

April 23, 2018

Mr. Jim Steele, Chair
And Members of the Board of Supervisors
County of Lake
255 North Forbes Street
Lakeport, CA 95453

Re: Clean-Up Amendments to Lake County Cannabis Cultivation Ordinance

Chairman Steele and Members of the Board of Supervisors:

Thank you for adopting the Lake County Ordinance No. 3073 (“Ordinance 3073”), which provides a solid framework for legal commercial cannabis cultivation in the County for the first time. We have been asked to prepare a few suggested amendments to Ordinance 3073, which are detailed below, that will help facilitate review and approval of cultivation permits in the County, as well as the County’s receipt of Measure C tax revenues associated with those permits.

1. Permit “Early Activation”

Ordinance 3073 already includes a provision (§ 21-27.13(at)(4)(i)(e)) that allows the Planning Director to grant an “Early Activation” permit to applicants that meet certain criteria, including submittal of a “complete” application for a minor or major use permit. An “Early Activation” permit allows an applicant to begin some cultivation activities while the County continues to process the full permit application. Planning staff have indicated that issuance of an “Early Activation” permit will take a significant amount of time (i.e., approximately 30 days after the County deems the applicant’s use permit application complete, which itself can take months). This raises two pressing concerns - one for the licensees, and one for the County.

First, as respects the licensees, a delay of months before receiving an “Early Activation” permit to begin cultivation will result in the loss of this year’s cultivation season. The County is aware of the scale of investment some licensees have already made in the County by working through the Article 72 self-certification process to obtain Letters of Authorization and temporary state licenses in anticipation of beginning cultivation this year. Without Board action to accelerate the issuance of “Early Activation” permits, much of that investment stands to be lost.

Second, as respects the County, loss of this cultivation season could result in the loss of up to \$500,000.00 in Measure C tax revenue. Measure C provides, in relevant part, that “each person engaged in legally-authorized cannabis cultivation within the unincorporated area of Lake County shall pay an annual tax of one dollar (\$1.00) per square foot of an outdoor cultivation site, two dollars (\$2.00) per square foot of a mixed-light cultivation site, and/or three dollars

(\$3.00) per square foot of an indoor cultivation site . . .” (County Code, § 18-51.) Taxes begin to accrue on the date “on which a person becomes engaged in legally-authorized cannabis cultivation.” (County Code, § 18-54.) Based on the few state licenses issued so far in Lake County, by allowing cultivation this year the County could collect approximately \$548,000.00 in Measure C tax revenue.

For these reasons, we suggest that the Board amend Ordinance 3073 to expedite issuance of “Early Activation” permits. Redline changes to the existing ordinance are shown below.

(e) Early activation

In addition to the requirements of Article 27.4, the following requirements apply:

- a. The applicant shall be qualified to receive a permit pursuant to Subsection 3.ii.(e).
- b. Evidence of enrollment with the applicable Regional Water Quality Control Board or State Water Resources Control Board for water quality protection programs or written verification from the appropriate board that enrollment is not necessary.
- c. The applicant shall have a Conditional Certificate of Recognition of Compliance for compliance with Article 72.
- d. The applicant shall have filed with the Department an application for a minor or major use permit application, as appropriate, for the same project that has been determined to be substantially complete by the Department. The Department shall make this determination at the time of the application’s submittal by reference to a checklist that the Department shall make publicly available.
- e. The Department shall issue the Early Activation to the applicant within 10 days of verifying the applicant’s compliance with each of the above criteria.

2. Employee Background Checks

Ordinance 3073 currently requires “all applicants and employees to undergo a background check by the Lake County Sheriff Department.” (Ordinance 3073, § 21-27.13(at)(3)(ii)(e).) As we have commented previously, the requirement for employees to submit to a background check is inconsistent with state law, the Medicinal and Adult Use Cannabis Regulation and Safety Act (Bus. & Prof. Code, § 26000 et seq. [“MAUCRSA”]), which does not require a background check for employees. If the Board is not inclined to omit the background check requirement for employees, then we recommend in the alternative that the Board amend this provision to clarify that an employee may begin work immediately after

submitting fingerprints to the Lake County Sheriff's Department, provided that the employer must terminate the employee if the employee subsequently fails the background check. This change will allow employees to work while awaiting the results of the background check, and reduce immediate time pressure on the Sheriff's Department to complete background checks in order to allow individuals to begin work. In this respect, § 21-27.13(at)(3)(ii)(e) should be revised as follows:

