The Willits Environmental Center
630 South Main Street
Willits, California 95490

Mendocino County Counsel
501 Low Gap Road, Room 1030
Ukiah, CA 95482

February 26, 2023

Mendocino County Board of Supervisors
501 Low Gap Road, Room 1010
Ukiah, CA 95482

Re: A jointly proposed commonsense solution to Vegetation Modification Issues from Willits Environmental Center & Attorney Hannah Nelson

Dear Mr. Curtis and Supervisors,

We are combining forces and speaking with ONE voice to provide a commonsense solution to the evidentiary and processes related to Vegetation Modification issues that are holding up cultivation applicants and preventing MCD from moving forward using consistent and adequate screening under 10A.17. We hope that the recent attempts to pit us against one another is halted and the temptation to further complicate review of applications in the name of diligence is prevented.

Introduction

It is imperative to not prevent Phase 1 applicants from moving through the permitting system. WEC and Hannah Nelson are in agreement that the ordinance does not need to be changed to effectuate a path forward for that cohort. We are in agreement that guardrails must be put in place to prevent MCD from further obstructing the valid claims of applicants that suspected tree removal was not in violation of the ordinance and that even if it were, in most instances, Phase 1 applicants would be able to satisfy a Compliance Plan that required an evaluation that would, (1) even with the tree removal, determine the impact to the

environment, especially sensitive species and habitat, is less than significant, or, (2) the impacts will be mitigated within the time allowed for a Compliance Plan to bring it within that threshold.

While there are areas of daylight between our perspectives on one item detailed below, we have one vision of the path forward and the need to urgently process cultivation applications in the manner intended under the ordinance consistent with the County's adopted Initial Study Mitigated Negative Declaration. Specifically, we see no reason why any changes need be made in the ordinance for Phase 1 applicants with respect to tree removal, and we find that Compliance Plans outlined in 10A.17.100, provide a clear path forward for some that may have wandered astray of the tree removal prohibitions in 10A.17.040 (k).

1. We unanimously believe that NO change to the ordinance is necessary for Phase 1 applicants with respect to tree removal and that only changes to the ordinance that impact future applications may be contemplated. We also firmly believe that changes with respect to the tree removal issue would require environmental review regardless of whether it is more restrictive than the intent or wording of the MND and ordinance or more permissive.
    a. Willits Environmental Center takes the position that a change to the ordinance to define "for purposes of developing a cultivation site" as proposed in the suggested option 1, which was approved by the Board on 2/7/23, would necessitate environmental review. WEC objects to what it believes is a narrowing of the intent of the mitigation measure in the MND because that definition does not include roads and water storage and other activities despite the reference to those items in the background leading up to the mitigation measure in the MND. WEC contends that an ordinance change of this type is not merely a "clarification" that would eliminate the need for environmental review but would constitute exactly the type of language change that DOES require such review. Regardless, WEC does not believe that the ordinance change is necessary to accomplish to moving forward with a solution for Phase 1 applicants and jointly recommends with Ms. Nelson, that only if any changes to the ordinance for Phase 2 and Phase 3 applications are going to be contemplated they must be preceded by an environmental review.
    b. Hannah Nelson believes that Option 1 of the proposed definition change to the ordinance is unnecessarily encompassing "alteration, grading, removal, or other development of land" instead of specifically limiting the definition to tree removal as stated in the mitigation measure and the ordinance, and therefore, requires environmental review if a change in language from the current ordinance is contemplated. Regardless, Ms. Nelson does not believe that the ordinance change is necessary to accomplish to moving forward with a solution for Phase 1 applicants and jointly recommends with WEC, that only a change for Phase 2 and Phase 3 applicants should be contemplated and that such change be preceded by an environmental review of the proposed change in language of the ordinance.

c. Both WEC and Ms. Nelson agree that NO definition change is needed for Phase 1 applicants with respect to tree removal and that if any ordinance change is contemplated on the issue of the tree removal prohibition, it must go through environmental review before adoption. Given the state of the impending rolling deadlines for state licensure, it is unrealistic to think such review could be done and implemented without further delaying application review. Fortunately, we strongly believe that no definitional change is needed for the current applicant pool and that any change for future applicants may be done with proper environmental review without jeopardizing the processing status of applicants.

2. The County's delay in processing applicants has created a proof problem that is not the fault of the applicants. In addition to supporting the directive of the Board to accept a sworn declaration as valid proof of the fact that there was no tree removal in violation of 10A.17, we propose that the following thresholds must be met by the County if it seeks to challenge the Affidavit and require further investigation:

    a. An issued Code Enforcement, CalFire/CDF, CDFW, or Water Board violation related specifically to the alleged tree removal. Nothing in this provision prevents the affiant from submitting further information regarding proof that the issue has been successfully resolved to the satisfaction of the resource agencies and thereby ending the inquiry.
    b. Other evidence that wholly controverts the affidavit with respect to protected tree removal not for a disease or safety concern, where that controverting evidence has been verified by a county or state agency to have occurred in the time after the passage of 10A.17. Anonymous complaints and allegations initiated by MCD and satellite imaging alone, even if appearing to wholly controvert the Affidavit, is not sufficient to defeat an affidavit or cause further investigation unless there is independent corroboration that the tree removal was in violation of 10A.17 and occurred after 5/4/2017. While helpful if provided, the presence or absence of a less-than 3-acre conversion exemption permit, is insufficient proof to overcome an affidavit. While helpful if provided, the presence or absence of supporting evidence documenting disease or safety concerns by the affiant is insufficient proof to overcome an affidavit. Nothing in this provision shall in any way diminish the ability of a resource agency from determining whether tree removal was illegal under state law and the process outlined under 10A.17.090 (T) shall still be applicable to removal conducted prior to 5/4/17 if tree removal of a protected species was conducted that was not otherwise exempt. Referrals, if made, must be made by the County in a timely manner, must be made to all resource agencies at the same time, and the 30-day response period shall be applicable to those agencies.
    c. Further, it may be helpful if there are future ordinance changes applicable to future applicants, to specify language in the ordinance that any tree removal going forward requires specific documentation of the removal, of the disease, the species, or other relevant factors. However, it is not recommended that the

