

Testimony of Tom Infusino to the Calaveras County Board of Supervisors 2-14-17

Issue: Would a ban on commercial cannabis cultivation, drafted by the County, and passed by the Calaveras County Board of Supervisors, be exempt from CEQA?

Conclusion: The ban would not be exempt. CEQA applies to the approval of County health and safety ordinances and codes. The passage of a ban would likely have significant impacts on the environment. There is no statutory exemption for cannabis bans. The categorical exemptions do not apply. As a result of unusual circumstances, the ban may have significant impacts on the environment.

Recommendation: First, extend the urgency ordinance, since no Supervisors wants the industry unregulated for any amount of time, and the urgency ordinance expires once a permanent ban/regulation is put in place by the board or the voters. Second, release the draft EIR on commercial cannabis regulation for public review and comment in March, so that all can learn from it before they vote. Third, as part of the comment period on the draft EIR, the Board should direct staff to add the commercial cannabis ban alternative to the EIR for full analysis. While this may trigger a 45-day recirculation of the EIR, it will make the final Board regulation/ban much less vulnerable to legal challenge. Fourth, if the ban initiative passes and is challenged in court, or if the ban initiative is defeated, continue processing the County ban/regulation. This ensures that the final regulation/ban will be in place before the urgency ordinance runs out. It provides the assurance that, if the ban initiative is ruled invalid in court, there is some regulation/ban to immediately take its place.

Analysis:

1) Is the ban a project carried out by the government subject to CEQA compliance?

Yes. CEQA applies to the adoption of county zoning ordinances and county codes relating to health and safety. (*Heniger v. Board of Supervisors* (1986) 186 Cal.App.3d 601 [County must complete an EIR on ordinance to regulate alternative sewage disposal systems].) As you know from the Board's discussion of the ban initiative, CEQA does not apply to voter sponsored initiatives.

2) May the ban have significant impacts on the environment?

More precisely, the question should be stated: Is there substantial evidence in the record suggesting that a commercial cannabis ban may have a significant impacts on the existing human environment including aesthetics, agriculture, air quality, biological resources, climate change, cultural resources, geology/soils, hydrology/water quality, land use planning, mineral resources, noise,; population, employment & housing; public health, hazards, & solid waste; public safety and services; recreation, traffic & Circulation, utilities, growth inducement, or cumulative impacts?

The effects of the ban are measured against the existing regulatory and the existing environmental setting. (CEQA Guidelines, sec. 15125.)

The existing environmental setting is that there are over 700 registered commercial grows, and an over 700 unregistered commercial grows. 70% of these are in District 2. The upcountry area in District 2 has the climate most suitable for the crop. The forested, and soon to be reforested, areas in District 2 have the capacity to visually shield these crops from neighbors. The more densely populated communities

along the highway 49 corridor and to the west are in grasslands and patchy oak woodland that do not visually screen crops. Many of the existing grows are on smaller lots and in residential neighborhoods creating land use conflicts. Many of the unregistered grows have been observed stealing water, excessively grading land without erosion control, using herbicides and pesticides in unsafe fashions, creating unsafe conditions and land use conflicts in residential neighborhoods, and providing substandard housing and sanitary facilities for workers. (Note: I do not have a good estimate on the acreage affected by these grows, or if the grows are in sensitive wildlife habitat, but the Planning Department's satellite photos may help to get figure that out.)

Over the last year, the over 700 registered grows have been struggling to meet the requirements of the urgency ordinance that regulates water supply, grading, aesthetics, public safety and other adverse effects on the environment. Non-conforming grows that have been reviewed are not receiving their final permit approvals. About \$3.6 million were collected in application fees. About \$1.2 million have been used to hire and train personnel to inspect grows, and to shut down unregistered grows. The voters have passed an initiative to tax commercial cannabis. That would raise about \$7 – 11 million per year for the County's general fund. It not yet foreseeable how that money would be spent and how it would benefit or harm the environment, and thus there is no need to speculate on that.

