



COUNTY OF HUMBOLDT

Legislation Text

File #: 23-1515, Version: 1

To: The Humboldt County Board of Supervisors

From: Planning and Building Department

Agenda Section: Public Hearing

SUBJECT:

Appeal of the Planning Commission Decision to Deny a Conditional Use Permit for 22,000 Square Feet (SF) Existing Outdoor Cannabis Cultivation on a 90-Acre Parcel, and a Special Permit to Reduce the Setback to BLM Public Land

RECOMMENDATION:

That the Board of Supervisors:

1. Open the public hearing and receive the staff report, testimony by the appellant (applicant), and testimony from the public;
2. Close the public hearing;
3. Adopt the resolution (Attachment 1) which does the following:
 - a) Finds that the Humboldt County Board of Supervisors has considered the Mitigated Negative Declaration for the Commercial Medical Marijuana Land Use Ordinance and the project specific addendum prepared for the Big River Farms, LLC project);
 - b) Finds the proposed project complies with the General Plan and Zoning Ordinance;
 - c) Approves the Appeal submitted by Big River Farm, LLC; and
 - d) Approves the Conditional Use Permit and Special Permit subject to the recommended conditions of approval; and
4. Direct the Clerk of the Board to give notice of the decision to the appellant, the Planning and Building Department, and any other interested party.

SOURCE OF FUNDING:

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

DISCUSSION:

Executive Summary

This is an appeal of the Humboldt County Planning Commission's September 21, 2023, denial of the Big River Farm, LLC Conditional Use Permit and Special Permit. Big River Farm, LLC is appealing the decision, citing relevant factors were not considered and that only hearsay and speculation rather than substantial evidence was the basis of the decision to deny the project. The Planning and Building

Department supports the appeal and recommends the appeal be approved and the project approved subject to the Recommended Conditions of Approval.

Project Information

In December of 2016, an application was submitted by Big River Farm, LLC for a Conditional Use Permit to cultivate cannabis on APN 108-023-008, with a Special Permit for a reduction of the 600 foot setback to public lands. The project includes 22,000 square feet of existing cannabis cultivation and 2,190 square feet of ancillary nursery space. Processing such as drying and curing occur in an existing 30' x 40' garage attached to the 1,200 square foot residence, and/or in the existing 30' x 40' storage shed. All other processing such as trimming and packaging are proposed to occur offsite at a licensed facility. Power for the cultivation operation is provided by P.G.&E., with generators for emergency backup power. Five employees are anticipated to meet operational needs during peak season. Irrigation water is sourced from a groundwater well, supplemented by rain catchment. The estimated annual irrigation water usage is 219,000-gal. (9.9 gal./SF/year). Water storage totals 86,600-gal. in hard tanks, and the applicant has secured grant funding to install an additional 50,000-gal. of storage tanks for a total of approximately 138,700-gallons of storage. The staff recommendation to the Planning Commission identified that the project complied with the requirements of the CMMLUO, and a project specific Addendum to the Mitigated Negative Declaration for the Commercial Medical Marijuana Land Use Ordinance was prepared for the Big River Farms, LLC project finding there were no adverse significant impacts resulting from the project.

Prior to the September 2023 Planning Commission, the project had been scheduled for hearings in 2019 and 2021. During these hearings public comments were submitted by two parties in opposition to the project. There were a number of issues raised that were discussed at length during the September 21, 2023 hearing, some of which were incorporated into the findings for denial.

Decision

The project was heard before your Planning Commission on September 21, 2023, and was denied by a vote of 4/3 (AYES: Levy, Mulder, O'Neill, Mitchell, NOES: Skavdal, Landry, West).

The Planning Commission made the decision to deny the project based on the finding that the proposed cannabis operation would be detrimental to the public health, safety, and welfare, and in conflict with the General Plan. This finding was premised on four pieces of evidence outlined below.

1. Public comments were received indicating criminal and dangerous activities have occurred and continue to occur on the site, including a gun fight on the subject property on or around November 2018.
2. There is no evidence presented that the approval of this use would not be detrimental to the public health, safety, and welfare.
3. The way the site had been graded had potential for sedimentation and the construction of greenhouses over the property line onto BLM property shows a past practice of not complying with regulations.
4. The BLM property to the South is potential for habitat for Northern Spotted Owl. The General Plan calls for the protection of listed species.

