

To: The Humboldt County Board of Supervisors

From: Planning and Building Department

Agenda Section: Public Hearing

SUBJECT:

Maple Creek Investments, LLC Appeal of the Planning Commission Denial of a Special Permit to Allow 27,025 Square Feet of New Outdoor Cannabis Cultivation.

RECOMMENDATION:

That the Board of Supervisors:

1. Open the public hearing and receive the staff report, testimony by the applicant/appellant and public;
2. Close the public hearing;
3. Adopt the resolution (Resolution 20-___). (Attachment 1) which does the following:
 - a. Considers the Addendum along with the Environmental Impact Report certified for the CCLUO per §15162(c) of CEQA Guidelines; and
 - b. Makes the findings to grant the appeal submitted by Maple Creek Investments, LLC and to approve the Special Permit; and
 - c. Grant the Appeal
 - d. Approve the Special Permit.

SOURCE OF FUNDING:

The Appellant has paid the appeal fee associated with filing this appeal.

DISCUSSION:

Executive Summary

This is an appeal of the Humboldt County Planning Commission's August 6, 2020 denial of a Special Permit application to allow 27,025 square feet of new outdoor cannabis cultivation. The applicant/appellant believes the Planning Commission denied the project without identifying reasons for the denial or providing an itemized resolution of the denial, that the Commission did not conduct a hearing free of bias and fair under constitutional due process principles, whereas the applicant followed the law and did everything requested by the county, and the Planning and Building Department recommended this project for approval. The applicant/appellant also notes the negative precedent the Planning Commission would set relative to permitted growers, and economic development and the growth of the cannabis industry.

The Planning Commission did not adopt a resolution reflecting why they took the action they did. This application was thoroughly evaluated, and staff found the request complies with the CCLUO and recommended approval. There was public opposition to the application. There have been other cannabis cultivation permits issued in the immediate vicinity without controversy. The Planning Commission violated the zoning ordinance in acting without written

findings and thus the appeal should be granted. The action on the Special Permit is a separate action. Staff initially recommended approval of the application, and nothing was submitted in the Planning Commission hearing that would change that recommendation and staff recommends the Board of Supervisors approve the application and approve the Special Permit.

Background

An application was initially filed under the CMMLUO for a Conditional Use Permit to allow an acre of existing outdoor cannabis cultivation. This application was not made complete within 6 months and was deemed withdrawn consistent with County Code Section 312-6.1.5. The subject application was submitted under the CCLUO on 12/14/20 for 10,000 square feet of existing and 33,560 square feet of new outdoor cannabis cultivation. The application was later modified to 27,025 of new outdoor cannabis cultivation due to access issues to the western portion of the parcel and other constraints. On 11/01/19 the applicant was assessed with a violation of the CCLUO for cultivating cannabis in 2018 without the proper permits and issued a \$9,530 penalty that is to be paid post project decision

Project Description

The application is a Special Permit to allow 27,025 square feet (sf) of new outdoor commercial cannabis cultivation and a 2,000 square-foot (SF) on-site processing facility. The cannabis cultivation technique will be full sun planted in the ground. Section 314-55.4.6.1 of the CCLUO allows up to an acre of cultivation on parcels larger than 10 acres with approval of a Special Permit. The subject parcel contains minimal development with on-site structures including a travel trailer, a 500-sf wooden shed, a generator, propane tank and water storage tank. The proposed 2,000 SF processing facility will occupy the location of the existing wooden shed, generator and propane tank, which along with the travel trailer, are to be removed. Four (4) full-time employees and six (6) part-time or seasonal employees are needed for cultivation and ancillary processing activities.

Maple Creek Investments, LLC (MCI) will obtain rooted clones with verified genetics from a licensed nursery. Processing will be carried out in the proposed 2,000 SF on-site ancillary processing facility. The facility will be built to commercial standards including ADA compliance and a new wastewater treatment system. Energy will be provided by PG&E and the applicant intends to enroll in a renewable energy program and or purchase carbon offsets.

