



# COUNTY OF HUMBOLDT

AGENDA ITEM NO.

For the meeting of: March 5, 2013

Date: February 18, 2013

To: Board of Supervisors

From: Phillip Smith-Hanes, County Administrative Officer *PSH*

Subject: Presentation of Outline of the Draft Medical Marijuana Outdoor Cultivation Ordinance and Community Meetings on the Outline

RECOMMENDATION(S):

That the Board of Supervisors review the Outline of the Draft Medical Marijuana Outdoor Cultivation Ordinance (Attachment 1), make any desired modifications, and direct staff to schedule community meetings to gather input regarding the Outline.

SOURCE OF FUNDING: General Fund

DISCUSSION:

On September 6, 2011, the Board of Supervisors heard a presentation from representatives from Mendocino County regarding that county's Ordinance 9.31 concerning the outdoor cultivation of medical marijuana and voted to "refer consideration of the Mendocino County Program to the Medical Marijuana Subcommittee and Department Heads." On January 24, 2012, the Board received an update from the County Administrative Officer regarding meetings with the subcommittee. The Board expressed concerns about the fact that this process would not result in regulation of the nuisance effects of outdoor cultivation in small-lot neighborhoods during the 2012 growing season and directed staff to update the Board on "any

Prepared by Phillip Smith-Hanes CAO Approval *Amy Olsen*

REVIEW:	Auditor _____	County Counsel <u><i>DS</i></u>	Human Resources _____	Other _____
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TYPE OF ITEM:

Consent

Departmental

Public Hearing

Other \_\_\_\_\_

**BOARD OF SUPERVISORS, COUNTY OF HUMBOLDT**

Upon motion of Supervisor \_\_\_\_\_

Seconded by Supervisor \_\_\_\_\_

Ayes \_\_\_\_\_

Nays \_\_\_\_\_

Abstain \_\_\_\_\_

Absent \_\_\_\_\_

PREVIOUS ACTION/REFERRAL:

Board Order No. H-2, M-1, M-1

Meeting of: 9/6/11, 1/24/12, 2/28/12

and carried by those members present, the Board hereby approves the recommended action contained in this Board report.

Dated: \_\_\_\_\_

By: \_\_\_\_\_

**Kathy Hayes, Clerk of the Board**

existing measures that may be utilized in the interim.” This information was presented to the Board on February 28, 2012.

For nearly a year, staff has continued to work on development of an ordinance to regulate the nuisance effects of outdoor medical marijuana cultivation. During this time, through a variety of presentations and informational meetings by the Sheriff, the Department of Fish and Wildlife, scientists at the University of California at Davis, and others the Board and public have become aware of significant environmental harms occurring as a result of wide-spread, unregulated outdoor cultivation of marijuana in rural Humboldt County. Reports of vast, unregulated water withdrawals from salmonid-bearing streams and rivers, massive amounts of rodenticides being used in forests and impacting species of special concern, unregulated and unpermitted grading leading to sedimentation of streams and rivers, and illegal dumping of exhausted potting soil, plastic soil bags, and human waste, all associated with the outdoor cultivation of marijuana, raised the level of concern. Despite these very real local harms associated with an unregulated activity, however, actions at the State and federal levels continue to call into question the ability of local governments to address these harms.

### *State Legal Status*

As your Board knows, the use and possession of medical marijuana is permitted for patients that receive a doctor’s recommendation for it under California law, but there is no statewide regulatory framework for the use, possession, cultivation and transportation of medical marijuana. Instead, a patchwork of court decisions exists applying some broad principles to local regulatory activities. While staff was working on this Board-directed project, several cases were decided by the California appellate courts and accepted for review by the California Supreme Court that called into question the County’s ability to affirmatively permit the cultivation of medical marijuana by patients or their care providers. Staff believed that due to the medical marijuana cases pending before the California Supreme Court, the County should instead consider a registration process that would attempt to avoid the pending legal issues involved in a permitting program. The registration program that staff looked to in modeling the outline currently before the Board was upheld by the Third District Court of Appeals in a published decision on February 6, 2013 against a facial constitutional challenge.

