CITY of CARPINTERIA, CALIFORNIA

December 12, 2017

County of Santa Barbara Board of Supervisors
c/o Mike Allen, Chief Deputy Clerk of the Board
105 E. Anapamu Street, Room 407
Santa Barbara, CA 93101

Re: Consideration of State Cannabis Licensing Options

Dear Chair and Supervisors:

As Mayor of the City of Carpinteria, I write to you on behalf of the Carpinteria City Council (City) to request that the Board of Supervisors not take any actions to support or enable cannabis businesses to acquire temporary or annual State licenses prior to the adoption and effectuation of the County's own Cannabis Land Use Ordinance and Licensing Program (CLUO&LP). The City feels strongly that to do otherwise would effectively circumvent the intended purpose of the County's local ordinance adoption process, which is to create comprehensive regulations for commercial and medical cannabis activities. Further, the City believes that to allow or facilitate the issuance of temporary or annual State licenses for cannabis activities occurring within the Coastal Zone prior to the adoption and certification of the County's Local Coastal Program (LCP) Amendment to Article II, Santa Barbara County Coastal Zoning Ordinance (CZO) as part of the CLOU&LP effort would be legally inconsistent with planning and zoning laws, the County's LCP, and the California Coastal Act (Coastal Act). Such action may also violate the California Environmental Quality Act (CEQA), as the County does not appear to have conducted any environmental analysis of the interim procedures under consideration.

The City intends this letter to serve as comments on the CLOU&LP, the Draft Programmatic EIR on the CLOU&LP, and any actions the Board contemplates taking with respect to an interim authorization program.

Background

This letter concerns two actions taken by the Board of Supervisors (Board) at its November 14, 2017 hearing.

First, the Board directed staff to return to the December 14, 2017 Board hearing with further details for the development of a procedure to allow existing, legal nonconforming medicinal cultivators to request a letter of authorization from the County Executive Office in support of individual efforts to obtain a temporary State license under the State's new licensing program anticipated to be operative in January 2018.[1]

Second, the Board directed staff to return with additional details for an interim procedure by which the County could determine that owners and operators seeking annual cannabis licenses are consistent with the County's proposed CLUO&LP before it is effective and operative within the Coastal Zone to enable owners and operators to obtain annual licenses from the State. As directed by the Board, this

[1] The State licensing authority may issue temporary licenses that are valid for 120 days with possible 90-day extensions if an application for an annual State license has been submitted to the State licensing authority.

procedure would apply to existing, legal nonconforming, and new or expanded operations, and medicinal or recreational operations.

The City of Carpinteria has grave concerns with these contemplated procedures. As has been well documented elsewhere, including the County's Draft EIR for the CLUO&LP, there is a high concentration of existing cannabis activities within the Carpinteria Valley. Many of these cannabis operations are located in close proximity to sensitive receptors including, but not limited to, schools and residences. Numerous complaints have been filed with the City and County concerning the nuisance, quality of life, and possible health effects of excessive exposure to cannabis operations. By the County's own admission, there is no definitive figure on just how many cannabis operations are in existence within the County or the Carpinteria Valley in particular, nor of their respective compliance with, or legal status under, existing County or State regulations. Additionally, the County has previously acknowledged its inability to effectively monitor, ensure compliance with, or enforce existing regulations. The City is concerned that a process allowing the legitimization of existing illegal cannabis operations and the creation of new cannabis operations before the proper regulatory controls are in effect could exacerbate current impacts on City residents and lead to future complications the County may not be anticipating.

Temporary Licenses During Gap/Transition Period

The County's letter of authorization procedure for existing, legal nonconforming medicinal growers, as discussed on November 14th, would make no effort to verify or fact check the statements made by cultivators seeking licenses. Instead, the County would simply accept a sworn affidavit from the cultivators that they were in operation prior to January 19, 2016 and would ask these cultivators to voluntarily supply information about property owner consent, odor control, and security measures. There would be no mechanism for validating the claims or statements provided by the growers, and, as several Board members acknowledged, penalties for providing false information in affidavits are unlikely to be imposed due to lack of County investigation and verification. Nor is there any clear basis under this contemplated procedure for the County to refuse to issue a letter of authorization on behalf of a grower, since there is no means to enforce voluntary submittal of requested information. It appears that anyone who submits an affidavit, without any verification as to its accuracy, will receive a letter of authorization.

The City believes the only appropriate options are for the County to either develop a procedure for verifying claims of legal nonconforming status, or short of that, not act on applications for temporary State licenses until the County's CLUO&LP is adopted and in effect. By not issuing a letter of authorization or similar statement, the State would not be able to issue temporary State licenses to alleged existing, legal nonconforming growers. To do otherwise provides an incentive and opportunity for unregulated growers to gain legitimacy under the State's licensing program, potentially leading to claims of vested rights and making it more difficult to shut down illegal operations, if or when growers are ever found to be in violation of their sworn affidavit statements. The County's submittal of letters in support of issuance of temporary State licenses is clearly a benefit to growers, but there is significant risk and cost for the County in taking such action and no benefit provided to the County or its residents, particularly since there is currently no fee or taxation structure in place for these operations.

