



COUNTY OF HUMBOLDT

For the meeting of: 1/12/2021

File #: 21-19

To: The Humboldt County Board of Supervisors

From: Planning and Building Department

Agenda Section: Public Hearing

SUBJECT:

Mattole River Farms, LLC Appeal of the Planning Commission Approval of a Conditional Use Permit to Allow 11,400 Square Feet of Existing 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 21-__). (Attachment 1) which does the following:
 - a. Considers the Addendum along with the Mitigated Negative Declaration certified for the CMMLUO per §15162(c) of CEQA Guidelines; and
 - b. Makes the findings to deny the appeal submitted by Mattole River Farms, LLC and to approve the Conditional Use Permit; and
 - c. Deny the Appeal
 - d. Approve the Conditional Use Permit for 11,400 square feet of existing cannabis cultivation.

SOURCE OF FUNDING:

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

DISCUSSION:

Executive Summary

Mattole River Farms, LLC filed an appeal of the Planning Commission approval of the Conditional Use Permit for Mattole River Farms, LLC (Applicant). The applicant is appealing the Planning Commission's approval because the project was approved for a smaller cultivation area than requested in the application. The application submitted on December 12, 2016 was for 17,000 square feet of existing outdoor and 4,800 square feet of existing mixed-light cultivation. At their November 19, 2020 meeting, the Planning Commission approved the permit for 11,400 square feet of cultivation (4,800 square feet of mixed light and 6,600 square feet of outdoor). The appeal claims that the applicant was

denied the opportunity to present testimony and evidence that they believe supports approval of a larger amount of commercial cultivation and that approval for a lesser amount of cultivation results in an uncompensated taking under both federal and state law. The Planning Commission approved the recommendation made by staff and no new information has been submitted to would change that. The hearing was conducted via Zoom and the applicant/appellant did not raise their hand until the motion was being made.

Project background

Mattole River Farms LLC submitted an application on December 12, 2016 for 17,000 square feet of existing outdoor cannabis cultivation and 4,800 square feet of existing mixed-light cultivation. Irrigation is provided by a 1-million-gallon rainwater catchment pond and power is provided by PG&E and supplemented with solar panels. There is disagreement between staff and the applicant regarding the amount of pre-existing cultivation that occurred on the site.

Google Earth aerial imagery from May 2014 shows the 4,800 square foot mixed light greenhouse was existing. As part of the county effort to issue Interim Permit to enable applicants to obtain state licenses, staff conducted a Cultivation Area Verification (CAV) in 2017. This CAV was based on September 2015 TerraServer imagery. The entirety of an apple/quince orchard was misidentified as outdoor cultivation when staff conducted the CAV in 2017. Based on this CAV, an Interim Permit was issued for the full application amount of 17,000 square feet outdoor and 4,800 square feet mixed-light. Subsequent to issuance of the Interim Permit, the orchard was removed and cannabis was planted in its place.

The applicant has been operating under this Interim Permit since 2018. After adjacent property owners alerted the county to the misidentification of the orchard as cannabis, a second CAV omitting the orchard was completed by staff in July 2019. This CAV could verify only 6,600 square feet existing outdoor in the area around the greenhouse and below the pond in addition to the 4,800 square feet of mixed-light. Additional evidence of existing outdoor cultivation was requested at this time. The previous landowner attests to growing approximately 500-600 cannabis plants dispersed in between orchard rows. Staff reviewed the May 2014 Google Earth imagery and observed spacing between orchard rows which could plausibly have been used for cannabis plants. However, no cannabis plants are visible in the orchard through available aerial imagery, either in the May 2014 image or in September 2015 image. Three public comment letters were received from neighboring property owners and state that no outdoor cannabis cultivation occurred in the orchard. The opposition letters therefore consider this application an expansion of cultivation area. The agent provided a video clip from the television documentary "Pot Cops." The footage shows the orchard on the subject parcel while the narrator describes the Humboldt Sheriff eradicating outdoor marijuana plants. There is no law enforcement report to suggest that this site was visited by the Sheriff. Evidence of existing cultivation provided by the applicant consists of a statement by the previous landowner and a Site Plan submitted with the application. Planning staff walked the site with the applicant's agent on October 8th to examine the evidence of existing cultivation in the orchard area, however staff did not identify compelling evidence at that time. An additional package of evidence was provided on October 29, 2020 (see Exhibit C of Attachment 6) showing pictures of depressions in the field and dried stalks. of

cannabis cultivation existing on the parcel prior to January 1, 2016.

The satellite images only support the 11,600 square feet of cultivation approved. The testimony from the neighbors contradict the statements made by the applicant and prior property owners that larger amounts of cultivation occurred in the orchard. It is the responsibility of the applicant to demonstrate the pre-existing cultivation. It was a common practice of 1.0 applicants to ask for as much cultivation as possible, even if that amount of cultivation could not be supported. The parcel is located in the Headwaters Mattole River impacted watershed and is therefore not eligible to apply for new cultivation.

Planning Commission Action:

A duly-noticed public hearing was held via Zoom on November 19. The project was pulled from the consent calendar by a member of the public. Staff made a presentation which discussed the disagreement in cultivation area. Chair Bongio opened the public hearing. A comment was made by a member of the public expressing concern with the amount of cultivation requested by the applicant and the design of the pond. Chair Bongio then asked whether anyone else from the public wanted to speak, paused briefly, and seeing no hands raised, brought it back to the Commission for deliberation. Commissioner Pellegrini then made a motion to approve the project. While the motion was being made, the agent for the project raised their hand. Director Ford and Supervising Planner Cliff Johnson both saw the hand raised, however at that point the public comment portion of the hearing had already been closed. The Commission voted unanimously to approve the project as recommended by staff.