While staff was drafting an ordinance for a registration process, the California Supreme Court dismissed one of the key cases that drove the decision to apply a registration framework rather than a permitting system (*Pack v. Superior Court (City of Long Beach)*, which held that permitting was preempted by federal law). The Supreme Court also accepted two more medical marijuana cases for review. The Court has since heard oral argument on one of these pending cases, *City of Riverside v. Inland Empire Patient’s Health & Wellness Center, Inc.*, on February 5, 2013. The Supreme Court’s decision will be issued within 90 days of oral argument. This case involves the City of Riverside’s zoning ordinance which explicitly prohibits medical marijuana dispensaries as a nuisance per se. The City used nuisance law to enjoin the operation of the dispensary in the case. The trial court ruled for the City and the appellate court also upheld the City’s use of nuisance law and found that the City’s ban on dispensaries was not preempted by state law. The outcome of this case will weigh heavily on what happens with an outdoor cultivation ordinance and depending on the Supreme Court’s holding, staff will likely come back with additional recommendations for this Ordinance.

### *Federal Enforcement*

Despite the confusing legal status of medical marijuana under State law, marijuana remains illegal under federal law. Staff is therefore also attempting to keep abreast of federal enforcement activity surrounding medical marijuana. Recently, Mendocino County has been subpoenaed by a federal grand jury to turn over records relating to their permitting program (which has now ceased operation). At this time, Mendocino County is refusing to comply with the subpoena and has retained counsel to represent them in that action. Although the federal government is continuing its enforcement of activities relating to medical marijuana cultivation and distribution, at this time jurisdictions with medical marijuana cultivation registration programs appear to be out of the federal government’s purview. This could change, of course, but it is staff’s belief that any liability for a registration process would be much less than for a permitting process and therefore, staff continues to

recommend that your Board consider a registration-based system rather than a permitting system despite the dismissal of the *Pack* case.

*Outline of the Draft Medical Marijuana Outdoor Cultivation Ordinance*

Based on these considerations, staff has prepared and reviewed with the Medical Marijuana Subcommittee an outline for a draft registration-based ordinance. Staff believes it is important for the basic tenets of a potential ordinance to be thoroughly reviewed by your Board and the public prior to development of specific ordinance language. Therefore, the Outline of the Draft Medical Marijuana Outdoor Cultivation Ordinance (Attachment 1) is formatted in a way to show your Board and the public in one document both the basic direction of a draft ordinance, as well as indicate, through the use of footnotes, why certain items are in the Outline and why there are alternatives for the Board to consider. Staff's hope is that the Board will weigh in on the underlined items, which indicate that a choice should be made, and then open up the Outline to broader public discussion.

*Community Meetings*

In particular, staff believes it would be most effective to schedule community meetings to gather community input on the Outline. Meetings would likely be held, at minimum, in southern and eastern sections of the County, and could include additional locations and timing considerations as your Board directs.

FINANCIAL IMPACT:

There will be minimal cost associated with conducting community meetings, which can be absorbed within existing budget appropriations.

OTHER AGENCY INVOLVEMENT:

A wide variety of County and outside agencies is potentially affected by a medical marijuana outdoor cultivation ordinance.

ALTERNATIVES TO STAFF RECOMMENDATIONS: Board's discretion

ATTACHMENTS:

1. Outline of the Draft Medical Marijuana Outdoor Cultivation Ordinance

## Outdoor Cultivation of Medical Marijuana

1. Repeal Ordinance 2328 (Title V, Div. 8, Ch. 1)<sup>1</sup>
2. Nuisance per se to cultivate medical marijuana (MMJ) outdoors in Humboldt County's jurisdiction unless the cultivation site is registered<sup>2</sup> and meets specific limitations as outlined here.
  - a. Registration Requirements
    - i. Registration occurs at DHHS - Public Health Branch
      1. Alternative One<sup>3</sup>
        - a. All information to be received in confidence and retained, used or disclosed only for purposes of administration or enforcement of this code or state law, or as otherwise required by law
        - b. Fee for registration as set by Board
        - c. Registration is good for one (1) year only. Site must re-register each year to be in compliance
      2. Alternative Two
        - a. All information is to be received, checked for completeness, verified as needed, and then returned to the applicant. The Public Health Branch shall only retain their registration form, indicating that all required information has been submitted by the applicant for the parcel in question.
        - b. Fee for registration as set by Board
        - c. Registration is good for one (1) year only. Site must re-register each year to be in compliance
      3. Alternative Three
        - a. All information is to be received, checked for completeness, verified as needed, and then returned to the