Annual Licenses During Gap/Transition Period

The City also strongly believes that the only appropriate response to applications submitted for annual State licenses during the interim period between January 2018, when the State will begin accepting and issuing licenses, and when the County's CLUO&LP becomes operational (Interim Period) is to inform the State licensing authority that the applicant is not in compliance with local regulations since

the CLUO&LP is not yet in effect. There is no viable manner by which the County could conclusively demonstrate compliance with yet to be determined or approved regulations, nor does there appear to be any way to enforce the regulations if they have not yet become operative. This is of particular importance within the Coastal Zone, where it is expected that the County's CLUO&LP would not become effective until approximately June 2019.

Adding further potential complications, it is not uncommon for regulations adopted by the County for the Coastal Zone to change through the Coastal Commission certification process. If a cannabis operator has established operations in compliance with the current draft regulations, how will the County force the operator to make modifications to comply with the Coastal Commission's revisions to the CLUO&LP? The operator will almost certainly claim some form of vested rights or legal nonconforming status. This could lead to a patchwork of applicable regulatory controls throughout the County, making enforcement even more challenging.

As with temporary licenses, the lack of a fee or tax structure for these uses would mean there is no benefit and significant risk and cost to the County and its residents associated with facilitating operation of these unregulated uses.

Interim Authorizations Violate Zoning

Granting interim authorizations to conduct uses not allowed by the CZO and prior to the effectiveness of regulations that the Board has determined are necessary to control proposed cannabis uses runs directly counter to the purpose of planning and zoning laws. A zoning scheme is akin to a contract whereby landowners forego certain rights to use land in the assurance that the use of neighboring property will be similarly restricted, in order to enhance the overall community welfare (*Topanga Assn. for a Scenic Cmty. v. Cty. of Los Angeles* (1974) 11 Cal. 3d 506, 517.). If the County issues interim authorizations to cannabis operations, it is breaking the contract that exists between landowners in the agricultural zones that only the activities allowed under the current CZO shall be permitted. In *Neighbors in Support of Appropriate Land Use v. Cty. of Tuolumne* (2007) 157 Cal.App.4th 997, 1009, the court found that a County violated this principle when it approved a use by Development Agreement that was not allowed in the zone, rather than rezoning the property. By issuing interim authorizations to conduct cannabis activities before the Coastal Commission has certified the County's proposed Ordinance allowing the activities, the County would be creating the same ad hoc exceptions to zoning that the court struck down in the *Tuolumne* case.

Inconsistency with Coastal Act and County's LCP

The County cannot legally take actions that would be inconsistent with its own LCP, such as determining compliance with non-existent regulations or acting in a way to facilitate the issuance of annual State licenses for an activity not currently allowed within the Coastal Zone. There are no provisions in the County's existing CZO for commercial cannabis uses. Nearly all cannabis uses would meet the definition of "development" pursuant to the Coastal Act and the County's CZO, and therefore would require issuance of a Coastal Development Permit (See CZO §§ 35-58 and 35-169.2(1).). Until the proposed regulations allowing cannabis operations have been approved by the Coastal Commission, the County cannot make the findings required for issuance of a Coastal Development Permit to any cannabis operation that would involve development (See CZO § 35-169.5 [findings required for approval of Coastal Development Permit include that the project conforms to the Local Coastal Land Use Plan and laws, rules, and regulations pertaining to zoning].) "Any proposed amendment to the Local Coastal Program shall not take effect until it has been certified by the Coastal Commission." (CZO § 35-180.7.). Approving uses not yet allowed by the County's LCP directly undermines this requirement and violates the Coastal Act (See *Charles A. Pratt Constr. Co. v.*

California Coastal Comm'n (2008) 162.Cal.App.4th 1068, 1075 [LCP's are not merely a matter of local law; they embody state policy].). The County should not be approving any new cannabis uses until the CLUO&LP is certified through the LCP Amendment process and becomes effective.

Inconsistency with California Environmental Quality Act

The November 14th Board letter requested the Board determine that establishing a process to provide letters of authorization to applicants seeking temporary State licenses is exempt from CEQA because the letters are "administrative activities that will not result in direct or indirect physical changes in the environment." While the proposed letter of authorization procedure may be an administrative activity, it may result in indirect physical changes in the environment. Specifically, providing letters of authorization will have the effect of allowing existing cannabis growers who claim to have legal, nonconforming operations to obtain temporary State licenses to operate and potentially expand without any verification of the legality of the existing operations. As such, the County's issuance of letters of authorization may indirectly result in physical changes in the environment by facilitating legitimizing cannabis cultivation without any evaluation of compliance with existing local regulations or any requirement to comply with existing or proposed County regulations intended to address traffic, odor, public health and safety hazards, and land use incompatibility impacts of such operations. Therefore, establishing a procedure by which the County would assist in allowing existing cannabis growers to obtain State licenses to operate prior to the establishment of local regulations requires analysis under CEQA.