Projected water usage is estimated at 30,000 gallons a month and not to exceed a yearly usage of 200,000 gallons. MCI projects better moisture retention when planting in the native soils than in above ground methods, additionally dry farming of the cultivation area may be feasible. Water storage will include four 50,000-gallon hard tanks. The irrigation water source will be rain catchment. A groundwater well located on a neighboring parcel (313-146-002) under the same ownership will supply domestic water for on-site staff and personnel. The water from the well will be transported to the cultivation site via truck. The distance from the well location to the cultivation site is roughly one mile on a County paved and maintained road. Commercial water meters will be installed in line within the drip irrigation system to accurately monitor water usage. Irrigation of the site will take place in the early morning or evening, as to provide

maximum soil saturation and limit evaporation due to excessive heat caused by daytime temperatures.

All materials used for fertigation or pest and disease control will be triple rinsed and drained into fertigation and pest or disease control equipment and used in the next application to the crop. There is no domestic trash or waste on site as there is no domestic residence. Trash from daily operations and employee areas will be bagged onsite and removed weekly and transported to the Humboldt waste management facility. Human waste from cultivation staff will be captured utilizing portable facilities maintained by Six Rivers Portable Toilets in Blue Lake, CA. Operator will maintain service records and receipts for these facilities.

Analysis

The application is to allow 27,025 square feet of outdoor full-sun cultivation on land zoned Forestry Recreation. All requirements for cultivation have been met. The cultivation will be grown in the native soils with a slopes of less than 15%, irrigation water will be sourced from rainwater catchment, power to the site will be provided by PG&E, there were no tribal cultural resources or historic resources identified in the project area, and the subject parcel is accessed off a paved County-maintained road. This application checks all the boxes for approval of an application.

A Road Evaluation Report was completed by Six Rivers Developments in September 2018. The Evaluation addressed Butler Valley Road from Maple Creek Road to Kneeland Road, Maple Creek from Blue Lake Blvd to Butler Valley Road, and Kneeland Road from Freshwater Road to Butler Valley Road. All road segments evaluated were found to be Category 4 equivalent. The short driveway to the project site is rocked and gated.

A Timber Conversion Investigation was completed by Blair Forestry Consulting in June 2019. The Report found the site had been a homestead since approximately 1953 and no commercial tree species were cleared from the historic homestead site. Instead, fruit trees and other overgrown brush were cleared to allow use of the site.

A Jurisdictional Wetland Delineation Report was completed in February 2019. The Report identifies 1.29 acres of wetlands on-site. The Report states that there were no signs of filling or altering of wetland areas. Wetlands on-site are attributed to the drainage conditions relating to Maple Creek Road. Currently, the Streamside Management Area (SMA) buffers are physically marked on-site so that the area can be fully circumvented by project activities. Recommendations include protocol level surveys be conducted prior to any site disturbances related to road or structure development and employment of erosion control materials to reduce impacts of disturbance to aquatic species.

A Noise Source Assessment was carried out by Six Rivers Development LLC in August 2019. Using a REED Instruments R8080 sound level meter, an average dBA of 37.5 was recorded based on three recordings in different parts of the parcel at different times of the day. The CCLUO requires that noise from the operation be no more than 3 decibels above ambient at the property lines. This will be an ongoing condition of approval.

A Preliminary Biological Assessment Report was carried out by TransTerra Consulting and Mother Earth Engineering in November of 2018. The Assessment methods included a search of the California Natural Diversity Database (CNDDDB) and California Native Plant Society (CNPS) database. A habitat assessment was conducted in the project area. No Special Status species were observed during the assessment. The Report recommends the use of natural fibers for cultivation netting and to avoid sediment transport into jurisdictional waters to avoid impacts to aquatic life.

Northern Spotted Owl activity centers have been recorded in the area of the subject parcel although there is not an activity center within 2,300 feet of the cultivation site. There is a NSO siting in the northwest corner of the parcel, this dates back to the year 2000 but no additional siting's have been recorded at this location since that time. The project will not produce noise above 50dB at 100' from noise sources or at the edge of habitat, whichever is nearest. The operation is outdoor cultivation and the source of power will be PG&E. Generators will be used for backup power only.

A Cultural Resources Investigation Report was carried out by Roscoe and Associates Cultural Resource Consultants in November 2018. The Report identified previously conducted investigations which found artifacts in the project area. No known cultural resources fall in direct proximity to the project site with the nearest known artifact being 75 meters away. Field surveys did not identify historic or pre-historic artifacts on the project site. The Report recommends that Inadvertent Archaeological Discovery protocols be included as ongoing conditions of approval.

