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Mendocino County Board of Supervisors
501 Low Gap Road, Ukiah, CA 95482

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Sent via Granicus System

Re: Agenda Item 4h- Appeals Process

Attached "Redline" Version Missing Parts/ Opportunities For Additional Amendments: It is unfortunate that the "redline" version of this agenda item did not actually provide "redline" versions all of the substantive changes proposed (related to appeals) and mostly limited the redlining to the replacement of the Ag Dept for MCD. Subsection 10A.17.100 (D)(6) was newly proposed and was redlined, but two very substantive entirely newly proposed sections, 10A.17.126 and 10A.117.128, were not "redlined." In fact, the "redline" version of 10A.17 attached to this agenda item failed to include section 10A.17.040, which states the General Limitations under the ordinance and, importantly, includes the specific exemptions from the tree removal prohibition that is likely to be one of the most often cited grounds for denial and basis for appeal (10A.17.040 (K)).

Additionally, while adjustments to change department names were made, other "cleanup" amendments that had been previously directed by the Board were not proposed in this version. Specifically, the removal of all references to local track and trace processes (10A.17.100 (E) and 10A.17.110 (C)) should have been made in this proposed amendment of the ordinance. The Board previously directed County Counsel to bring forward additional proposed modifications to the generator sections (10A.17.070(F)) and should have been brought forward in this round of ordinance amendments. Additionally, removing local LiveScans for non-owner/applicants was previously directed by the Board to be removed (10A.17.090 (L) (M)) and should have been brought forward in the proposed amendments now before the Board.

Additionally, there is an opportunity to align cultivation style definitions (not sizes, just style) with state law by amending the definitions (10A.17.020) to read "Mixed light, Outdoor, and Indoor cultivation is defined identical to those definitions as stated in current state regulation." This will allow for the County to take advantage of changes in state regulation without having to amend our ordinance each time a change at the state level occurs with respect to cultivation style types. The County can retain its own size categories and adopt the state's style definitions without conflict.

Due Process Must Be Given Its Due: I appreciate that finally there is a written proposal for appeals process for the Board to discuss and urge that we examine the proposed provisions in the context of **whether they provide a reasonable opportunity for a meaningful ability to appeal**.

An appeals framework must address both the heart of due process and the technical and picky procedural aspects. It is important while discussing the technical minutia to keep in mind the heart of due process: if the procedures are not reasonable and do not provide a meaningful appeal, it does not serve the purpose intended. Therefore, technical issues about the number of days after denial an appellant must file a notice of intent to appeal, or the need to address level of proof for the basis for denial, or the need to have an independent reviewer of the decisions, are not merely picky items that are an annoyance to discuss and contemplate; they are the necessary components of establishing a fair and reasonable opportunity for a meaningful appeal.

Context Is Important: I noticed that in the proposed appeals process, **there is no provision for a Stay of the denial pending appeal**. Here, we have cultivators that have waited 5 ½ years for the County to get its act together regarding processing the applications, we have gone through 6 program manager/directors, under

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three different departments, and rules and processes are still being newly created. As such, the appeals provisions should include protections from abrupt termination of their continued right to cultivate, unless there is an imminent harm or safety concern to people or the environment. Mendocino County Code Section 6.20.010, et seq. includes a Stay pending an appeal for Tobacco Retailers that face losing their license. Even the Cannabis Facilities license provisions under Mendocino County Code section 6.36 ensures issuance unless there is substantial evidence in the record that demonstrates a specific basis for denial, and it allows for revocation only after a finding made after an evidentiary hearing conducted at least 10 days before the Board meeting where the revocation would be made (except for a few exceptions where the revocation can be more immediate like if the state license is revoked). Given that there are Nuisance laws and processes to immediately enforce against imminent cultivation related environmental and health and safety matters available to utilize if health and safety are at issue, given that Phase 1 cultivators have been in this ever-changing permitting process for so long without consistent application of rules and procedures, and given that many of them would have no re-entry both because of their zoning and the end of the provisional licensing at the state level, it is important that we consider the context and do everything we can to allow for Stay of Denial pending final outcome of any Appeal.

