, there is no method to make sure that doctor prescriptions or medical cards are not being used at multiple cultivation sites. It is almost impossible to know if certain personal medical cultivation sites are legal or illegal before or when staff arrive at a cultivation site which can create a dangerous situation. These cultivation sites can be substantial in size, up to 600 sq. ft. There is no County that currently allows up to 600 sq. ft. for personal cultivation. In addition, for the personal use of one person for medical purposes, only three counties allow for more than 100 sq. ft. outdoors and only three counties allow for more than six plants outdoors. Even with the proposed amendments, El Dorado County will be allowing for more in outdoor personal cultivation of cannabis than a large amount of its fellow California counties.

- State to require cultivation sites over six plants obtain commercial licenses.

Under Health and Safety Code Section 11362.2 provides, "Not 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." Section 11362.77(a) provides that "a qualified patient or primary caregiver may also maintain no more than six mature or 12 immature cannabis plants per qualified patient." 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; see also *Kirby v. County of Fresno* (2015) 242 Cal.App.4th 940, 968 [section 11362.77 "does not establish an express statutory right to possess and cultivate medical marijuana that trumps local land use

regulation.”].) Section 11362.77(c) provides, “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).”

As stated by CalCannabis Cultivation Licensing, which is responsible for regulating and licensing commercial cannabis cultivation, “Business and Professions Code section 26033 sets forth the conditions in which a qualified patient or primary caregiver would be required to get a state cannabis license and 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 state has communicated that growing in excess of six plants without a commercial license is “subject to criminal action.” Thus, even if the County allowed for more than 6 plants for qualified patients or primarily caregivers under section 11362.77(a), the patient or caregiver would be required under state law to obtain a commercial cannabis cultivation license. The following are the costs for the state cultivation permits that coincide with the personal cultivation amounts that El Dorado County currently allows:

Specialty Cottage Outdoor - An outdoor cultivation site with up to 25 mature plants. Application fee \$135 and License and Renewal Fees \$1,205.

Specialty Cottage Indoor - An indoor cultivation site with up to 500 square feet or less of total canopy. Application fee \$205 and License and Renewal Fees \$1,830.

Specialty Cottage Mixed-Light - A 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

By these cultivation sites going through the state process, they would have to operate the state’s track and trace system. This would allow for the cannabis to be tracked so it does not go into the black market.

- 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.

Further History of Cannabis Public Meetings in El Dorado County

On July 17, 2018, and after at least 40 public meetings, the El Dorado County Board of Supervisors placed five ballot measures on the ballot for the November 2018 election, which enabled voters to decide whether to allow different aspects of commercial cannabis and its taxation. The ballot measures named Measure N (taxation, permitting and enforcement of commercial cannabis), Measure P (commercial outdoor and mixed-light cultivation of cannabis for medicinal use), Measure Q (commercial outdoor and mixed-light cultivation of cannabis for recreational adult use), Measure R (retail sale, commercial distribution, and commercial indoor cultivation of cannabis for medicinal use), and Measure S (retail sale, commercial distribution, and commercial indoor cultivation of cannabis for recreational adult use) were passed by the voters. More information on the history of the commercial cannabis program is available at:

<https://www.edcgov.us/Government/planning/Cannabis/Pages/Cannabis-Information-Home-Page.aspx>.

The County is now in the implementation stage of its commercial cannabis program. Due to the regulations and taxes, participation in the legal commercial cannabis market is much more costly and time-consuming than the black market. If the black market continues to thrive in El Dorado County, often under the guise of legal personal grows under the existing ordinance, the regulated commercial market will likely fail.

OTHER DEPARTMENT / AGENCY INVOLVEMENT

Sheriff's Office; County Counsel; Planning and Building; and District Attorney.

CEQA COMPLIANCE

The proposed amendments are exempt under the "common sense" exemption from CEQA in Guidelines section 15061(b)(3) (Title 14, Chapter 3 of the California Code of Regulations), which exempts from CEQA projects for which it "can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment." The proposed amendments bring the existing ordinance into compliance with state law, which already allows 6 plants indoors per residence and the County's existing ordinance already allows for potentially more than 6 plants outdoors (up to 600 square feet with three medical cannabis cards). The amendments come within this common sense exemption because they do not designate additional lands for new cannabis cultivation that is more intense than the cannabis cultivation already authorized in those residential zones through the existing ordinance and state law. The amendments thus do not result in any different or new effects on the environment than were already assumed to exist without the amendments. The remaining amendments are minor and are made as part of implementation of the existing program and reasonable regulations of it and there is no possibility that these amendments will have a significant effect on the environment.

Furthermore, the proposed amendments are not subject to CEQA pursuant to Section 15060(c)(2) of the Guidelines because the amendments will not result in a direct or reasonably foreseeable indirect physical change to the environment; Section 15060(c)(3) because the enactment of the amendments is not a "Project" as defined in Section 15378 since the amendments have no potential for resulting in physical change to the environment, directly or indirectly; Section 15305 because the proposed amendments consist of minor alterations in land use limitations in areas with an average slope of less than 20%, which do not result in any changes in land use or density; and Section 15308 because the proposed amendments are intended to protect the environment.

FINANCIAL IMPACT

The initiation of a registration program could cost the County a significant amount of funds if operated correctly with site inspections to make sure cannabis is not entering the black market.

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