

C. DAVID EYSTER
DISTRICT ATTORNEY

DALE P. TRIGG
CHIEF DEPUTY DISTRICT ATTORNEY

MIKE GENIELLA
PUBLIC INFORMATION

707-391-1019

geniellam@co.mendocino.ca.us



COURTHOUSE
P.O. Box 1000
Ukiah, CA 95482

COAST OFFICE
700 S. Franklin St.
Ft. Bragg, CA 95437

**OFFICE OF THE
DISTRICT ATTORNEY
COUNTY OF MENDOCINO**

RESPONSIVE MEMORANDUM

**RE: Proposed Amendments to Chapters 6.36 (Marijuana
Facilities) and 10A.17 (Marijuana Cultivation)**

By design or otherwise, the District Attorney, his attorneys and support staff have had little to no involvement in the County's planning for and resulting ramping up of local rules and regulations relating to medical and recreational marijuana cultivation and distribution within Mendocino County. Within the last month or so, however, there have been discussions between County Counsel and the District Attorney regarding what assistance, if any, the District Attorney and his staff may be able to provide the Mendocino County Department of Agriculture in regards to criminal history background checks. The District Attorney asserts that his office does have access to criminal justice databases – not the least being the District Attorney's own local data management system -- from which information can be derived to perform comprehensive criminal history background checks for individuals required locally to submit to such background checks. Of course, this additional work will require some additional staffing and other resources. If performed through the District Attorney's Office in support of the Department of Agriculture, such criminal history background checks cannot be construed as the District Attorney's legal approval, on behalf of all law enforcement, that an applicant's overall plan, ongoing work, and conduct expressly or implicitly meets with all applicable state laws. That said, the District Attorney cannot participate in conducting background checks unless and until the guidelines for such background checks are fully approved by the Board, are comprehensive in scope, and are in full compliance with all applicable state laws, particularly but not limited to the criteria being applied at the state-level.

In attempting to summarize the District Attorney's comments, the staff report submitted for this November 16, 2018 hearing before the Mendocino County Board of Supervisors has mischaracterized some of the District Attorney's recommendations which this responsive memorandum will attempt to summarily address. Any mischaracterizations will be highlighted with line-outs with comments in red to follow.

Proposed Changes

1. **Criminal History Background Check**

Current versions of Chapters 6.36 and 10A.17 require a criminal history background check only for violent felonies as defined in California Penal Code section 667.5(c). However, the State of California criminal background check searches for additional crimes beyond that

section; these crimes are listed in Business and Professions Code section 26057(b)(4). Staff recommends bringing the County's ordinance into conformance with the State provisions to be searching for the same crimes the State will be searching for. This change is reflected in the addition of subparagraph (1) to paragraph (B) of section 6.36.060 and subparagraph (1) of paragraph (m) of section 10A.17.

In working with and at the request of the District Attorney, four additional categories are being proposed to be added to the County's criminal history background check process.

First, the District Attorney has identified Health and Safety Code sections 11358, 11359 and 11360 as additional code sections with provisions that should be included in the background check process. ~~Under new subparagraph (2), if the applicant has a felony conviction under these statutes, the application would be denied (or the proposed employee could not be a part of the operation).~~ A felony conviction under these three statutes would generally mean the person had multiple convictions of certain crimes related to cannabis or convictions that resulted in violations of additional statutes, such as illegal cultivation that also resulted in a violation of the Water Code related to an illegal diversion of water.

The staff report's attempt to summarize the District Attorney's recommendation in this regard is incorrect. In all discussions with County Counsel, the District Attorney was and is aware of Business and Professions Code section 26057(b)(5). In pertinent part, that statute states:

Except as provided in subparagraphs (D) and (E) of paragraph (4) and notwithstanding Chapter 2 (commencing with Section 480) of Division 1.5, a prior conviction, where the sentence, including any term of probation, incarceration, or supervised release, is completed, for possession of, possession for sale, sale, manufacture, transportation, or cultivation of a controlled substance is not considered substantially related, and shall not be the sole ground for denial of a license. Conviction for any controlled substance felony subsequent to licensure shall be grounds for revocation of a license or denial of the renewal of a license.

