



COUNTY OF HUMBOLDT

For the meeting of: 9/3/2019

File #: 19-720

To: Board of Supervisors

From: Planning and Building Department

Agenda Section: Time Certain Matter

SUBJECT:

1:30 p.m. - The Bluff Creek Company, Inc. appeal of the Planning Commission denial of The Bluff Creek Company, Inc. Special Permits to allow 9,200 square feet of existing outdoor commercial cannabis cultivation operations within 600 feet of Public Lands

RECOMMENDATION(S):

That the Board of Supervisors:

1. Open the public hearing and receive the staff report, testimony by the appellant (applicant), and public;
2. Close the public hearing;
3. Adopt the attached resolution (Resolution 19-__ (Attachment 1) doing the following:
 - a. Finding that the California Environmental Quality Act (CEQA) provisions do not apply to the project per section 15270 (Projects Which Are Disapproved) of the CEQA Guidelines; and
 - b. Finding the project cannot be approved because it is inconsistent with the Commercial Medical Marijuana Land Use Ordinance; and
 - c. Deny the appeal and deny the Special Permits;
4. Direct the Clerk of the Board to give notice of the decision to the appellant and project applicant, the property owner, and any other interested party.

SOURCE OF FUNDING:

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

DISCUSSION:

Executive Summary

This is an appeal of the Humboldt County Planning Commission's February 7, 2019 denial of The Bluff Creek Company Inc. Special Permits for 9,200 square feet of existing outdoor cultivation, appurtenant propagation and processing activities, and a setback reduction to less than 600 feet from public lands (Six Rivers National Forest). The proposed project is located on the east side of Highway 96 (between the highway and Klamath River) approximately 3 miles northeast of Weitchpec. The

Planning Commission denied the project because it is located within a ceremonial district and thus does not meet the 600-foot setback from a Tribal Cultural Resource (TCR) required by CMMLUO Section 55.4.11(d). The applicant is appealing the Planning Commission's decision claiming that the action to deny the permit is in violation of county, state and federal laws. Staff does not agree with the applicant's contentions, as the CMMLUO is very clear in allowing tribes to decide what can occur within 600 feet of a TCR and recommends that the Board of Supervisors deny the appeal and deny the Special Permits.

Background

The single issue associated with this appeal is the site location within an area that meets the definition of a Tribal Cultural Resource. The County adopted a Mitigated Negative Declaration associated with the adoption of the Commercial Medical Marijuana Land Use Ordinance (CMMLUO). Mitigation for impacts to archaeology and cultural resources are contained in the ordinance section 55.4.11(d) which requires a 600 foot setback from a Tribal Cultural Resource (TCR) unless that setback is reduced or waived by the affected tribe. In this case, the Yurok Tribe has designated the area as a ceremonial district which meets the definition of a TCR.

The CMMLUO defines a TCR as:

“Tribal Cultural Resources” means sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American tribe, including unique archaeological resources and historical resources as described under sections 21074, 21083.2 (g), and 21084.1 of the Public Resources Code, respectively. Tribal Cultural Resource shall also include sites or resources identified by the tribe through an action of the Tribal Council or equivalent body.

The fact that the Yurok Tribe has identified this area as a site or place with cultural value to the tribe qualifies the location as a TCR. Attachment 1a is a resolution of the Yurok Tribe establishing the Ke'wet Ceremonial District. It does not include a map of the district to protect the location and associated resources. Staff has seen the map and the subject site is within the boundaries of the district.

The ordinance only allows a reduction in the 600 foot setback through agreement with the affected tribe. In this case the Yurok Tribe is not willing to grant such a reduction. There are no other provisions to deviate from this ordinance requirement. Compounding this is that this standard serves to mitigate a potential environmental impact and thus cannot be changed or deviated from without redoing the environmental analysis for the adoption of CMMLUO as a whole, which would be extremely complicated.

The Planning Commission recognized that the ordinance requirement is straight forward and would not allow approval of the application as presented, but several of the Commissioners attempted to continue the item to allow the applicant time to find a location to relocate the cultivation to. Due to the impact of the Ke'wet Ceremonial District on affected applicants it has been the practice of the Planning and

Building Department to allow applicants to modify their applications to a Retirement, Remediation, and Relocation (RRR) application. This option was offered to the applicant and encouraged at the Planning Commission hearing, but the applicant chose not to accept a continuance to pursue this alternative. The Planning Commission voted 3-2 (1 abstention, 1 absent) to deny the application. The two no votes were based on the desire to see additional efforts to relocate the cultivation site.