Consider Standards of Proof for Denials: One of the difficulties we have all experienced in the past 5 ½ years of living with this complex ordinance, is that some very complicated and specific requirements were included in the ordinance without any detail regarding what level of evidence or burden of proof was required to deny an application. The ordinance was very specific about the level of proof that the Phase 1 applicant had to have to establish proof of prior cultivation, but left silent, for example, what level of proof the Department would need to establish in order to find that a compliance plan is "not viable" (10A.17.100 (D)(2)). Likewise, with respect to denial based on tree removal, what level of proof does the Department need to establish that the tree removal was not done in accordance with the specified exception for disease and safety concerns (10A.17.040(K))? If the applicant brings evidence forward that they fit in the exception, should the burden shift to Department to demonstrate that there was in fact a violation of the tree removal prohibition based on specific proof the Department has? Should the burden then shift again to allow the applicant to rebut that evidence? Should applicants be required to bring forth evidence that the ordinance or supplementary application materials never informed them they would need? I have suggestions regarding how the Veg Mod issue should be handled and have given a memo to the Ad Hoc and to County Counsel regarding those issues and have attached it to this memo. I only raise them here because I believe that any appeals process must look at how issues pertaining to interpretations of the ordinance have been or will be made, and by whom, to know whether the appeals process itself is fair and reasonable.

These are issues that should be determined BEFORE some of the technical provisions of the proposed Appeals process can be evaluated for fairness. For example, proposed section 10A.17.127 (A) **allows the County to provide additional materials to the hearing officer in advance of the hearing, but has no opportunity for the Appellant to provide additional materials** (besides what was submitted to the county in the informal stage prior to that) --- even in response to new evidence or theories the County might bring forth to the hearing Officer--- and 10A.18.128 (B) establishes that if a Hearing Officer determines its necessary to interpret the ordinance, it is only the Department that provides the interpretation the Hearing Officer can rely on. **There is NO opportunity for the Appellant to offer a contrary interpretation or historical information that might provide the intention of the drafters of the ordinance or other information relevant to the interpretation**. If those two seemingly unfair and skewed procedural provisions of the proposed appeals process are enacted and there are also no indications in the ordinance of evidentiary standards or presumptions regarding when a compliance plan is not "viable" or when a tree removal done pursuant to the legitimate exception for "disease and safety concerns" as allowed for in the ordinance, then all of a sudden 10A.17.127 (A) and 10A.17.128 (B) are exponentially more unfair. **If there is**

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also no Stay of the denial pending the appeal in addition to those provisions, then the whole framework is stacked in such a way as to effectively prevent a meaningful opportunity to appeal.

Specific Suggested Changes: To ensure a reasonable and meaningful appeals process, the following should be incorporated:

1. 10A.17.126 (A): change "Within ten (10) days…" to "Within fifteen (15) business days from the date of receipt of a Notice…" Mendocino County established the time limit for appealing Building determinations to be 30 days (18.04.085) and 10 days for Planning decisions (10.208). It is likely that in the cultivation permit context for Phase 1 and Phase 2, there may not have been as much interaction (pre-planning meetings, etc.) as there would be in Planning decisions, and that perhaps there was more on-going contact and opportunity to sort things out than a Building determination issue, so 15 days seems reasonable. All provisions (not just this section) should specify business days. It is not possible or feasible to have the depth of materials prepared and the professional assistance that may be needed to help submit the appeals materials in such a short time. So, unless this provision only deals with a Notice of Intent to Appeal and does not relate to the deadline to submit explanations and supporting materials, business days must be used. Likewise, in other sections, given the likely need for the assistance of professionals and the need to prepare and provide detailed information on complicated issues, fairness mandates a reasonable amount of time for any deadlines. All deadlines specified should always be from receipt of the Notice not just from the issuance date of the denial or notice. I have letters from MCD that were emailed to the applicant a month or more after the date on the letter. All dates should run from the RECEIPT of the Notice.
2. Amend proposed 10A.17.100 (D) (6) to provide a Stay upon filing of the Notice of Intent to Appeal, including an exception from the prohibition on continued cultivation (if authorized to cultivate prior to the Notice of Denial) pending the appellate process except in instances of immanent threat to health and safety, which can be enforced through Code Enforcement and existing Nuisance laws. No pending appeal should be the basis of a nuisance or abatement action unless there are imminent health and safety concerns to people or the environment. Add a separate Section into 10A.17.126 providing for a Stay of the denial/exception to prohibition on continued cultivation if no imminent health and safety concern.
3. 10A.17.126 (A) (2): This section requires the Appellant to state the grounds upon which they are appealing. Unless the Notice of Denial has explicit grounds upon which the denial is being pursued, how can an Appellant state the basis upon which they appeal?
4. 10A.17.126 (A) (4): This section requires the payment of a fee. Is this a fee for an informal review as envisioned in 10A.17.126 (B) or the appeal to the Hearing Officer as required under 10A.17.126 (B) (2)? Both provisions seem to require payments at two separate times. Are they separate fees? All fees must be reasonable to allow for a meaningful right to appeal. I suggest that if the informal review is by the very Department that made the decision to deny the applicant[1], not much additional effort or staff time would be required to conduct an informal review of that decision since the department would already be very familiar with the issues. As a result, if that is the case, I would suggest no fee for the informal meeting and a reasonable deposit for an appeal in front of a Hearing Officer, with cost recovery borne by the unsuccessful party.