The District Attorney's true recommendation is that an applicant with one or more felony convictions occurring prior to January 1, 2018 for a violation of Health and Safety Code 11358 that also involved plead and proven environmental violations, such as but not limited to Fish and Game Code sections 1602, 5650, and 5652, should be denied a local permit.

Likewise, the District Attorney recommends that an applicant with felony convictions occurring after January 1, 2018 for violations of Health and Safety Code sections 11358(d), 11359(c) and 11360(a)(3) shall also be denied a local permit. To be convicted of one of these statutes after January 1, 2018 as a felony requires additional and specified circumstances to be proven, outlined in each statute:

Since January 1, 2018, to be charged with and convicted of a felony under Health and Safety Code section 11358(d), one of the following additional facts must be plead and proven:

(1) The person has one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 of the Penal Code or for an offense requiring registration pursuant to subdivision (c) of Section 290 of the Penal Code.

(2) The person has two or more prior convictions [of some version of H&S 11358].

(3) The offense resulted in any of the following:

(A) Violation of Section 1052 of the Water Code relating to illegal diversion of water.

(B) Violation of Section 13260, 13264, 13272, or 13387 of the Water Code relating to discharge of water.

(C) Violation of Section 5650 or 5652 of the Fish and Game Code relating to waters of the state.

(D) Violation of Section 1602 of the Fish and Game Code relating to rivers, streams, and lakes.

(E) Violation of Section 374.8 of the Penal Code relating to hazardous substances or Section 25189.5, 25189.6, or 25189.7 of the Health and Safety Code relating to hazardous waste.

(F) Violation of Section 2080 of the Fish and Game Code relating to endangered and threatened species or Section 3513 of the Fish and Game Code relating to the Migratory Bird Treaty Act, or Section 2000 of the Fish and Game Code relating to the unlawful taking of fish and wildlife.

(G) Intentionally or with gross negligence causing substantial environmental harm to public lands or other public resources.

Since January 1, 2018, to be charged with and convicted of a felony under Health and Safety Code section 11359(c), one of the following additional facts must be plead and proven:

(1) The person has one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 of the Penal Code or for an offense requiring registration pursuant to subdivision (c) of Section 290 of the Penal Code;

(2) The person has two or more prior convictions [of some version of H&S 11359]; or

(3) The offense occurred in connection with the knowing sale or attempted sale of cannabis to a person under the age of 18 years.

(d) Notwithstanding subdivision (b), a person 21 years of age or over who possesses cannabis for sale may be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code if the offense involves knowingly hiring, employing, or using a person 20 years of age or younger in unlawfully cultivating, transporting, carrying, selling, offering to sell, giving away, preparing for sale, or peddling any cannabis.

Since January 1, 2018, to be charged with and convicted of a felony under Health and Safety Code section 11360(a)(3), one of the following additional facts must be plead and proven:

- (A) The person has one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 of the Penal Code or for an offense requiring registration pursuant to subdivision (c) of Section 290 of the Penal Code;
- (B) The person has two or more prior convictions [of some version of H&S 11360];
- (C) The offense involved the knowing sale, attempted sale, or the knowing offer to sell, furnish, administer, or give away cannabis to a person under the age of 18 years; or
- (D) The offense involved the import, offer to import, or attempted import into this state, or the transport for sale, offer to transport for sale, or attempted transport for sale out of this state, of more than 28.5 grams of cannabis or more than four grams of concentrated cannabis.

Second, the District Attorney has requested that convictions under Health and Safety Code section ~~11366.5~~ also be cause for denial. That section relates to convictions for ~~providing a place for manufacture or distribution of controlled substances, with a sentence enhancement for knowingly allowing the place to be fortified to suppress law enforcement entry.~~ New subparagraph (3) would mean that applicants would be denied for having a prior conviction under that section. As proposed, this is a factor for both cannabis cultivation and cannabis facilities.