Appeal Issues:

Appeal Issue 1: The appeal filed by the Gallegos Law Firm argues that the applicant's right to due process was violated because they were prevented from providing witnesses and evidence at the hearing. The appeal documents include sworn declarations from six individuals who claim to have been prepared to provide verbal testimony in support of the larger amount of cultivation and who claim to have been prevented from speaking by the Planning Commission.

Response: As described above, the opportunity was presented for members of the public to speak and the applicant did not respond until after public comment had been closed. It could be questioned whether the Chair provided sufficient time for the applicant to respond, but in context, the project was recommended for approval on the consent calendar. The member of the public who asked to have the project removed from consent had spoken and so without any other hands raised it would be normal to conclude there was no controversy associated with the project. The applicant/appellant had the opportunity to have the item removed from consent, they did not, and had the ability to indicate that they wanted to speak during the public hearing, they did not. They were not deprived due process.

Appeal Issue 2: The appeal argues that the applicant was denied the ability to confront and cross-examine witnesses.

Response: The context of a Planning Commission hearing is quasi-judicial and not a courtroom. There is no inherent right in a Planning Commission hearing to confront and cross examine members of the public or county staff. The opportunity is to present evidence to support one's request or claim. There is no due process violation relative to this claim.

Appeal Issue 3: The appeal argues that the applicant was denied the right to a neutral fact finder because the deprivation of the right to speak is evidence that the Planning Commission was biased against them.

Response: As discussed above, public testimony was provided but the applicant did not request to speak until after the public comment portion of the hearing had closed. The Planning Commission did not receive any contrary testimony to the staff recommendation and acted on that recommendation. This does not show bias, rather it reflects that the Planning Commission's action was based on the information presented.

Appeal Issue 4: The appellant argues that denial of the larger amount of cultivation requested would result in an uncompensated taking under both state and federal law.

Response: It is unclear what basis the appellant is suggesting that approval of a permit to allow 6,600 square feet of outdoor cultivation and 4,800 square feet of mixed-light cultivation would be a taking under state or federal law. The subject site is zoned Unclassified, which under the CMMLUO would allow up to 10,000 Square Feet of mixed light or outdoor cultivation, subject to issuance of a Zoning Clearance Certificate demonstrating compliance with all ordinance provisions. The applicant has chosen to apply for a greater amount of pre-existing cultivation as allowed by the CMMLUO which is subject to review and approval of a Conditional Use Permit. A CUP is a discretionary action which allows the County a great amount of potential actions to approve, conditionally approve or deny the application. The applicant is attempting to obtain approval of a CUP for pre-existing cultivation. The applicant must demonstrate the existence of the pre-existing cultivation area in order to receive approval of a CUP for the amount requested. If the applicant cannot satisfactorily accomplish this there can be no expectation of receiving a permit for a cultivation area in excess of what can be demonstrated. Even if the amount of cultivation area could be demonstrated, the applicant must still demonstrate that the application can comply with the requirements of the CMMLUO, that there will not be significant environmental impacts and that all findings required for approval of the permit can be made. There is a significant amount of discretion the County must exercise in deciding upon a CUP. Denial of a larger amount of cultivation under these circumstances does not constitute a taking.

Summary:

This is an unusual appeal in that it is the applicant appealing an application approval. There are two actions here on the appeal and on the Conditional Use Permit. The appeal is focused on the fact that the applicant did not speak to the Planning Commission prior to the action of the Commission to approve the staff recommendation. The appellant/applicant claims they were not given opportunity to

address the commission. Another hand was raised from the public which resulted in that person addressing the Commission. The applicant did not raise their hand until the public comment period had been closed and the motion was being made. The appeal does not indicate whether the applicant attempted to raise their hand to speak and failed to identify themselves. The lack of response on the part of the applicant is not a process violation.

The second action is on the permit itself. The applicant claims a certain amount of cultivation area based on what a prior owner claims to have done. The prior owner submitted the application and sold the property. The amount of cultivation is not supported by aerial image evidence and neighbors claim the location of the claimed cultivation did not exist.

Based upon these factors, staff recommends the appeal be denied, and the Conditional Use Permit be approved consistent with the Planning Commission action to approve 6,600 square feet of outdoor cultivation and 4,800 square feet of mixed light cultivation.

FINANCIAL IMPACT:

The appellant has paid the appeal fee.

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 deny the appeal and uphold the approval of the project, as summarized below:

1. Approve the appeal and deny the Conditional Use Permit. This option should only be pursued if there is evidence submitted demonstrating that the Conditional Use Permit cannot be approved in compliance with County policies and regulations.
2. Approve the appeal and approve the project in a modified form. The Board of Supervisors may find that there is a convincing case for a larger cultivation area. In that case, a condition should be written to modify the project description.

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 and Findings
2. Appeal filed by Mattole River Farms, LLC
3. Planning Commission Staff Report and Supplemental

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4. Planning Commission Resolution
5. County Cultivation Area Verifications (2017 and 2019)
6. Evidence submitted by the applicant to support approval of 17,000 square feet of existing outdoor cultivation and 4,800 square feet existing mixed-light

PREVIOUS ACTION/REFERRAL:

Board Order No.: N/A

Meeting of: October 20, 2020: Hearing Continued

File No.: N/A