MCI's operations and management agent will implement procedures to properly secure the processing facility during and after hours of operation. Only management will be authorized in these locked areas to mitigate potential theft. All product at the end of the shift will be returned to these locked areas which will be remotely monitored via closed circuit video surveillance during operational and non-operation hours.

The Humboldt Bay Municipal Water District commented that the project has the potential to adversely affect public trust resources, because the proposed groundwater well could result in non-compliance with the California Sustainable Groundwater Management Act of 2014 (SGMA) and that the project was not exempt from CEQA review. First the project is not exempt from CEQA review, the determination is that through compliance with the mitigation measures in the EIR for the CCLUO and compliance with the CCLUO, the potential project impacts would be less than significant. The CCLUO does not allow diversionary water sources for cultivation irrigation and the use of rainwater catchment is consistent with this. The well water will be used for domestic use and to provide drinking and sanitation water to on-site personnel. The reference to SIGMA is interesting because SIGMA applies to medium and high priority groundwater basins that are in overdraft which does not include the Mad River basin. As of the writing of this report there is not a Groundwater Sustainability Plan or Groundwater Sustainability Agency associated with the Mad River.

Several letters have been received from concerned neighbors opposed to the project. Concerns raised include the potential impacts on wildlife and drinking water, potential increase in crime, traffic, and the potential decrease in property values. Questions were also raised regarding the size of the processing facility and the source of water. Many comments express concerns regarding the impact that a commercial cannabis operation will have on the character of the surrounding area.

Staff analysis of this project found it is in compliance with the CCLUO. For context it is worth noting that the property immediately south of this site was approved for 17,000 square feet of commercial cannabis cultivation by the Planning Commission on September 19, 2019. Other properties in the immediate vicinity have pending applications for commercial cannabis, with at least four nearby properties having been engaged in commercial cannabis cultivation since at least 2015. The Planning Commission recently approved a two-acre cultivation site further out Maple Creek Road.

Planning Commission Action

The Planning Commission received public testimony from five individuals opposing the project during the hearing. Public testimony included concerns regarding the applicant not living on the parcel, odor pollution, increased traffic, the potential leaching of fertilizers and pesticides into groundwater and the Mad River, the potential of theft, vandalism, illegal drug sales and the use of firearms, and the potential decline of property values. It was also stated that rainwater catchment would not be an adequate water source for the proposed project, that the proposed project is too close to a school, and that the wetland delineation performed was inadequate.

The appellant/applicant was not able to testify until after the Planning Commission begin deliberation but explained that they own approximately 1,000 acres in the immediate area, have been landowners in the area for 60 years, and manage their lands with the best practices. The appellant/applicant also testified that multiple commenters from the public are members of one family related to the adjacent property owner. There seems to have been a parcel line dispute between the property owners that was settled in court in favor of the applicant. The appellant/applicant believes that there is a little bit of emotion from the neighboring family tied up in that rather, than a focus on the merits of the project. The appellant/applicant also asserted that they have done everything pursuant to the County's requirements and that the project meets or exceeds those requirements. Lastly, the appellant/applicant stated the one of the opposing commenters owns the property directly to the south of the proposed project parcel and is a permitted cannabis cultivator.

During deliberation, the Commission made both positive and negative comments about the project and expressed concerns about protecting the Maple Creek area. Comments in favor of the project included that the project was in compliance with the CCLUO, power from PG&E, use of rainwater catchment, full sun outdoor cultivation, no lights, no generators, roads are in decent condition. Comments made against the project included not being able to vote without a recommendation from CDFW, the presence of a prior violation on the site, cumulative effects of cannabis on this rural community, that Maple Creek is a special place and the intent of the ordinance was to get cannabis out of the hills. A motion was made to approve the project as

recommended by staff. This motion failed with a 2-4 vote. O'Neal then made a motion to deny, which was seconded by Pellegrini. The motion passed with a 4/2 vote (Ayes: Bongio, O'Neill, Levy and Pellegrini. Nays: McCavour and Mitchell. Abstain: Newman).