Appeal

An appeal was timely filed on October 3, 2023, by SL Consulting Services on behalf of Big River Farm, LLC (Appellant). A summary of relevant information referenced in the evidence, the Appellant's arguments in support of the appeal, and additional public comments are discussed in further detail below, with staff responses and analyses *italicized*.

Public Health, Safety and Welfare.

1. Much of the discussion related to this project is centered around potential criminal activity occurring on the property and its relationship to the required finding of approval, in Section 312-17 of the Humboldt County Code, that “the proposed development and conditions under which it may be operated or maintained will not be detrimental to public health, safety, welfare, or materially injurious to properties or improvements in the vicinity. As noted above, this was the finding referenced by the Planning Commission to support its denial of the application.

- a) **Allegations of Criminal and Dangerous Activity:** Public comments were submitted to the Planning Commission indicating criminal and dangerous activity have occurred and continue to occur on the site, including a gun fight on the subject property on or around November 2018. Allegations of illegal or dangerous activities having occurred onsite include a gunfight, gunshots emanating from the property, and illegal trimming and sale of cannabis. Per public comment, a gunfight occurred on or adjacent to the access road to the subject parcel. Public comment indicates two groups of men were parked across the street from each other and opened fire, hiding behind the parked vehicles. Public comments also note that the residents of the subject property are Bulgarian, and an unidentified Bulgarian man was hospitalized for a gunshot wound around the same time as the altercation. The public comments include reference to a North Coast Journal article describing an attempted crime against the applicant (Included with **Attachment 6**).

Appellant Response: The Appellant contends no evidence other than hearsay has been presented to date regarding the alleged gun violence referenced in the evidence for findings of denial. According to the Appellant, the written public comments submitted on April 25, 2019, were not in conformance with verbal testimony received at the public hearing on September 21, 2023. Specifically, that the 2019 comments stated that the gun violence occurred on Mr. Hilovsky's property and that the September 21, 2023, comments state that the gun violence happened on the subject property. The Appellant also argues that due to the heavily forested nature of the area a clear view from the public commenter's property to the Big River Farm, LLC driveway is not possible. For these reasons the Appellant believes the public testimony does not appear reliable.

The Appellant also notes that the applicant does not use firearms either as part of the cannabis operation or recreationally, and it is not uncommon for firearms to be used recreationally in rural areas. The Appellant states that they believe the gunshots heard by public commenters

originated on other properties in the vicinity, not the subject parcel.

The Appellant notes that the applicant was the potential target of a crime as publicized in a North Coast Journal article and further notes that the applicant has never been accused, indicted, or interviewed regarding other allegations in the news article of those submitted as part of public comment. The Appellant states that a bank account is now used for business operations and will no longer have large amounts of cash on hand, which is what motivated the attempted crime, and that the applicant has undergone all required background checks, including notification and review by the California Department of Justice and the Federal Bureau of Investigation, as part of the state licensing process.

The Appellant asserts this piece of evidence is speculative and based on hearsay and requests the Board of Supervisors review the Common Issues in Quasi-Judicial Hearings prepared by the League of California Cities, which states that findings “must be relevant to adopted, applicable criteria in statutes or policies”. The Appellant asserts this piece of evidence does not appear to be rooted in the matter of a land use decision, and the applicant should not be expected to provide evidence on impacts to public welfare that is not clearly defined in statute and that other applicants have not been required to submit.

Staff Response: The finding that a project will have a detrimental effect on Public Health, Safety and Welfare needs to be based on evidence which demonstrates the operation of the permit would endanger the public. There are reports of gun fire, a gunshot victim that has not been connected to the site, an attempted crime against the applicant and the accusation that illegal trimming was conducted on site. Efforts were made to obtain a statement from the Humboldt County Sheriff’s Office for comment or clarification but no pertinent information regarding this incident has been received. The Planning Department has not been made aware of any charges filed against the applicant, warrants for arrest, arrests made, or convictions for criminal activity.

There is no evidence available that the alleged gunfight was connected to the cannabis operation on 108-023-008 or to the applicant, nor that the gunshot victim described by the public commenter was associated with the referenced gunfight, or the cannabis operation on 108-023-008 or the applicant. A police report or other documentation regarding the referenced gunfight has not been found. To date allegations regarding the criminal and dangerous activity in the referenced public comment have not been substantiated.

