

April 27, 2018

Supervisor Heidi Hall, District 1
950 Maidu Avenue
Nevada City CA, 95959
By email to *Heidi.hall@co.nevada.ca.us*

Supervisor Hall,

I am an attorney who lives and works in downtown Nevada City, District 1, and am jointly submitting this letter with my associate attorney, Sarah L. Smale. I have been honored to represent cannabis patients, cultivators, retailers, and related businesses throughout my entire career.¹ On their behalf, I want to thank you sincerely for taking significant steps to regulate unregulated cannabis within Nevada County.

I understand your staff is recommending halting the issuance of commercial cultivation permits this season in order to prepare a full Environmental Impact Report [EIR] pursuant to the California Environmental Quality Act [CEQA].² While I agree the County must comply with CEQA, I write today to urge you to direct staff to consider other options, as outlined below. CEQA actually empowers this Board to issue commercial cultivation during the 2018 season, in some form, and you should do so in order to (1) immediately begin curbing environmental impacts associated with unregulated cultivation, (2) gather the data so important to a meaningful discourse regarding cultivation and related activities within the County, and (3) permit responsible operators to engage in the legal cannabis marketplace as soon as possible.

I am aware of the County's limited resources. However, a full EIR is the most costly of the options available to this Board, and other options may be pursued in a feasible manner that would not be unduly burdensome on our public resources. As such, my suggestions are limited to those possibilities which may be implemented in the most efficient manner with the lowest impact on the County's resources.³

¹ In addition to running a practice focused entirely on California cannabis law, I am a member of the International Cannabis Farmers Association, a national nonprofit comprised of farmers and scientists working to support sun-grown cannabis and traditional cannabis farming methods. I am also a member of the California Cannabis Industry Association (CCIA), the National Organization for the Reform of Marijuana Laws (NORML), and a strong supporter of the Nevada County Cannabis Alliance, the local branch of the California Growers Association.

² See, Nevada County Cannabis Conversation, located online at <https://www.mynevadacounty.com/2185/Cannabis-Conversation>; see also, April 26, 2018 Staff Report (dated April 20, 2018.)

³ See, *Cal. Public Resources Code § 21003 (f)*, "Avoidance of Delay and Duplication," which imposes an efficiency requirement upon the public agencies involved in the CEQA process:

"All persons and public agencies involved in the environmental review process be responsible for

Brief Overview of CEQA Requirements

CEQA establishes a three-tier process to ensure environmental considerations inform the decisions made by public agencies:

The first tier is jurisdictional, requiring that an agency conduct a preliminary review to determine whether an activity is subject to CEQA. An activity that is not a project as defined in the Public Resources Code and the CEQA guidelines not subject to CEQA.⁴

A project, according to CEQA, is defined as “an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.”⁵

“Conversely, if an action *is* a project within the meaning of CEQA and [thus] not exempt, a public agency intending to approve it must first engage in environmental review, meaning that an environmental impact report or a negative declaration (explaining why no environmental impact report is necessary) must be prepared and must be considered by the agency.”⁶

Notably, the state Legislature declared CEQA “does not apply to the adoption of an ordinance, rule, or regulation by a local jurisdiction that requires discretionary review and approval of permits, licenses, or other authorizations to engage in commercial cannabis activity” until July 1, 2019, provided site-specific reviews are completed.⁷

Summary of Available Courses of Action

Based on these rules, Nevada County is empowered to proceed in at least three ways:

1. Pursue the costliest and most time-consuming option to hold off on all permitting while a full EIR is prepared; or

carrying out the process in the most efficient, expeditious manner in order to conserve the available financial, governmental, physical, and social resources with the objective that those resources may be better applied toward the mitigation of actual significant effects on the environment.” *See also*, Title 14 of the California Code of Regulations [*C.C.R.*] § 15006, “Reducing Delay and Paperwork,” again emphasizing the need for efficiency in the CEQA analysis.

4 Union of Medical Marijuana Patients, Inc. v. City of San Diego, 4 Cal.App.5th 103, 111 (2016), internal citations omitted.