[1] I strongly suggest that until MCD has fully trained staff that are making independent decisions, the informal review process under 10A.17.126 (B) include someone from either PBS or the CEO's office since essentially, until that time, the Director is involved in every single file decision, so the informal review would not have the benefit of fresh eyes on the issues, as will be the case when the Director is able to rely on well trained staff decisions and enter the dialogue during the informal review from an informed but fresh perspective.

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5. 10A.17.126 (B)(1): In addition to the comment made in footnote 1 regarding the need for the informal reviewer to have some fresh eyes on the issue, this provision does not state any timeframes by which the Department must notify the appellant of when the informal meeting will be (and give reasonable amount of time for it to happen), and does not give any timeframes for when it has to actually occur after the filing of the Notice of Appeal and before the timeframe for when a Hearing has to happen (which as stated elsewhere, I suggest should be expanded). There should also be reference to a Stay of the Denial and allowance for continued cultivation if no imminent harm.
6. 10A.17.126 (B)(2): This subsection should be amended to ensure both the hearing Officer AND THE APPELLANT are notified (not just the Hearing Officer). Additionally, as with the item in 10A.17.126 (A)(4), the fee issue needs to be clarified.
7. 10A.17.126 (C): A provision regarding the ability for a continuance should be inserted. The Uniform Nuisance Abatement hearing ordinance allows one continuance at the request of a party upon good cause. (8.75.120)
8. 10A.17.127 (A): As stated above, this section allows for the County to provide materials, evidence, and memos to the Hearing Officer in advance of the hearing but does NOT specifically provide that the Appellant may submit additional materials. This provision states that the Department must also provide those materials to the Appellant but does not allow the Appellant to respond even if there is new evidence or arguments that the county is providing to the hearing officer. This provision also allows the Department to send the new materials to the Appellant by EITHER first class mail or by email. The section should be clarified to require the Department to provide those materials in a manner and timeframe such that the Appellant RECEIVES those materials in sufficient time to allow the Appellant to provide additional materials to the Hearing Officer in response to the Department's materials in advance of the hearing.
9. 10A.17.127 (B): This section states that the burden of proof shall be borne by the Appellant. However, if as stated above in this memo (page 2, Consider Standards of Proof for Denials), the Department should have the burden of proof on let's say, establishing that a compliance plan is not viable, or if in a different scenario, an applicant has submitted reasonable evidence that it complied with the disease and safety exception to tree removal prohibitions, and the burden now must shift to the Department to show that there is specific proof that the applicant did not comply (as opposed to presumptions that if trees are gone the removal did not fit into the exceptions), shouldn't the burden be on the Department to prove that it had substantial evidence to deny the application on that basis? The revocation of a Tobacco Retailer license requires substantial evidence. Certainly, where cultivation applicants have been already operating under years of authorization, and where the rules, the processes, and the procedures kept changing, substantial evidence is a reasonable standard to require the Department to have to meet before it can deny a permit. The County keeps indicating that this is a MINISTERIAL permit. If the applicant has provided reasonable evidence that it has met the conditions, including by providing affidavits that it meets the requirements, then the burden should shift to the Department to prove that the applicant has NOT in fact met those requirements or has otherwise violated the ordinance. Those allegations should be supported by substantial evidence and the Appellant should have an opportunity to rebut that evidence.

Due Process is not protected if the procedures, evidentiary standards, burdens of proof and appeals processes are unreasonable, and don't afford a meaningful opportunity for the applicant to contest the revocation of a right they have been operating under for years.

Respectfully, submitted,
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