The subject property is in a rural area. It is not uncommon for individuals to discharge firearms for hunting or recreational purposes in rural areas of the County. While the Appellant indicates any gunfire is coming from adjacent parcels, there is no way to verify the location of the gunfire, as there are various parcels under separate ownership in the vicinity, any of which may be engaging in recreational activities that include the use of firearms. There is no evidence to support Appellant’s claim, and likewise there is no evidence to support the claim that gunfire in the area originates from the subject parcel.

Regarding the allegations of illegal trimming and sale of cannabis on the property, staff requested METRC manifests for the operation from 2018 to 2022, as those were the years the locally issued Interim Permit was valid. The Applicant and their Agent of Record provided redacted METRC manifests which appear to show lawful selling of cannabis, both flower and trim/shake, for 2019 through 2022. METRC was not required by the State Bureau of Cannabis Control (BCC) until 2019, and many distributors, third-party processors, and similar were only initiating METRC system in 2019. Additionally, METRC was only required in 2019 for annual/provisional state license holders, and not temporary license holders. Trimming would be allowed as proposed under the Interim Permit and is not considered a violation of the terms and conditions of the Interim Permit. Based on the above, the available evidence does not support a finding that illegal trimming and sale of cannabis has occurred in association with this operation.

The alleged kidnapping plan included in the article submitted as part of public comments is not relevant to the appeal of the Planning Commission findings. The perpetrators of the alleged kidnapping plan were arrested at the airport in McKinleyville immediately after landing, and the raid referenced in the article did not take place on the subject property. These topics are, however, discussed further in the Additional Objections Found in the Public Comment section of this Staff Report.

- b) Lack of evidence presented that the approval would not be detrimental to the public, health, safety and welfare.** To support the finding that the project would be detrimental to the public health, safety, and welfare, the Planning Commission included in the adopted resolution the statement that there “*is no evidence presented that the approval of this use would not be detrimental to public health, safety, and welfare.*”

Appellant Response: The Appellant asserts this is incorrect and that all possible evidence of conformance with local and state law was submitted for review by the Planning Department and the Planning Commission. This evidence includes METRC transactions records and maintenance of a state license which requires background checks, in addition to all the technical documents normally associated with commercial cannabis applications.

The Appellant requests the Board of Supervisors review the attached Common Issues in Quasi-Judicial Hearings prepared by the League of California Cities, which states findings “*must be relevant to adopted, applicable criteria in statutes or policies*”. The Appellant asserts stating that there is no evidence that the approval of this use would not be detrimental to the public welfare is not rooted in the matter of requirements for a land use decision, and the applicant should not be expected to provide evidence on impacts to public welfare that is not clearly defined in statute that other applicants have not been required to submit.

Staff Response: Criminal activity associated with the proposed project is relevant to the adopted and applicable criteria. Specifically, it is relevant to the required finding in Section 312-17.1 that the project is not detrimental to the public health, safety or welfare. It would be

entirely appropriate to find that an operation engaged in criminal and dangerous activity would be detrimental to the public health, safety, and welfare. The issue in this case is that there is no substantial evidence that the operation has been engaged in criminal and dangerous activity. It is not against the law to be the victim of a crime, and unverified accusations by two parties, refuted by the applicant, is not sufficient evidence to find that criminal activity has occurred.

Further, the project complies with all relevant requirements and performance standards in the CMMLUO, as demonstrated in the findings and evidence contained within the resolution attached to the Staff Report presented at the Planning Commission hearing of September 21, 2023. All the technical information typically associated with commercial cannabis application have been submitted.

In addition to performance standards under the CMMLUO, information supporting that the use of the road and the well would not impact public health, safety and welfare has been submitted.

Conformance with these standards and the additional supplemental documents on file constitute significant evidence that the approval of this use would not be detrimental to public health, safety, and welfare.

- c) **Sedimentation Issues and History of Non-Compliance:** To support the finding that the project would be detrimental to the public health, safety and welfare the Planning Commission stated the manner in which the site has been graded had potential for sedimentation and the construction of greenhouses over the property line onto BLM property shows a past practice of not complying with regulations.

Appellant Justification: The Appellant notes all 1.0 pre-existing applications demonstrate a past practice of not complying with regulations. Big River Farm, LLC has operated under an Interim Permit since 2018 and has not been the subject of any other violations that would indicate a past practice of non-compliance. The grading and construction of the greenhouse in question occurred in 2015, prior to a legal pathway for the cultivation of cannabis and was removed after a boundary survey was completed which showed that it was over the shared property line. A timber stocking plan has been submitted in part to address the grading and encroachment on BLM property. This timber stocking plan has been submitted to BLM and CDFW staff, who indicated satisfaction with the stocking plan.