Appeal

Appeal Issue 1: The Planning Commission is required by law to state the reasons for denial and provide an itemized resolution for the reason of denial of a project and failed to do so. This fact alone is legally fatal to the Commission's denial vote and requires an approval of the project per the Department's staff report and strong recommendation.

Response: Humboldt County Code section 312-6.5.1 states: *Following public review, the Hearing Officer shall approve, conditionally approve, or deny the proposed project in accordance with the particular requirements of this Code as they apply to the project, and in accordance with the required findings of this Code. (See, Sections 312-17, Required Findings, and Sections 312-18 through 312-49, Supplemental Findings.) The Hearing Officer's decision shall be expressed in writing.* The Planning Commission erred in not providing written findings supporting their decision. For this reason, the appeal should be approved. But action on the appeal is separate from action on the actual application. The Board of Supervisors could approve the appeal and deny the Special Permit.

Appeal Issue 2: The Planning Department's position on the project. The Department's reversal of position, now supporting denial in front of the Board is required by regulation and should be disregarded in lieu of the Department's staff report recommending approval

Response: The applicant/appellant seems to be under the misunderstanding that the staff is obligated to carry forward the Planning Commission action as a recommendation to the Board of Supervisors. That is the case with legislative actions (Zoning Ordinance and General Plan Amendments) but that is not true of appeals on permits. In the appeal everything is open for consideration. In this case the Planning Commission did not leave a record of their rationale for denial and thus there is nothing to either support or take issue with. The staff recommendation is based on the facts associated with the application.

Appeal Issue 3: The Commission failed to discharge its duty to conduct a hearing free of bias and be fair under constitutional due process principles, as evidenced by:

- a) *The project has a much lower impact than the previously approved (by consent without comment) project directly across the street.*
- b) *Applicant's identified spokesperson/project manager was denied the opportunity to speak at the hearing by the Commission's chairperson.*
- c) *At least three of the four commissioners voting to deny the project apparently had not read the Department's staff report strongly recommending approval.*
- d) *The Department failed to distribute Applicants written response to public comment to the commissioners prior to the hearing, so no commissioners read Applicants respond to inaccurate public comment.*

- e) *At least two of the commissioners voting to deny the project related personal anecdotal stories of swimming at Maple Creek or enjoying rural atmosphere of the areas as the basis for denial.*
- f) *The commissioners voting to deny the project clearly did not understand the regulatory status of the Applicant's project, referring incorrectly numerous times to the "abatement" status of the project. The project was never and is not an abatement project and that mistake of fact prejudiced the vote. A material mistake of act is fatal to the denial vote.*
- g) *The denying commissioners ignored clear bias of the large majority of public commenters, who commented inaccurately on Applicant's project but did not previously comment on the project across the street that was previously approved by the Commission.*

Response: Bias apart from a resolution is difficult to determine. Several items raised by the applicant are worth noting. First there was another cannabis cultivation site approved by the Planning Commission near the site (adjacent property). It did not have the public opposition this application generated. The application on the adjacent property was for 17,000 square feet of outdoor cultivation. The cultivation is on a timberland acre conversion from the 2012-2014 time period and the water use would convert from a point of diversion on an adjacent parcel to a rainwater catchment pond. The site is immediately adjacent to the Mad River, so it is closer to the Mad River and closer to Northern Spotted Owl observations than the subject parcel.

It is true the applicant's agent got up and spoke early in the hearing and primarily indicated he would answer any questions. The Commission did not have questions. The agent was not given another opportunity to address the Commission as there were not questions for the applicant. Several members of the public were allowed to speak for longer than the three minutes typically allotted for public comment. The actual property owner was not given the opportunity to address the Commission until after the Commissioners had largely stated their positions and it did not seem to have an impact on how the Commissioners voted. The appellant is correct that individual speakers from the community opposing the application were given more time in the public hearing than the applicant.

At least one of the Commissioners asked about an abatement on the subject site, and it was explained that the site was not subject of a code enforcement action, but there had been a period where there was cultivation on site without a permit. This had been corrected and there was not an issue. There would be a fine imposed as a condition of project approval. In the comments it was pointed out there was a concern with the abatement, so if this weighed on the decision of one or more commissioners it may have affected the decision.

Appeal Issue 4: The applicant followed the law, did everything requested by the County, and the Department strongly recommended the project for approval given its low-impact status. The Department staff report stipulates that all conditions and criteria for project approval have been satisfied in conjunction with all applicable County code sections and that there is no legal basis deny the project.