Substantial evidence in the record indicates that a ban on commercial cannabis cultivation may have the following significant environmental impacts. Because the registered grows will no longer be subject to the county regulations to protect the environment, the growers are likely to stop spending the extra money trying to comply with those regulations. Thus, one can expect that formerly registered grows will return to practices that fail to control erosion, fail to use herbicides and pesticides responsibly, fail to screen grows, fail to protect public safety, and fail to provide safe and sanitary housing for workers. Because the County will have neither application fees nor cannabis taxes to finance enforcement of the ban, illegal commercial cultivation is likely to continue unabated. Finally, the additional impacts from these formerly registered grows may contribute to significant cumulative impacts associated with continued clearcut harvesting, hazard tree removal, salvage logging, and the Butte Fire. These cumulative impacts may affect aesthetics, biological resources, soils, housing, hazardous materials, and utilities. Thus, unless there is a statutory exemption, an EIR is needed.

3) Is a ban exempt from CEQA compliance?

First, there are certain specified activities that, despite their significant impacts, have been exempted from compliance with CEQA by the terms of the statute itself. For example, the State chose to exempt from environmental review the Los Angeles Olympics, and the construction of some sports stadiums. However, there is no such statutory exemption from CEQA for local government cannabis regulations or bans. That is why the County is preparing an EIR on the final ordinance (regulation or ban).

Second, there is a "common sense exemption for a project if "it can be seen with certainty that there is no possibility that the activity in question may have a significant impact on the environment." (CEQA Guidelines, sec. 15061, subd. (b)(3).)

Finally, there are also categories of government activities that are exempt from CEQA review, because by their nature they have no significant impact (e.g. repainting the lines on the roadways, regular maintenance, etc.) In this instance, some might note that CEQA Guidelines section 15307 and 15308 exempt activities of local governments that protect natural resources and the environment. However,

as noted above, the commercial cannabis ban does not have this effect. Similarly, while CEQA Guideline 15321 exempts enforcement activities by law enforcement staff, it does not exempt the actual passage of the code. Finally, if there is an unusual circumstance that results in the activity having a direct or cumulatively significant impact, then the activity is not exempt. (CEQA Guidelines, sec. 15300.2) In this instance, the unusual circumstances noted above result in the potentially significant impacts of the cannabis ban.

In short, the commercial cannabis ban may have significant impact on the environment, and therefore would not qualify for a “common sense” or a categorical exemption.

4) What CEQA document would give the County the most legal protection?

If a ban were approved without an EIR, a legal challenger need only prove that substantial evidence in the record supports a “fair argument” that there may be one significant impact on the environment from the ban. That means, the County may have 10 studies indicating that there will be no impact, but if the opposition can point to only one reputable study that there will be an impact, then the ban will be set aside, and an EIR will be required prior to the ban’s re-approval. Thus, completing a short “negative declaration” claiming there is no impact, or trying to rely on a categorical exemption to avoid any type of report, makes the ban most vulnerable to a legal challenge on CEQA grounds. State another way, the “fair argument” standard is a very low threshold for a ban challenger to meet. (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 310.) Given the facts of this case, a ban with no EIR gives the County almost no legal protection from a successful CEQA law suit.

By contrast, a ban approved with an EIR gives the County the most protection from a CEQA lawsuit. In that instance, the county need only identify “substantial evidence” in the record to support its findings. (CEQA Guidelines, sec. 15091, subd. (b).) That means a challenger can have 10 studies claiming that the County’s findings are wrong, but if the County has just one reputable study that supports its findings, then the County has complied with the law.

5) Conclusions.

If Supervisors want a ban/regulation that is insulated from legal attack, they will draft a ban/regulation that does not suffer from legal flaws, and they will complete an EIR on that ban/regulation. If they want a ban/regulation that is effective, they will provide the funding for enforcement.