Regarding sedimentation issues, the Appellant also notes the site is required to operate under State Water Resources Control Board (SWRCB) standards to minimize erosion, and the site is located over 1,000 feet from the nearest stream course with a substantial forest buffer. A Water Resources Protection Plan (WRPP) is on-file with the SWRCB and County which demonstrates how the site is being or will be managed to protect water quality. The WRPP is attached to this staff report.

The Appellant also asserts the motion to deny the Big River Farms, LLC permit application based on this rationale singled out this applicant when other projects have been approved under

similar circumstances and does not appear to have been made in good faith.

Staff Response: An onsite inspection was conducted by Planning Department staff with staff from CDFW on May 18, 2023. Bear Creek is located approximately 2.5-miles southeast of the project site, at that location the project would have the unlikely potential to deliver sediment to Bear Creek. However, a fork of Jewett Creek is located 0.38-mile southeast of the project site, which is a tributary to Bear Creek. It would be difficult to determine if excess sedimentation of Bear Creek in 2019, as mentioned by public comments, could be attributed solely to development on this site. The technical information on-file indicates that the site can be managed to protect water quality and that sedimentation that may have occurred will be corrected.

The Appellant is correct to note that similar projects with a history of unpermitted grading and property line encroachment have been approved. The purpose of the CMMLUO is, in part, to permit existing commercial cannabis cultivation when possible to bring the operations into compliance with all applicable standards of the CMMLUO and eliminate existing violations. As there was no legal pathway to permitting cannabis operations prior to the adoption of the CMMLUO, all pre-existing cannabis operations could be said to demonstrate a history of unpermitted activities. These unpermitted activities are explicitly contemplated in the CMMLUO.

2. **Northern Spotted Owl:** The Planning Commission cited in their resolution that the BLM property to the south is potential habitat for Northern Spotted Owl and the General Plan calls for protection of listed species.

Appellant Justification: The Appellant notes BLM and CDFW staff had met with County staff to offer guidance to create acceptable mitigation measures to protect the Northern Spotted Owl. The Appellant also contends a neighboring parcel was approved for cannabis cultivation in close proximity to Northern Spotted Owl habitat in consultation with CDFW.

The Appellant also asserts the motion to deny the Big River Farms, LLC permit application based on this reason singled out this applicant when other projects have been approved under similar circumstances and does not appear to have been made in good faith.

Staff Response: The Appellant is correct that appropriate mitigation measures have been incorporated into the project. The project is consistent with Department Policy Statement (DPS) 16-005, Regulation of Generator Noise in areas of Habitat or Potential Habitat for the Marbled Murrelet or the Northern Spotted Owl. This DPS limits generator noise to 50 decibels at 100 feet from the noise source or at the edge of habitat, whichever is more restrictive. The project has also been conditioned to restrict construction activities to the time periods outside the nesting bird season (February 15 to September 1) or conduct pre-construction surveys no earlier than three days prior to scheduled ground disturbing activities to determine presence of nesting birds.

Specific Conditions of Approval to address concerns regarding the Northern Spotted Owl were crafted in concert with the Bureau of Land Management and California Department of Fish and Wildlife. Both agencies expressed satisfaction with the conditions, which included relocation of the nearest cultivation greenhouse away from BLM land and sensitive receptors, stocking the area with 1.1 acres of timber, grid power to serve the project, limiting the project to outdoor cultivation only (no mixed light), and a prohibition on the use of rodenticides. In this manner this project has had more coordination with these agencies over NSO than most cannabis applications and all measures have been incorporated in the project proposal or as Conditions of Approval. No additional comments or communications from CDFW or BLM have expressed further concern regarding protection of sensitive species. Documentation available on file and referral responses from the Bureau of Land Management and California Department of Fish and Wildlife indicate appropriate measures will be taken such that there will be no significant impacts to the Northern Spotted Owl.

Based on the evidence available on file, including input from BLM and CDFW, this project if approved as proposed subject to recommended conditions will be compliant with the General Plan goal of protection of listed species.

Additional Objections Found in Public Comment

The following concerns have been raised by members of the public, though they were not specifically included in the evidence for the findings adopted by the Planning Commission for the denial of the permit application.