While the amendments to Article X adopted by the Board on November 14th require legal non-conforming uses to terminate or apply for a permit within 6 months of the operative date or 18 months of the effective date of the CLUO&LP, it is unclear how or when uses that the County is considering to allow to become established or expand during the Interim Period would be brought into compliance with the CLUO&LP when it becomes operative. Even if a similar amortization period is established for uses authorized in the Interim Period, uses could be in a prolonged permitting process and/or delay condition compliance such that they are operating for years outside of local regulations and during this time causing significant adverse impacts on the environment. This is particularly likely in the Coastal Zone, where local regulations are not anticipated to be certified by the Coastal Commission until approximately June 2019.

Any process by which the County takes action to allow cannabis uses to become established or expand will result in physical changes to the environment and is therefore subject to environmental review pursuant to CEQA (CEQA Guidelines, § 15378.). The County cannot delay environmental review until its regulations are effective. It must conduct environmental review prior to taking any action that allows cannabis uses to establish or expand, even on a provisional basis.

The Draft EIR for the CLUO&LP identifies many significant impacts that would result from adoption of the proposed CLUO&LP. These environmental impacts would likely be even greater if cannabis uses were allowed to become established prior to the operative date of the CLUO&LP and the implementation of mitigation measures required by CEQA. As Supervisor Wolf stated at the Board's November 14th hearing, the Draft EIR does not analyze any interim procedures. Therefore, it cannot be relied upon as environmental review for any proposed interim actions. The only action the County can take without conducting CEQA review is to enforce its existing ordinances, which do not allow commercial cannabis operations.

The Draft EIR for the CLUO&LP is a program-level document which concludes that many of the potential environmental impacts are too speculative to be evaluated at the program level and instead explicitly states that cannabis-related development will be evaluated in future environmental review on

a case-by-case basis. Would the Interim Period compliance review procedures be considered a discretionary decision, meaning each proposal would be subject to CEQA review? Or, would cannabis uses proposed during the Interim Period be considered ministerial or administrative decisions exempt from CEQA? If it is the latter, any process by which the County authorizes cannabis uses to establish or expand during the Interim Period would violate CEQA, as the Draft EIR relies on environmental clearance being conducted on a project-level basis to fully mitigate certain impacts such as traffic and affordable/farmworker housing demand. Further, it does not appear that even the Program-level mitigation proposed in the Draft EIR for known impacts, including traffic mitigation fees and in-lieu housing fees, could be imposed in the Interim Period if only a "compliance review" and no land use permit is required. The County would also have no way to directly enforce the Program-level mitigation measures or the requirements of the CLUO&LP, meaning that an operator could demonstrate or commit to compliance during the County's compliance review site visit or consultation and then operate in a way that does not comply, causing potentially significant environmental effects. The County's only apparent recourse would be to attempt to get the state to revoke the operator's State license. Given the lack of clear procedures in this regard, significant environmental damage could result even if the County was successful in getting the State to revoke an operator's license.

Presumably cannabis operations proposed in the Coastal Zone would be able to apply for building and other County permits to facilitate new or expanded operations once they complete the compliance review process. Again, this interim approval process will allow operators to establish claims for vested rights and legal nonconforming status that will enable them to circumvent the regulations of the CLUO&LP once it becomes effective. Further, this interim process could allow operators to later claim that the proper environmental baseline for any future environmental review that may be required is the existing operations. This would completely undermine the CEQA review process for the CLUO&LP, potentially resulting in numerous operations that would be able to sidestep mitigation by establishing their operations as existing conditions.

Finally, the project description in the Draft EIR does not include the issuance of interim authorizations to legitimize legal nonconforming uses and allow the establishment of new cannabis uses prior to the CLUO&LP becoming effective in the Coastal Zone. The project description in an EIR must be accurate. If it is inaccurate because it fails to discuss the entire project, the analysis of impacts in the EIR will likely reflect the same mistake, leading to an insufficient EIR (See *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 393.). Since the Draft EIR does not analyze the potential impacts of the interim authorizations the County is contemplating, such an authorization program would require its own environmental clearance. This would likely require an EIR due to the potential significant impacts of allowing cannabis operations to be established without any regulations in place to provide controls to protect the public health, safety, and welfare.

Conclusion

The City requests that the County do the following as to existing and proposed cannabis activities in the Coastal Zone: (1) make a determination as to which existing cannabis operations qualify as legal nonconforming under Article X and issue only to those operations temporary authorizations that enable them to obtain temporary State licenses; (2) refuse to issue any authorizations for existing cannabis operations that the County determines do not qualify as legal nonconforming under Article X; (3) not issue any form of authorization or approval for a proposed new cannabis operation until the CLUO&LP has been certified by the Coastal Commission and is in effect. The City believes that these actions are necessary to protect the health, safety, and welfare of the residents of the City of Carpinteria, as well as residents of the County.

Sincerely,

Fred Shaw
Mayor of the City of Carpinteria

CC: Dave Durflinger, City Manager
City Council Members
Dylan Johnson, on behalf of Brownstein Hyatt Farber Schreck, LLP, acting as City Attorney
Steve Goggia, Community Development Director
Nick Bobroff, Senior Planner
Steve Hudson, District Director, California Coastal Commission
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