Response: Other than the aforementioned violation of the CCLUO for cultivating cannabis in 2018 without the proper permits, which has been resolved, this is not in dispute.

Appeal Issue 5: Denial will send a strong negative message to County applicants that even if you comply with every possible regulatory criteria and are recommended for approval by the department, the Commission can deny your permit on bias, on a whim, for any reason they want to. The applicant, similar to tens if not hundreds of other applicants, have spent hundreds of thousands of dollars to go through the permitting process only to be denied.

Response: The lack of findings for this action is problematic. In addition to the fact that this violates County Code, it introduces an element of arbitrariness to the action. Applicants should know the rationale for approval and denial of an application. Denial for cause is appropriate. Denial without a rationale leave applicants without direction and makes decision making appear arbitrary. In an industry where building trust between the government and industry is of paramount importance, arbitrary decisions would send a contrary message.

Appeal Issue 6: Denial would acknowledge the Commissions ability to ignore the Board's ordinance directives and thwart the clear purpose of applicable Humboldt County Code. The Commission does not have the authority to substitute its judgment for the Board's judgment and prior decision-making.

Response: This is a discretionary application and as such the Planning Commission can approve or deny. The question raised in the appeal is whether the action of the Planning Commission was appropriate relative to the facts associated with this application. Unfortunately, the rationale for the Planning Commission action is not captured in a resolution with a set of findings.

Appeal Issue 7: Denial will have a chilling effect on the significant economic upside of the cannabis industry becoming regulated taxpayers in the county. If applicants and potential applicants believe the risk of being denied, even with perfect applications, is too high, they will drop out of the process and the county will lose millions of dollars in tax revenues every year that could easily have been collected and put to great use in the county budget. The environmental impact of applicants dropping out of tightly restricted operations under the regulations will also be a significant negative impact of denial.

Response: To say that action on one application in a remote part of the County will have a chilling effect on the Humboldt County cannabis industry is hard to substantiate. If the Planning Commission were to make a regular practice of denying applications without adequate findings this would begin to create a negative perception. To date the County, including the Planning Commission has worked hard to help this industry experience success.

Recommendation

The action to deny the application by the Planning Commission without written findings violates County Code and cannot be supported. The Appeal should be granted on that basis.

The Special Permit as submitted by the applicant complies with the provisions of the Commercial Cannabis Land Use Ordinance and is not in a Community Plan Area or Sphere of Influence for a City. There is public opposition to the application, which does not seem to be related to the cannabis as evidenced by an application having been approved on an adjacent parcel with no opposition. Concerns were raised about traffic associated with a nearby swimming hole, but there was never a correlation as to how this project would interfere with access to the swimming hole. It is staff's recommendation that the application for the Special Permit be approved.

FINANCIAL IMPACT:

There will be no additional effect on the General Fund. The appellant has paid in full the appeal fee associated with this appeal.

STRATEGIC FRAMEWORK:

This action supports your Board's Strategic Framework by enforcing laws and regulations to protect residents.

OTHER AGENCY INVOLVEMENT:

None

ALTERNATIVES TO STAFF RECOMMENDATIONS:

The Board of Supervisors has a range of alternatives to the staff recommendation to grant the appeal and approve the project, as summarized below:

1. Approve the appeal and deny of the Special Permit. This option should only be pursued if there is evidence submitted demonstrating that the Special Permit cannot be approved in compliance with County policies and regulations.
2. Approve the project in a modified form. The Board of Supervisors may find that there are components of the project which are acceptable, but others that are not. In that case, a condition should be written to modify the project description to omit the offensive components of the project.

ATTACHMENTS:

NOTE: The attachments supporting this report have been provided to the Board of Supervisors; copies are available for review in the Clerk of the Board's Office.

1. Draft Board Resolutions and Findings
2. Appeal filed by Maple Creek Investments
3. Planning Commission Staff Report, Supplemental and Comments
4. Public Comment
5. Applicant Submitted Materials
6. Transcript of the August 6, 2020 Planning Commission Meeting

PREVIOUS ACTION/REFERRAL:

Board Order No.: N/A

Meeting of: N/A

File No.: N/A