Health and Safety Code section 11366.5 has two different subsections – (a) and (b). The District Attorney is not recommending that all convictions for Health and Safety Code section 11366.5(a) involving marijuana (but not chemical extraction or chemical synthesis) – whether at the misdemeanor or felony level -- be an automatic disqualifier. Rather, the District Attorney is recommending that only convictions for section 11366.5(a) at the felony level and not involving marijuana or not involving chemical extraction or chemical synthesis should be a disqualifier. That said, all convictions for section 11366.5(a) still should nevertheless be fully considered and vetted by the local licensing authority and, depending on the underlying facts and other applicable criteria, may be a discretionary disqualifier.

The District Attorney is recommending that all convictions for Health and Safety Code section 11366.5(b) be an automatic licensing disqualifier. Section 11366.5(b) relates to convictions of a defendant who has under his or her management or control any building, room, space, or enclosure, either as an owner, lessee, agent, employee, or mortgagee, who knowingly allows the building, room, space, or enclosure *to be fortified to suppress law enforcement entry* in order to further the sale of any amount of cocaine base as specified in paragraph (1) of subdivision (f) of Section 11054, cocaine as specified in paragraph (6) of subdivision (b) of Section 11055, heroin, phencyclidine, amphetamine, methamphetamine, or lysergic acid diethylamide and who has obtained or is obtaining excessive profits from the use of the building, room, space, or enclosure.

The District Attorney has further recommended that a conviction for Health and Safety Code section 11366 be a licensing disqualifier. A conviction by section 11366 is considered by the Legislature to be a more serious offense and conviction than a conviction for either subsections (a) or (b) or section 11366.5. This is evinced by the fact that a conviction for section 11366 exposes a defendant to a state prison commitment, as compared to the graduated penalties found in section 11366.5, both of which have been downgraded in Realignment to carry a penalty of Realignment County Prison, also known as local prison. Section 11366 relates to convictions for opening or maintaining any place for the purpose of unlawfully selling, giving away, or using certain controlled substances.¹

Third, the District Attorney has requested that convictions under Health and Safety Code section 11379.6 also be cause for denial. That section relates to the crime of to the manufacture of controlled substances by chemical extraction or chemical synthesis.² New subparagraph (4)

¹ The “certain controlled substances” referenced in this statute are (1) specified in subdivision (b), (c), or (e), or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (13), (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b), (c), paragraph (1) or (2) of subdivision (d), or paragraph (3) of subdivision (e) of Section 11055, or (2) which is a narcotic drug classified in Schedule III, IV, or V.

² The following is the full text of Health & Safety Code section 11379.6:

(a) Except as otherwise provided by law, every person who manufactures, compounds, converts, produces, derives, processes, or prepares, either directly or indirectly by chemical extraction or independently by means of chemical synthesis, any controlled substance specified in Section 11054, 11055, 11056, 11057, or 11058 shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for three, five, or seven years and by a fine not exceeding fifty thousand dollars (\$50,000).

(b) Except when an enhancement pursuant to Section 11379.7 is pled and proved, the fact that a person under 16 years of age resided in a structure in which a violation of this section involving methamphetamine occurred shall be considered a factor in aggravation by the sentencing court.

(c) Except when an enhancement pursuant to Section 11379.7 is pled and proved, the fact that a violation of this section involving methamphetamine occurred within 200 feet of an occupied residence or any structure where another person was present at the time the offense was committed may be considered a factor in aggravation by the sentencing court.

(d) The fact that a violation of this section involving the use of a volatile solvent to chemically extract concentrated cannabis occurred within 300 feet of an occupied residence or any structure where another person was present at the time the offense was committed may be considered a factor in aggravation by the sentencing court.

(e) Except as otherwise provided by law, every person who offers to perform an act which is punishable under subdivision (a) shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for three, four, or five years.

(f) All fines collected pursuant to subdivision (a) shall be transferred to the State Treasury for deposit in the Clandestine Drug Lab Clean-up Account, as established by Section 5 of Chapter 1295

would mean that applicants would be denied for having a prior conviction under that section. As proposed, this is a factor for both cannabis cultivation and cannabis facilities.

Fourth, the District Attorney has requested that the background check also look for conditions of probation, mandatory supervision, post release community supervision, or parole or any other lawful order that prohibits the possession or cultivation of cannabis. The issuance of a County permit or state license does not override such conditions. It seems appropriate for the County to not issue a cannabis cultivation permit or cannabis facilities business license, when the issuance of such permit or license would violate such conditions. New subparagraph (5) would provide for denial of an application if any of these conditions existed.