<sup>1</sup> This section of the Code was largely invalidated by the CA Supreme Court's ruling in the Kelly case and would contradict this new Ordinance. Staff recommends that the Board simultaneously repeal Ordinance 2328 and adopt this new Ordinance, once finalized.

<sup>2</sup> The Pack case, which was before the CA Supreme Court when this was written, had found that a local jurisdiction could not permit an activity that was illegal under Federal law. The Supreme Court has since dismissed this case. However, the issue of federal preemption remains a viable cause of action and for this reason, it is recommended that the Board proceed with a registration program and not a permitting program for medical marijuana cultivation sites.

<sup>3</sup> There are three registration alternatives to reflect varying amounts of information retained by the County. The benefit to retaining more information is that in the event we need to determine whether a cultivation site is in compliance with the registration requirements, we have the necessary information to enable us to do so. Some members of the public have been hesitant about having their medical marijuana cultivation information retained by the County in the event the Federal government wishes to obtain it. If the County does not have the information, then the Federal government cannot obtain it from the County.

applicant. Applicant shall then receive a signed and dated registration form indicating that they have completed registration for the parcel in question. Applicant must retain this registration form and all the documents they submitted to Public Health and post them at the cultivation site.

- b. Fee for registration as set by Board
- c. Registration is good for one (1) year only. Site must re-register each year to be in compliance

ii. Information to be submitted to Public Health

1. Address or legal description and Assessor Parcel Number for the property to be registered
2. Names & addresses of all those owning, leasing, occupying or having charge or possession of the property
3. Map showing the location for each MMJ [plant][cultivation area]<sup>4</sup>, as well as total number of MMJ plants cultivated on the parcel, the locations of property lines, easements, and the setbacks required under this Ordinance
4. Information demonstrating where water for MMJ plants is coming from, how much will be used, and the property owner's right to the water for non-domestic uses
5. An affidavit, on a form to be provided, that all structures, including agricultural structures of more than 10 x 12 ft, are permitted and that less than 50 cubic yards of soil has been moved and that there is no development, as defined by the County General Plan and County Code, within a Streamside Management Area
6. An affidavit, on a form to be provided, that no herbicide, pesticide, fungicide, rodenticide or other chemical will be used on or near the MMJ plants unless they are approved for use on plants in the United States of America and they are not used in amounts exceeding the manufacturer's recommendations
7. Alternative One:<sup>5</sup> All information listed below shall be reviewed and verified by Public Health and then returned to the Applicant.

<sup>4</sup> The location of each plant would be helpful in the event the cultivator chooses to plant very small groupings of 1 or 2 plants over a large area. One problem with scattered cultivation sites is that if we want the cultivator to post their registration, which cultivation site should it be posted at? If the cultivator intends to cultivate all their MMJ plants in one area, then depicting the cultivation area is most likely adequate.

<sup>5</sup> These are the documents that MMJ cultivators are most likely to not want Public Health Branch to retain. It is legal for the County to retain this information. However, whether the County wishes to retain it is a policy call for the Board to make. By returning this information, we may have more cultivators registering their cultivation sites. A good middle ground would be to give the information back, but require that it be posted at the cultivation site.