5 *Id.* at 112, citing *Cal. Public Resources Code § 21065*; *see also*, 14 *C.C.R.* § 15060(c)(2),(the activity will not result in a direct or reasonably foreseeable indirect physical change in the environment) and § 15061(b)(3) (there is no possibility the activity in question may have a significant effect on the environment).

6 *Id.* at 111, internal citations omitted.

7 *Cal. Business & Professions Code § 26055(h)*.

2. Immediately issue temporary permits to existing cultivators who do not expand their current cultivation sites under the temporary program, as they are not a “project” in that they are not a “direct physical change to the environment; or
3. Utilize the July 1, 2019, exemption to issue permits to new cultivators based on the newly proposed commercial cultivation ordinance, provided there is a site-specific discretionary review which may (but not necessarily will) require a site-specific Environmental Impact Report while the County takes the incremental step of *conducting an Initial Study* as a precursor to a full EIR to assess what categories can be “tiered off” the state Department of Food and Agriculture’s statewide EIR.

While each of these three primary avenues have benefits and burdens, the first option is by far the most time consuming and costly option. As it is unnecessary to perform a full EIR *without* an ancillary temporary permitting program, the remainder of this letter focuses on the *second* and *third* option, either of which are feasible options for the reasons set forth below.

A. Temporary Permits

As temporary permits for existing cultivators who do not expand the square footage of their cannabis gardens from the existing ordinance would not be considered a “project” under CEQA. Additionally, as a temporary permitting of existing farms would be subject to one of CEQA’s several categorical exemptions (*such as those listed here*⁸), a decision to issue such permits this season does not appear to subject the County to undue litigation.

PROS

As the April 26, 2018, Staff Report makes clear temporary permits may be issued after *one inspection*, this process strikes the balance of allowing cultivators to enter the regulated market the most quickly. This would immediately allow the County to enter these premises and inspect them, as well as bring them into state and local compliance as soon as possible. Additionally, it may be interpreted to kick off the two year transition period for Building and related code violations, should this Board so choose.

Of course, this temporary program would occur in *conjunction* with the preparation of an EIR for the more expansive commercial cultivation ordinance, allowing immediate permitting in addition to a full report.

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⁸ 14 C.C.R. 15301 (permitting, leasing and minor alterations to existing facilities), 15303 (construction and location of new, small structures), 15304 (minor alterations to land), 15307 (actions taken as authorized by local ordinance to assure protection of natural resources), and 15308 (actions taken as authorized by local ordinance to assure protection of the environment).

CONS

As these permits would not be able to expand beyond the current ordinance, which maxes out at 1000 square feet on parcels that are zoned AG, AE or FR and are greater than 20 acres, cultivators would be limited to the smallest state license types for the 2018 season.⁹

While the April 26, 2018, Staff Report indicates these licenses would be placed at risk because they would only be allowed to seek a Temporary License from the Department of Food and Agriculture, which are valid for 120 days, the County is empowered to authorize permittees to seek an annual license based on a temporary local permit, should an urgency ordinance do so expressly. (*See*, Attachment A.) Indeed, the urgency ordinance could simply include a one line addition stating: “Nothing in this ordinance shall be construed to preclude or prevent a temporary permittee from filing for an annual license from the State of California pursuant to 3 C.C.R. § 8103” or something along similar lines.

Additionally, multiple jurisdictions have brought the issue (of how to extend the state’s temporary licenses in areas where permanent land use entitlements are *pending*) to the attention of the state regulators, and I am confident the regulators will have worked it out long before Nevada County cultivators would be subject to this largely irrelevant quandary.

B. Tier Off of the CDFA’s PEIR via Business & Professions Code § 26055 (h)’s Temporary Exemption.

Although the County’s website indicates a full EIR is the *only* option, this is simply not so. In fact, should the County choose to rely on the limited exception of *B. & P. Code § 26055(h)*, it can and should pursue an *Initial Study* to determine whether a full EIR (the costliest and most time-consuming option) is necessary and determine where the County can “tier off” the CDFA’s Programmatic EIR.¹⁰

PROS

It would behoove the County’s bottom line to shift site-specific environmental analysis to the cultivator, although these costs would primarily be associated with larger farms who are greater threats to the environment. This option would also allow the County to use the CDFA’s PEIR checklist to “tier off” of the work already performed, further reducing time and cost to local taxpayers.