This application was received in 2016 and sent out for referral in June of 2017. Both the Karuk and Yurok tribes expressed concern about the application. The Northwestern Information Center (NWIC) stated the *“proposed project area has the possibility of containing unrecorded archeological site(s) and recommended a study as well as contacting the local tribes regarding traditional, cultural, and religious values.”*

On June 18, 2018, the Applicant submitted a Cultural Resource Survey (CRS) report prepared by William Rich and Associates which concluded “no artifacts, features, or archeological sites which would be considered an historical resource for the purposes of CEQA (15064.5(a)) were identified... [however, the] general vicinity has several recognized TCR areas, including sites, districts, and ethnographic landscapes.”

On July 2, 2018, the CRS report was forwarded to the Yurok and Karuk Tribes consistent with Department practice. On July 30, 2018, a Yurok Tribe referral response recommended denial stating that they had completed their review of the application and determined that the impacts of the cannabis operation on cultural resources would be substantial and could not be mitigated.

On August 10, 2018, the Department met with the Yurok Tribe on the reservation in Weitchpec to improve coordination for review of cannabis applications within their Area of Traditional Tribal Cultural Affiliation (ancestral territory). At that time the Tribe presented a specific region of concern as a TCR with geographically defined boundaries. The resolution in Attachment 1a was subsequently provided to the County.

The applicant has been responsive throughout the process and has been diligent in attempting to address issues and concerns. It took some time for the Ke’wet Ceremonial District to be identified, but that is part of the overall process to determine whether there are resources that need to be protected. The ordinance is clear, and this application cannot be approved at this location.

Basis of Appeal

The basis of the appeal is set forth in the appeal letter submitted by The Bluff Creek Company, Inc., Lucian Smith, President (applicant), received by the Planning and Building Department on February 25, 2019 (Attachment 3). The following discussion addresses the discrete points raised in the appeal.

Analysis

Appeal Issue 1: Unlawful Under County Code Section 314-55.4.11(d).

The appellant states the Planning Department staff denied the existence of Tribal Ancestral Territory Maps to determine if the property was in an Area of Tribal Cultural Affiliation prior to submittal of

application in 2016 and spent money on technical studies to complete the application.

It is hard to fathom that planning staff would state these maps don't exist because the maps have been in existence for some time and are used to determine the appropriate tribe to refer projects to. This was common practice before the cannabis program was initiated. As part of the processing of this application, a referral was sent to Karuk and Yurok Tribes based on these Ancestral Territory Maps and the responses indicated Tribal Cultural Resources (TRC) could be impacted and as a result, the Planning Department requested a Cultural Resources Investigation.

Appellant states after he was notified of the Yurok Ke'wet Ceremonial District, he found no records of said claim in the State Register of Historical Resources, the County Register nor the Park Service Register, and appellant was not allowed to access the Tribal Register. This may be true, but it must be understood the CMMLUO definition of "Tribal Cultural Resources" does not require the site to be registered in a specific historic register and specifies that a TCR may "include sites or resources identified by the tribe through an action of the Tribal Council or equivalent body." The Yurok Tribal Council approved the Ke'wet Ceremonial District to be eligible for the Yurok Historical Register and any other register as necessary. Although this action by the Yurok Tribal Council took place after application submittal and referral, the action qualifies the site as a TCR. It is the purpose of the referral process to determine where important resources exist and to protect them. In this case that objective has been met and there is no merit to this contention.

The applicant/appellant has also expressed that they have not been allowed to see the limits of the Ke'wet Ceremonial District. The maps defining the location of the Yurok Tribal Cultural Landscape and related correspondence with the Tribe are confidential per California Government Code Section 6254 (r) and 6254.10. Staff has seen the map and attests the site is within the district, and representatives of the Yurok will be present at the meeting to confirm this.

Appeal Issue 2: Alleged Brown Act Violation.

The appellant states that the County acted in violation of the Brown Act by either failing to have a meeting giving the notice required thereby or held such meeting(s) without giving required notice in deciding to accept the Yurok's TCR designation. The adoption of the CMMLUO was undertaken at publicly noticed hearings. The language of the CMMLUO provides that the affected tribe can determine what is a TCR. The ordinance does not provide the County the ability to conduct a public hearing to determine whether the tribe has acted appropriately in determining whether a site is a TCR. There was no requirement for a public hearing in receiving the Tribe's determination that the site was a TCR, so there could be no violation of the Brown Act. Also, the applicant was given the opportunity to RRR the site to another location prior to the Planning Commission hearing, which the applicant rejected and demanded a public hearing. A public hearing was held on February 7, 2019 with the Planning Commission. The Planning Commission offered the applicant the ability to continue the hearing to pursue RRR, but the applicant chose not to accept that invitation. The Planning Commission then denied the application. The current public hearing is in response to the appeal filed by the applicant. All noticing requirements for the Planning Commission and Board of Supervisors meetings have been satisfied and there is no violation of the Brown Act. Thus, there is no merit to this

contention.

Appeal Issue 3: Alleged California Public Resources Code Violation.