8. Alternative Two: All information listed below shall be reviewed, and verified by Public Health and then returned to the Applicant to post at the cultivation site.
  9. Alternative Three: All information listed below shall be reviewed verified, and retained by Public Health
    - a. If cultivation done by non-owner, a notarized letter from owner authorizing outdoor cultivation
    - b. Names and counties of residence for each patient and caregiver who participates in the cultivation, either directly through labor, or indirectly through financial reimbursement
    - c. Copy of current 215 recommendations for each patient who will receive MMJ from the cultivation site
  10. Any other relevant information as required by the County
- b. Nuisance per se<sup>6</sup> unless specific plant and site limitations adhered to
- i. Alternative One<sup>7</sup>: MMJ plant cultivation limitations:
    1. Legal parcel<sup>8</sup> of 20 acres or less
      - a. No more than 12 mature or 24 immature MMJ plants
      - b. If both mature & immature, maximum of 12 mature & no more than 24 MMJ plants total
      - c. Each MMJ plant must be at least 100 ft. from all property boundaries
        - i. Set-backs may be reduced or waived by the Board upon a finding of unusual hardship
    2. Legal parcel greater than 20 acres, but less than 160 acres
      - a. No more than 30 mature or 60 immature
      - b. If both mature & immature, maximum of 30 mature & no more than 60 total MMJ plants

<sup>6</sup> One of the MMJ issues the CA Supreme Court is currently considering is whether a MMJ dispensary may be enjoined or abated under nuisance law. If the court ultimately decides that a nuisance cause of action is not available to local jurisdictions for MMJ dispensaries, then the question would become what can a local jurisdiction use to enforce any zoning or registration or regulation or permitting scheme. Until we know what the Court will decide, we have decided to continue to use nuisance law and the County's ability to declare a nuisance per se as the enforcement mechanism in this Ordinance.

<sup>7</sup> There are a variety of ways to structure the number of MMJ plants that can be on a parcel before it is deemed a nuisance per se. We have placed two alternatives here, but your Board may choose others. The most important elements appeared to us to be setbacks and correlating the number of plants to the size of the parcel in an attempt to balance the interests of the neighbors in not seeing or smelling or being otherwise impacted by the cultivation of MMJ with the interests of those who wish to cultivate MMJ in a legal manner.

<sup>8</sup> The requirement that only legal parcels be allowed to register is intended to curtail the illegal division of parcels for the purposes of obtaining additional parcels to grow MMJ. An example would be illegally dividing a 320 acre parcel into two 160 acres parcels in order to register each one individually for the cultivation of up to 198 plants total, rather than the 99 plants maximum that could potentially be cultivated on one 360 acre parcel.

- c. Each MMJ plant must be at least 300 ft. from all property boundaries
3. Legal parcel 160 acres or greater
  - a. No more than 99 MMJ plants, whether mature or immature
  - b. Each MMJ plant must be at least 1,000 ft. from all property boundaries
- ii. Alternative Two: MMJ plant cultivation limitations:
  1. Every legal parcel over 10 acres in size may have no more than 12 mature or 24 immature MMJ plants for each posted MMJ recommendation
    - a. No more than 99 MMJ plants, whether mature or immature, regardless of the number of posted MMJ recommendations
    - b. Each MMJ plant must be at least 100 ft. from all property boundaries
    - c. Outdoor cultivation of any number of MMJ plants on parcels less than 10 acres shall be deemed a nuisance per se
- iii. Alternative:<sup>9</sup> De Minimis Exception
  1. Cultivation of two or fewer MMJ plants on any legal parcel shall be exempt from the registration, parcel size, and setback requirements, but shall not be exempt from the other requirements of this Ordinance or the requirements of state law
  2. Cultivation pursuant to this exception may still be found to be a nuisance pursuant to this Ordinance and the cultivation of the two or fewer plants ordered abated by the Board at a public hearing
- iv. General Limitations
  1. No outdoor cultivation of MMJ within 600 ft. of school, park, religious institution, known or discovered Native American cultural or ceremonial site, childcare center or day care, school bus stop, or other sensitive uses.<sup>10</sup>
  2. All MMJ plants that are visible at any stage of growth from a neighboring parcel, an easement, or a public right of way are to be surrounded by an opaque fence designed to shield the MMJ from view of the aforementioned areas.
  3. Limitations apply regardless of the number of qualified patients or primary caregivers residing at the property or involved directly or indirectly in the cultivation<sup>11</sup>

<sup>9</sup> This would effectively allow cultivation of one or two MMJ plants in urban areas, on small parcels, or on parcels that cannot meet the setbacks. It would also allow the Board to abate the cultivation if it occurs in a manner that negatively impacts the neighbors and/or the neighborhood.