This pathway would also allow cultivators to come into compliance with the County’s codes as soon as practicable, requiring them to become locally and state law compliance from the outset and kicking off the two-year transition period for Building and related code issues.

Tiering off the CDFA’s PEIR while relying on the temporary discretionary review process would also better insulate the County from legal challenges, due to the unambiguous statutory exception, and would allow greater transparency in the EIR process by performing an Initial

⁹ Note that simply converting the current plant counts from “personal/collective/cooperative” to “commercial” under the existing ordinance would *not* give rise to any greater requirements under CEQA.

¹⁰ *See*, CDFA’s PEIR here: <https://www.cdfa.ca.gov/calcannabis/PEIR.html>.

Study as to the parameters of an eventual full report.

CONS

While County Counsel has repetitively characterized this pathway as “kicking the can down the line,” it does not. Rather, it allows for a shifting of the burden from the County to the individual on a case-by-case basis while the County performs the first step of an Initial Study.

The disadvantage of this pathway instead is the additional time and cost to the cultivators, already struggling under massive regulatory burdens and constantly dropping product prices. Like temporary (i.e. pre-CEQA) permits, however, this disadvantage to the small farmer can be ameliorated by not exceeding the square footage of their current garden size and demonstrating compliance with the state’s environmental regulations from the outset, which would presumably streamline the discretionary review process.

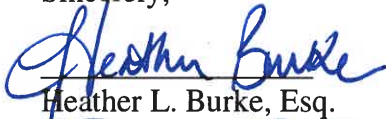
Another disadvantage, although also surmountable, would be the cost to the County for the discretionary review while it is preparing its Initial Study. These costs could be offset by requiring fees which do not exceed the cost to perform the discretionary review, or by streamlining the discretionary review in some manner.

CONCLUSION

In sum, each path forward is cumbersome, and none are clearly easier than another. However, issuing temporary permits or allowing site-specific discretionary review are a more appropriate avenue for this County considering our unique political history and the strong public policy reasons for permitting these farmers as soon as reasonably practicable. Additionally, preparing a full EIR without an Initial Study may prove to be wasteful of precious taxpayer money in light of the significant ability to tier off the state’s PEIR. An Initial Study would allow our County to address the tiering off in a more measured, thoughtful, and transparent manner.

Thank you sincerely for taking the time to read this lengthy letter and engage with your constituents and our community on this complex issue of historic importance. Our office appreciates your leadership and look forward to working together with the County out of prohibition into reasonable regulations.

Sincerely,



Heather L. Burke, Esq.



Sarah L. Smale, Esq.

cc: bdofsupervisors@co.nevada.ca.us

Attachment A

Heather Burke

From: CDFA CalCannabis Cultivation Licensing@CDFA <CDFA.CalCannabis@cdfa.ca.gov>
Sent: Friday, April 27, 2018 4:45 PM
To: Heather Burke
Subject: RE: Filing for an Annual License with a Local Temporary Permit

Hello Heather,

Thank you for contacting CalCannabis Cultivation Licensing.

Yes, an applicant can submit a temporary permit as their local authorization document with their Annual application. The local authorization document is not required for the Annual application, but if it is submitted, the local jurisdiction will have 10 days to respond to our compliance request, versus 60 days if no document is submitted. Attaching a valid document, even a temporary permit, will help shorten the wait time.

Thank you for your inquiry,



CalCannabis Cultivation Licensing

California Department of Food and Agriculture

1-833-225-4769

calcannabis@cdfa.ca.gov

Let's Get Growing

From: Heather Burke [<mailto:Heather.Burke@gmlaw.com>]
Sent: Friday, April 27, 2018 4:08 PM
To: CDFA CalCannabis Cultivation Licensing@CDFA <CDFA.CalCannabis@cdfa.ca.gov>
Subject: Filing for an Annual License with a Local Temporary Permit

Hi there,

I don't see the CDFA regs preclude filing for an annual license with a temporary permit from the local jurisdiction. Is the CDFA accepting annual licenses from applicants who are relying on temporary local authorizations?

Thanks for any insight on this issue.

GreenspoonMarder

Heather L. Burke

Partner, Greenspoon Marder

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Note new address.

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