The appellant points out that the definition of a TCR does not specifically match the definitions used in the California Public Resources Code sections 5024.1 and 21084.1. Public Resources Code section 5024 establishes the California Register of Historical Resources and Public Resources Code section 21084.1 is from the California Environmental Quality Act defining significant impact to a Historical Resource. Section 21084.1 states:

The fact that a resource is not listed in, or determined to be eligible for listing in, the California Register of Historical Resources, not included in a local register of historical resources, or not deemed significant pursuant to criteria set forth in subdivision (g) of Section 5024.1 shall not preclude a lead agency from determining whether the resource may be an historical resource for purposes of this section.

This language is repeated in CEQA Guidelines section 15064.5, subdivision (a)(4). The Public Resources Code thus gives the County authority to identify what constitutes a significant resource. To mitigate impacts to historical resources (tribal, cultural, and archaeological) the CMMLUO assigned the responsibility of identifying TCRs to the Tribes whose traditional territory is associated with the site. This is consistent with the California Public Resources Code. Thus, there is no merit to this contention.

Appeal Issue 4: Four Other Legal Issues.

The appellant states that:

- 1) The U.S. Constitution is the law of the land and that some parts of State law and CMMLUO are unconstitutional.

There has been no evidence submitted which indicate that the CMMLUO is inconsistent with the US Constitution. The CMMLUO allows cultivation of cannabis where it can be demonstrated there will not be an adverse impact on Tribal Cultural Resources. In this case, it cannot be found there will be no impact on TCR's. There is no merit to this contention.

- 2) Allowing tribes to identify TCRs on non-tribal lands and to request denial of a cannabis permit is unconstitutional.

The CMMLUO allows a tribe to determine the location of Tribal Cultural Resources and to grant setback reductions where appropriate. There is inherent logic in allowing a tribe to define what is significant to the tribe, without having non-tribal members affect that decision. Per Public Resources Code section 21084.1, the county has discretion to identify significant resources in manners other than what is eligible for listing and has done that with respect to TCRs. Further, the County has an obligation to attempt to mitigate impacts to cultural resources through consultation with local Tribes pursuant to AB 52. This is not unconstitutional.

- 3) CMMLUO's ability to restrict the use the property [to cultivate cannabis] prohibits the free exercise of Appellant's religious beliefs in that it would require appellant to agree with the religious beliefs and practices of the Yurok and Karuk tribes in order to legally cultivate cannabis.

The provisions of the CMMLUO do not restrict exercise of religion in any way. The CMMLUO does not restrict the ability to conduct other legal activities on the property. There is no merit to this contention.

- 4) Denial of the cannabis permit will result in a taking of the property and denial of other protected rights without equal protection and due process of law.

Cultivating cannabis is not a protected right, it is a privilege which may be exercised when it can be demonstrated there will be no adverse impacts to protected resources. The ability to cultivate cannabis on this site is tied to the ability to not adversely impact Tribal Cultural Resources. This cannot be done and thus cultivation of cannabis cannot be permitted. This does not deprive the applicant of continued use of the property for an existing residence and all the enjoyment that accompanies that.

Appeal Issue 5: Request for Stay on Temporary Permit to Pursue a Relocation Site to Modify Application to a Retirement, Remediation and Relocation (RRR) Project.

This offer has been made to the applicant dating back to October of 2018. It was made by the Planning Commission at their February 7, 2019 hearing. It continues to be an option.

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:

Department of Health and Human Services, Division of Environmental Health; Department of Public Works, Land Use Division; Office of County Counsel; California Department of Fish and Wildlife; Karuk Tribe and Yurok Tribe.

ALTERNATIVES TO STAFF RECOMMENDATIONS:

The Board of Supervisors could continue this item to allow one of two alternatives:

1. Allow the appellant/applicant to process an RRR permit; or
2. Direct staff to modify the ordinance and prepare an appropriate environmental analysis which

would allow the County to deviate from the 600 foot setback requirement and re-evaluate this application under those new provisions.

Alternative 1 is an appropriate alternative to denial of this application. The only drawback is this option has been offered to the applicant by both staff and the Planning Commission and he has chosen not to pursue this alternative. Alternative 2 is the only way that the application could be approved. This would meet with significant outrage from the tribes within the county and would require preparation of an EIR. As a result, alternative 2 is not recommended.

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 Resolution
2. Appeal filed by The Bluff Creek Company, Inc., Lucian James Smith, President, appellant/applicant, and Statement of Support of the Appeal by Philip Wayne Smith, Property Owner Trustee/Lessor
3. Resolution of the Planning Commission, Resolution No. 19-16
4. Planning Commission Staff Report
5. Applicant comments submitted directly to Planning Commissioners
6. Yurok Tribe Letter

PREVIOUS ACTION/REFERRAL:

Board Order No.: N/A

Meeting of: N/A

File No.: N/A