<sup>10</sup> It is anticipated that both the Board and the community will have sensitive uses they will wish to add or delete, so this is not an exhaustive list of all potential sensitive uses.

<sup>11</sup> This would be deleted in the event the Board chose Alternative Two on page 4 of this outline (no more than 12 mature or 24 immature MMJ plants for each posted MMJ recommendation).

4. No growing indoors pursuant to the County indoor residential MMJ cultivation ordinance *and* outdoors pursuant to this Ordinance. Must choose one *or* the other
5. Contiguous legal parcels under a single ownership shall count as a single parcel for purposes of this Ordinance.<sup>12</sup>

c. Enforcement

- i. Enforcement is complaint-driven. Complaints may be received from the general public, a member of the Board of Supervisors, a state or local agency, or another County department.<sup>13</sup>
- ii. Enforcing Officer<sup>14</sup> notifies owner and/or occupant of non-compliance with above requirements through issuance of “Notice to Abate Outdoor Marijuana Cultivation”
  1. Notice states how the cultivation is in violation of the requirements and how to abate it. Abatement may only be performed by an individual authorized under state law to possess MMJ.
  2. Abatement must happen within fourteen (14) calendar days after notice served
  3. Owner/occupant may appeal enforcing officers determination by filing a written request for a hearing before the Board to the Clerk of the Board, within ten (10) calendar days after Notice was served
  4. Notice shall contain a statement that the enforcing officer will abate the nuisance if time to cure or appeal has run and the nuisance still exists. The property owner and/or occupier will be responsible for all costs of abatement
- iii. Service of Notice to Abate
  1. Personal service to owner of property, or
  2. Posted on property and certified mail to an owner at the address listed on last equalized assessment roll or the address held by Public Health<sup>15</sup>, unless
    - a. Assessor records show change of ownership since last equalized assessment roll was completed, then it shall be mailed to new owner’s address

<sup>12</sup> This is intended to prevent a “MMJ plantation” scenario wherein one person or entity owns 4 or 5 contiguous 160 acre parcels and and grow up to the maximum amount on each parcel, resulting in 400 or 500 MMJ plants.

<sup>13</sup> Should Public Health notify the enforcing agency if registration is expired? What about if registration is incomplete?

<sup>14</sup> The Humboldt County Sheriff’s Department has indicated their interest in being the enforcing agency, but it is up to the Board to make the decision on whether they want the Sheriff to enforce the Ordinance or some other County department.

<sup>15</sup> This clause regarding the address held by Public Health will be deleted if the Board decides that Public Health will not retain this information.



3. Date of service is when personally served, or deposited in the mail and posted

iv. Appeal to Board

1. If timely appeal in writing made, Clerk shall schedule hearing not less than seven (7) calendar days and no more than thirty (30) calendar days from the date the appeal was filed and send notice of the hearing to the parties
  - a. The Board may continue the hearing upon a showing of good cause by either the appellant or the enforcing agency
2. Appeal to Board is a de novo hearing and Board may affirm, reverse or modify the determinations made in the Notice to Abate
3. Informal hearing, so technical rules of evidence need not apply
4. Board shall issue written findings upholding their decision, as well as the propriety of and means to abate the nuisance, which shall be mailed by the Clerk via regular U.S. Mail to the parties
5. Board's decision is final and conclusive on the day it is made

v. Costs

1. Property owner and/or responsible party are liable for all costs associated with enforcement of this ordinance and any abatement
2. Enforcing officer shall keep itemized account of costs of enforcing this ordinance and the performance of any abatements
3. Enforcing officer may schedule a hearing before the Board to affirm the accounting, at which time the owner of the property may appear and provide evidence that the accounting is not accurate or reasonable.
4. Board may make modifications to the accounting as they deem reasonable and shall confirm their decision by resolution
5. These costs may be collected by special assessment, lien, civil judgment and any other lawful method

vi. Other remedies

1. County may, in addition to or in lieu of the procedures outlined above, bring a civil action to abate a nuisance per se involving MMJ cultivation