3. **Raid on Illegal Cannabis Operation:** Public comments reference a raid on an illegal cannabis operation in November of 2018 in the 4200 block of Wilder Ridge Road. According to public comment 16,000 pounds of processed cannabis were seized and “arrests were made the nationality of which was Bulgarian”. This raid was days prior to the alleged gunfight near or on the subject property.

Staff Response: The raid referenced in this public comment was not conducted on the subject property. While the raid occurred a few days prior to the alleged gunfight according to public comment, there is no evidence available to indicate these were not separate isolated incidents. Correspondence with the Humboldt County Sheriff’s Office indicates the subject property was not identified as related to illegal grow referenced in public comment, and there are no specific confirmations of illegal activity on the subject property. No evidence made available indicates this instance was connected to the cannabis farm operated by the applicant and is therefore not germane to analysis or recommendations regarding a decision on this permit application.

4. **Applicant Was the Intended Victim of an Alleged Kidnapping Plan:** Per public comment and a newspaper article submitted to the Planning Department, the applicant was the intended victim of a kidnapping and robbery plot. The alleged perpetrators were arrested prior to carrying out the kidnapping. The submitted article indicates that several sources claim the applicant was involved in cannabis trafficking, and large quantities of cash were purportedly kept on site.

Staff Response: According to the article submitted by the public commenter and information available on file, there is no connection between the perpetrators of the alleged kidnapping plan and the applicant. The applicant and their Agent of Record provided redacted METRC manifests which appear to show a lawful selling of cannabis for 2019 through 2022. METRC was not required by the state Bureau of Cannabis Control (BCC) until 2019, and many distributors, third-party processors, and similar entities were only initiating METRC system in 2019. Per the agent of record the business maintains a bank account and can provide statements to verify its use. Ongoing use of a bank account alleviates the need for large quantities of cash to be kept on site for business operations. There is no evidence available indicating the applicant was involved in any illegal activity on the subject property or involved in any illegal activity in association with the cannabis operation on the property. The need to keep large sums of liquid assets on the property for business operations appears to be what made the applicant a target in the alleged kidnapping and robbery plan. This has been eliminated to the extent feasible through the continuing use of a bank account for the purposes of conducting business operations.

5. **Spring on Adjacent Property:** Public comment indicates concern for a spring on an adjacent property that may be affected by approval of the onsite well for cannabis irrigation.

Staff Response: The applicant has provided documentation from a certified engineering geologist which indicates there is a low likelihood that the well at the subject property is hydrologically connected to nearby surface waters, or wells in a manner that might affect adjacent wetlands, wells, and or surface waters in the vicinity.

FINANCIAL IMPACT:

The Appellant has paid the adopted fee associated with appeals to the Board of Supervisors. This fee does not cover the full cost accumulated by the Planning and Building Department of processing this appeal to the Board of Supervisors.

STRATEGIC FRAMEWORK:

This action supports your Board's Strategic Framework by its support of the Goals and Policies of of stabilizing and supporting a successful cannabis industry.

OTHER AGENCY INVOLVEMENT:

None

ALTERNATIVES TO STAFF RECOMMENDATIONS:

The Board could choose to deny the appeal and deny the application or could choose to approve a modified version of the requested entitlement. If one of these options is chosen it is recommended that the item be continued to allow preparation of appropriate documentation of the Board's action.

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
 - A. Conditions of Approval
 - B. Cultivation Operations Plan
 - C. Site Plan
 - D. Addendum to the MND for the CMMLUO prepared for the Big River Farms, LLC project
2. Justification for Appeal of Decision
3. Planning Commission Staff Report
4. Applicant's Evidence in Support of Required Findings
 - A. Big River Farms Signed LSAA Agreement
 - B. Hydrologic Isolation Assessment
 - C. Update to Well Analysis
 - D. Light Management Plan
 - E. NOI
 - F. Property Boundary Survey
 - G. Road Evaluation
 - H. Water Well Application
 - I. Well Completion Report
 - J. WRPP
 - K. DEH Worksheet
 - L. Restocking Plan
 - M. Wildlife Assessment Report
5. Adopted Resolution of the Planning Commission, Resolution No. 23-082
6. Public Comments submitted to the Planning Commission
7. Referral Agency Comments and Recommendations

PREVIOUS ACTION/REFERRAL:

Board Order No.: N/A

Meeting of: 9/21/2023 Planning Commission

File No.: 23-1258