All applicants and employees shall undergo a background check by the Lake County Sheriff [sic] Department. An individual may fail the background check if employee has been convicted of an offense that is substantially related to the qualifications, functions, or duties of the business or profession for which the application is made, except that if the sheriff determines that the applicant or permittee is otherwise suitable to be issued a license and granting the license would not compromise public safety, the sheriff shall conduct a thorough review of the nature of the crime, conviction, circumstances, and evidence of rehabilitation of the applicant, and shall evaluate the suitability of the applicant or permittee be issued a license based on the evidence found through the review. In determining which offenses are substantially related to the qualifications, functions, or duties of the business or profession for which the application is made, the sheriff shall include, but not be limited to, the conditions described in Section 26057 of the California Business and Professions Code. An employee may begin work immediately after submitting fingerprint images and related information as required to undergo a background check by the Lake County Sheriff's Department, provided that the employer for whom the employee works shall terminate the employee if so required by the Sheriff upon completion of the employee's background check.

3. State Water Board Enrollment Requirement

Ordinance 3073 currently requires, as a condition of eligibility to submit an application for a cannabis cultivation permit that the prospective applicant have enrolled his or her site for coverage under the State Water Resources Control Board's ("State Water Board") Cannabis General Order, pertaining to water quality protections, even before the County adopted Ordinance 3073. (Ordinance 3073, § 21-27.13(at)(4)(i)(d)(a).) In effect, this provision requires applicants to have enrolled a site under the Cannabis General Order even before it was legal to cultivate cannabis on a commercial basis in the County. This is a classic cart-before-the-horse situation. There is no reason a prospective applicant would have enrolled a potential cannabis site under the Cannabis General Order before the applicant had even received a County permit to engage in the cultivation activities covered by the General Order. This provision, as written, unfairly and without a sound policy basis prevents otherwise eligible applicants from seeking

County cannabis cultivation permits. Every other County that permits commercial cannabis cultivation simply requires enrollment under the Cannabis General Order as a standard permit condition of approval, and the County should do the same here.

(d) Minor and Major Use Permits for Commercial cannabis cultivation

~~a. A person interested in applying for a cannabis cultivation use permit shall be enrolled with the applicable Regional Water Quality Control Board or State Water Resources Control Board for water quality protection programs as of the effective date of this ordinance or written verification from the appropriate board that enrollment is not necessary.~~

4. Sunset Clause

As written, Ordinance 3073 contains a “sunset” clause tied to the enforceability of the County’s Measure C cannabis tax. This provision calls for the discontinuation of Ordinance 3073 in the event that the Measure C cannabis tax is “rendered ineffective” and is not replaced by another tax measure. This provision is problematic for several reasons, of which we discuss two below.

First, should Ordinance 3073 actually sunset, the County will be left without a clear mechanism to regulate all the commercial cannabis cultivation operations for which the County issued permits prior to the Ordinance’s sunset date. Ordinance 3073 provides for permit terms not to exceed 10 years, and once issued, the County would not be able to legally revoke issued permits in the event that Ordinance 3073 was not longer in effect. As noted, the County would have no clear mechanism to continue regulating those permittees.

Second, the sunset clause introduces uncertainty into the County’s regulatory program sufficient to potentially discourage the very investment in the County that the Ordinance was intended to attract. Serious cultivators cannot be expected to invest heavily in a cultivation program that could, in theory, no longer exist within 18 months.

We suggest that, rather than sunset the entire Ordinance, that the County simply stop issuing new permits until Measure C is restored or replaced by a new cannabis tax measure. Such a revision would eliminate the potential for permitted but unregulated cultivation activities, and also maintain the incentive to invest in the County. This revision is provided below:

Section 8: ~~No new permits shall be issued under this~~ This Ordinance ~~shall sunset 18 months after its effective date~~ if for any reason the existing marijuana tax ordinance adopted by the voters of Lake County in 2016 (“Measure C”) is rendered ineffective and no alternative cannabis tax ordinance has been approved by the voters of the County of Lake. The County shall resume issuing new

permits under this Ordinance in the event that Measure C is restored or the voters of the County of Lake approve an alternative cannabis tax ordinance.