Attached as part of this agenda packet are relevant sections of the Health and Safety Code, as well as Business and Professions Code section 26057, which includes the crimes the state is reviewing.

2. Public Nuisance

Staff is proposing two changes to section 10A.17.

First, the County is proposing to combine and clarify clauses (1) and (2) of paragraph (B). The added language clarifies that in order to avoid a declaration of nuisance on cultivation exempt under section 10A.17.030, such cultivation must comply with all other applicable laws, such as section 10A.17.040. Existing clause (2) is deleted, as adult use cultivation is now an exemption under section 10A.17.030 and therefore falls under clause (1).

Second, the County is proposing additional language to proposed clause (2) (existing clause (3) of paragraph (B)). This clause currently provides that the cultivation of cannabis in absence of an issued permit is not a public nuisance if it is being cultivated by an entity whose application for a Phase One Permit has been submitted to the County and that entity has submitted a sworn affidavit affirming that they have met the requirements of the ordinance or are actively in the process of fulfilling the requirements. As of January 1, 2019, a cultivator must possess either a State temporary, provisional or annual license to cultivate cannabis in compliance with State law. Requiring either a state temporary or provisional license in this clause of the ordinance will give code enforcement the ability to more effectively address non-permitted cultivation in a manner consistent with State law.

3. “Legal Parcel”/“Parcel” Definition Change

The Board of Supervisors has previously provided direction for a specific amendment to the definition of “legal parcel” or “parcel” in section 10A.17.020. The definition currently requires that the lot have been created pursuant to the Subdivision Map Act prior to January 1, 2016, or that a certificate of compliance have been recognized and recorded prior to January 1,

of the Statutes of 1987. The transmission to the State Treasury shall be carried out in the same manner as fines collected for the state by the county.

2016 (with an exception related to industrial-zoned districts). The Board directed that the definition be changed so that lots for which applications for subdivision were on file with the Department of Planning and Building Services prior to January 1, 2016, but only finalized after that date (with a recorded map), could also be eligible to apply for a permit. This change is consistent with the overall policy behind establishing the January 1, 2016, cutoff date, which was to discourage people for subdividing property solely for the purpose of creating additional legal parcels for new cultivation sites.

In addition to the amendment to section 10A.17.020, staff is recommending the addition of a new section 10A.17.082. This new section creates a new application period for applicants with cultivation sites not previously eligible to apply under the former definition of “legal parcel” or “parcel,” but eligible following the amendment of the definition by this ordinance. Such applicants would have one hundred eighty (180) days after the effective date of the ordinance to apply for a Phase One Permit.

Environmental Review

The proposed change to Section 6.36.060 regarding revised criminal history background check procedures is categorically exempt from review under the California Environmental Quality Act. CEQA Guidelines section 15061(b)(3) provides that a project is exempt from CEQA if it can be seen with certainty that there is no possibility that the activity in question may have a significant impact on the environment. The proposed changes related to criminal history background checks is an administrative change that will determine whether an individual is eligible to apply for a County license. There will be no impact on the environment from this change.

Chapter 10A.17 was adopted following the approval of a Mitigated Negative Declaration that reviewed the impacts of the County’s new cannabis cultivation regulations. As such, an Addendum to the Mitigated Negative Declaration has been prepared to satisfy the requirements of CEQA for the changes proposed to Chapter 10A.17 by this ordinance. The addendum makes findings on the level of significance these changes entail with regard to environmental review. A separate resolution has been prepared to adopt the Addendum, and the Addendum is attached to the resolution for review.

Recommended Action

Please see the Agenda Summary for the recommended action.

Attachments

1. Relevant California Codes
2. Resolution Adopting Addendum to Previously Adopted Mitigated Negative Declaration, with Addendum attached as Exhibit A
3. Redline Draft of Ordinance Making Amendments to Chapters 6.36 and 10A.17
4. Ordinance Making Amendments to Chapters 6.36 and 10A.17
5. Ordinance Summary