documentation require hiring professionals if photographic proof establishes the fact that the species is not in the protected species list, there is evidence of disease, the tree(s) is/are apparently dead or dying, or other evidence of a safety and fire prevention need.

3. If there has been a violation of 10A.17 for Phase 1 applicants, the Compliance Plan provided in 10A.17.100 can be utilized to require evaluation of impact and mitigation, if needed.

10A.17.100 (C) (1) allows for Compliance Plans for Phase 1 applicants for whom a Mendocino County Code violation has been discovered during the application process. While to date, the Compliance Plan option has typically been used to allow applicants to obtain building permits, the language of 10A.17.100 (C) does NOT limit the use of this tool in such a manner:

> (C) Discovery of any violation(s) of the Mendocino County Code during the Permit application process will be treated in a similar manner to violation(s) that are self-reported during an active amnesty program. …
>
> (1) If the discovered violation(s) are directly related to a Phase One Permit application, **and/or** if it is discovered that the Permit would authorize a particular use for which a separate County permit is required but has not yet been obtained, the applicant shall be required to agree in writing to a compliance plan prior to issuance of the Permit. Emphasis added.

If a Compliance Plan were to specify that an applicant must have a referral to a resource agency or must provide a biological assessment by a qualified biologist that the overall impact, even with tree removal that occurred in violation of 10A.17 as established using the evidentiary standards and thresholds above, is either less than significant or can be mitigated further to bring it within the overall less than significant level, then the environmental concerns would be addressed and the applications not always denied.

We recognize and agree that there may be instances where even the use of this tool would be insufficient for an applicant to overcome the tree removal if egregious. However, we strongly believe that between this tool and the Sensitive Species and Habitat Review process, egregious instances of environmental harm would not result in the issuance of a permit. It is likely that none of the current Phase 1 applicant pool have egregious violations, if at all, given the length and cost of licensing and the current cannabis market conditions. While it is true that this opportunity would not be applicable to Phase 2 and Phase 3 current applicants, it is a viable solution for Phase 1 applicants.

County Counsel may argue that the use of Compliance Plans under 10A.17.100 (C) (1) would be contrary to the tree removal prohibition language of 10A.17.090 (T). However, it is possible to harmonize the provisions and acknowledge that the catch-

all allowance for Compliance Plans in 10A.17.100 (c) (1) was enacted with the concrete knowledge of the more specific language of 10A.17.090 (T) and that the two can co-exist. *Medical Board v. Superior Court (Lam)* 88 Cal App.4th 1004, 1018, (2001). Specifically, since the Compliance Plan provision does NOT limit the TYPE of Code Violation for which the Compliance Plan may be issued both because it is silent about any County Code Sections that would be exempt from its applicability and because it uses the term "and/or" when going on to detail what happens when the violation may be one that requires a separate permit, it is possible to allow a Compliance Plan for the tree removal prohibition violation, which could be viewed as a violation of County Code.

This interpretation, coupled with the specifics of what might be required in the Compliance Plan if a tree removal violation for a Phase 1 applicants is confirmed when processing the cultivation application, is consistent with the goals of the MND and the mitigation measure regarding the tree removal prohibition which is to ensure that overall, the project has a less than significant impact. While ideally, less than significant impact would be ensured through strict adherence to the mitigation measure, it is NOT inconsistent for it to occur, eventually, through the Compliance Plan that is available to Phase 1 applicants. This is particularly true because of the SSHR process, which, while required by a separate mitigation measure in the MND, is wholly relevant to the issue of less than significant impact for sensitive species and habitats, the primary reason for the protective measures to begin with.

It is important to contextualize the suggested use of Compliance Plans for Phase 1 applications: Phase 1 is CLOSED. There will be no more Phase 1 applicants. The Compliance Plan mechanism in the ordinance was intended to assist in processing Phase 1 applications in a responsible manner.

<u>Conclusion</u>

It is imperative to not prevent Phase 1 applicants from moving through the permitting system. WEC and Hannah Nelson are in agreement that the ordinance does not need to be changed to effectuate a path forward for that cohort. We are in agreement that guardrails must be put in place to prevent MCD from further obstructing the valid claims of applicants that suspected tree removal was not in violation of the ordinance and that even if it was, in most instances, Phase 1 applicants would be able to satisfy a Compliance Plan that required an evaluation that would, (1) even with the tree removal, determine the impact to the environment, especially sensitive species and habitat, is less than significant, or, (2) the impacts will be mitigated within the time allowed for a Compliance Plan to bring it within that threshold.

We will not be pitted against one another or sustain a claim by County Counsel that one of us is more likely to succeed in a lawsuit than the other. Rather, we demand

a reasonable approach and we have done the work and analysis to provide a path forward. We strongly implore you to take our collective advice and implement our suggestions.

Submitted in solidarity,

Ellen Drell

Ellen Drell for Willits Environmental Center and Hannah L. Nelson, Attorney at Law