5. Permit Clustering

Ordinance 3073 currently provides for “collocation” of up to four permits on a single parcel: “Up to four cultivation permits may be allowed in a single parcel provided that each permit meets the minimum acreage requirement and all other development standards.” (Ordinance 3073, § 21-27.13(at)(3)(ii)(i).) This is a sensible provision for larger parcels.

We suggest that the Ordinance be revised to also include a provision for “permit clustering”. “Clustering” refers to the concentration of multiple permits onto a single parcel, rather than distribution of those permits among separate parcels. To illustrate, a project applicant could receive County permits for several parcels and conduct the permitted cultivation separately on each parcel. Or, in the alternative, the applicant could elect to conduct the cultivation activity allowed under each permit within a concentrated area on a single parcel, and not cultivate on the other parcels.

Clustering of permits on a single parcel presents a number of environmental and administrative benefits. From an environmental perspective, concentration of cultivation reduces broader agriculture-related environmental impacts associated with dispersed cultivation. Concentrated cultivation allows for more efficient use of water, and more efficient use of equipment and labor resources (which can result in reduced traffic and other impacts), among other benefits. From an administrative perspective, concentrated cultivation facilitates more efficient administrative and regulatory oversight by the County. These benefits amplify as the number of clustered permits increases. Importantly, permit clustering does not increase the number of acres that could be permitted under the Ordinance. As noted, permits clustered on one parcel would result in fewer parcels being cultivated. For the reasons outlined above, we recommend that the County allow permit clustering. Suggested text is below:

Clustering of Permits

An applicant with contiguous parcels under common ownership that each qualify for a minor or major use permit under this Article may cluster all permits that could be approved for each such parcel onto a single parcel. Permits totaling up to twenty-five (25) percent of the total acreage of the receiving parcel may be collocated on a single receiving parcel. For example, up to ten acres of cultivation permits may be collocated on a parcel that is 40 acres in size. If an applicant chooses to cluster permits pursuant to this provision, the applicant shall not

cultivate cannabis on each parcel for which the applicant clusters the permit on a different parcel during the term of the permit.

6. Air Quality Requirements

The Ordinance requires all cannabis permittees to obtain an Authority to Construction (“ATC”) and Permit to Operate (“PTO”) from the Lake County Air Quality Management District (“Air District”). (Ordinance 3073, § 21-27.13(at)(5)(i).) This requirement is problematic for a number of reasons. First, the Air District does not have rules in place are specific to cultivation operations. The Air District has rules that apply to agricultural burning, but cannabis cultivators are not permitted to burn cannabis plant waste. Second, this provision requires cannabis cultivation, an agricultural activity, to undergo the same permitting requirements as a major source of air emissions, such as a waste incinerator or metal smelting operation. As the State of California, Department of Food and Agriculture, CalCannabis Cultivation Licensing division (“CalCannabis”) recognized in its programmatic environmental impact report for cannabis cultivation across the state, cultivation generally is not a major source of air emissions. No basis exists to require and ATC/PTO for all cannabis cultivation activities when the same is not required for other types of much more impactful agricultural activities throughout the County. We accordingly recommend that Ordinance 3073 be revised, in relevant part, as follows:

i. Air Quality

- a) Intent: All cannabis permittees shall not degrade the County’s air quality as determined by the Lake County Air Quality Management District (LCAQMD).
- b) In this section, permittees shall identify any equipment or activity that which may cause, or potentially cause the issuance of air contaminates including odor and shall identify measures to be taken to reduce, control or eliminate the issuance of air contaminants, including odors.
- ~~c) All cannabis permittees shall obtain an Authority to Construct permit pursuant to LCAQMD Rules and Regulations, prior to the construction of the facility described in the Property Management Plan.~~
- ~~d)c)~~ All cannabis permittees shall obtain Authority to Construct Permit pursuant to LCAQMD Rules and Regulations, if applicable, to operate any article, machine, equipment or other contrivance which causes or may cause the issuance of an air contaminant.
- ~~e) All permittees shall maintain an Authority to Construct or Permit to Operate for the life of the project, until the operation is closed and equipment is removed.~~

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Should you have any questions concerning the matters discussed herein, please do not hesitate to contact me by telephone at (916) 382-4377, or by e-mail at bjohnson@hthjlaw.com.

Very truly yours,
HARRISON, TEMBLADOR, HUNGERFORD & JOHNSON

By 
Bradley Johnson