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Via Electronic Mail

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Re: Amended Analysis of Humboldt Cannabis Reform Initiative

Dear Chair Madrone, Director Ford, and Members of the Board:

As you know, this firm represents the proponents of the Humboldt Cannabis Reform Initiative (the "Initiative"). We have reviewed the Amended Analysis and Recommendations regarding the Initiative ("Amended Analysis") prepared by the Humboldt County Planning and Building Department for the June 27, 2023 Board of Supervisors meeting.

As a general matter, we are disappointed in the Amended Analysis, which fails to respond constructively to many of the clarifications and corrections we offered in our April 20, 2023 letter (the "April 20 Letter") regarding the County's original analysis. Rather than admit any error, the Amended Analysis either doubles down on erroneous interpretations or raises new, equally inaccurate objections to the Initiative. County staff appears to be looking for interpretations that harm growers, even where those interpretations are not supported (much less compelled) by the Initiative's text.

Such an approach may reflect the political strategy of Initiative opponents like the Humboldt County Growers Alliance.[1] But it would be incredibly short-sighted and self-defeating for the County to commit to inaccurate interpretations of the Initiative just because the Growers Alliance believes such interpretations are politically expedient. Indeed, we strongly suspect that if the Initiative does pass, growers will be urging the County to adopt interpretations along the lines of those advanced by the Initiative's proponents, rather than the overblown and inaccurate readings advanced by the Growers Alliance.

By continuing to seek out problematic interpretations, the County may be limiting its own flexibility—flexibility that, as the April 20 Letter explains, the Initiative itself preserves. The County also is missing an opportunity to represent all of its residents, not just the most vocal proponents of a single industry.

Given the very short period of time the County allowed for review of the Amended Analysis, which was released at close of business on Friday, June 23, this letter addresses the errors in the analysis only briefly. Although we are not encouraged by County staff's approach to these issues thus far, we remain willing to talk with staff and members of the Board in an effort to clarify the Initiative's intent, purpose, and actual effects.

The Amended Analysis Mischaracterizes the Initiative's Effect on "Expanded" Operations

As our April 20 Letter explained, the Initiative would not prevent existing permit holders from making changes to their operations (such as adding solar panels and water tanks) that would improve the environment by reducing energy and water usage. The Amended Analysis responds by citing purportedly inconsistent statements on the Initiative proponent's website and in a letter to the editor of a local news site. Setting aside whether these statements are a proper guide to interpretation of the Initiative, there is no inconsistency.

The website and letter to the editor state that adding water tanks *could* be deemed an "expanded" use. This is true, insofar as adding water tanks for the purpose of increasing water usage or cultivation intensity or area would be an expanded use. However, consistent with the April 20 Letter, adding water tanks for the purpose of

[1] Many of the new arguments in the Amended Analysis bear an uncanny similarity to arguments raised by the Humboldt County Growers Alliance in a May 18, 2023 "policy analysis."

reducing surface diversions or groundwater usage without increasing overall resource use or intensity would not be an "expanded" use.

The Amended Analysis does not squarely address this point. Nor does it address the addition of solar panels. Instead, the Amended Analysis offers a slew of new objections based on what the analysis claims is the County's different understanding of non-conforming uses. Specifically, the Amended Analysis expresses concern that "persons holding non-conforming permits cannot modify their permits to expand the activities on-site such as adding a nursery or processing, or distribution or expanding to a Micro-business. . . . Adding any of the activities identified would require additional resource usage." (Amended Analysis at 16).

The Amended Analysis misses the point. The Initiative addresses new and expanded "commercial cannabis cultivation" activities, which are specifically defined in the text. (Initiative at 7.) Under this definition, adding a new nursery to an existing operation might be an "expanded" use if it results in a total cultivation area exceeding 10,000 square feet. But "processing," "distribution," and "Micro-business" are not "cannabis cultivation" activities within the Initiative's definition. Nothing in the Initiative requires the County to treat them as such.

The Amended Analysis claims "this is not clear from the four corners of the HCRI." (Amended Analysis at 16.) This is incorrect. The Initiative is clear on this point. The Initiative's definition of "cannabis cultivation" includes only "planting, growing, harvesting, drying, curing, grading, or trimming of cannabis." (Initiative at 7.) References to processing, manufacturing, distribution, dispensing, delivery and sale in the definition are relevant only to the definition of "commercial" activities—that is, the commercial "intent" underlying the cultivation of cannabis. Accordingly, activities like processing, distribution, dispensing and sale may be "commercial," but they are not part of the definition of "cannabis cultivation."

Finally the Amended Analysis claims that the Initiative's "expressed goals" do not include protecting small-scale cultivators. (Amended Analysis at 18.) Once again, the Amended Analysis is incorrect. As we explained in our June 21, 2023 letter addressing an identical claim by the Sanders Political Law firm (at the behest of the Growers Alliance), controlling Supreme Court authority requires consideration of the whole text and context of the Initiative in determining its purpose. (*See Cal. Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 933-34.) The Initiative's *express* goals include "support[ing] small-scale, high-quality cannabis cultivation" and "encourag[ing] small-scale production." (Initiative Goal CC-G1.) Other language in the Initiative's findings and background section further support this purpose, as the Amended Analysis appears to

acknowledge. The Amended Analysis, like the Sanders firm's letter, is simply wrong about the Initiative's purposes.

The Amended Analysis Introduces New Errors Related to Light Deprivation and Mixed-Light Cultivation

We appreciate the Amended Analysis's correction of the statement in the original analysis that the Initiative would render all mixed-light cultivation non-conforming. Unfortunately, the Amended Analysis appears to introduce a new error in this section.

The Amended Analysis claims that because light deprivation does not involve the use of artificial light under the County's definition, "[f]armers who currently are permitted for outdoor cultivation and practice light deprivation would become non-conforming because they would no longer be defined as outdoor but would be Mixed Light." (Amended Analysis at 19.) This conclusion does not follow. The Initiative's "Mixed Light Tier 1" definition includes "Natural light and light deprivation . . . without the use of artificial light." (Initiative at 8.) Farmers using light deprivation without artificial light—consistent with how the Amended Analysis describes the County's definition of light deprivation—would be using Mixed Light Tier 1 methods, which would conform to the requirements of Policy CC-P2. The amended Analysis does not explain why the County would nonetheless consider these permits "non-conforming."

The Initiative Requires In-Person Inspections—Which the Amended Analysis Now Claims the County Is Already Planning on Conducting

The Amended Analysis states that although remote inspections have occurred in the past, starting this year the County will conduct in-person inspections on all permitted sites. Accordingly, the Initiative will simply provide legal support for—and ensure compliance with—a practice the County plans to undertake anyway. County staff has apparently decided that in-person inspections are worth the time and effort, and the Initiative's proponents agree.

The Initiative Does Not Add a New, Discretionary "Renewal" Process

The Amended Analysis claims that the Initiative creates "uncertainty" about the requirements for renewal of an expired permit. According to the analysis, the current ordinance says permits "expire" after one year, but it does not say those permits expire "unless renewed." The analysis claims that in "land use planning vernacular," a "renewal" requires "an application, a review, and a discretionary decision."

These contentions are puzzling for two reasons. First, the Amended Analysis seems to suggest that the County may not be enforcing the permit expiration requirement in the current ordinance. As our April 20 Letter pointed out, the fact that the County does not seem to have any process for addressing expired permits is the fault of the existing ordinance, not the Initiative. Second, the Amended Analysis does not cite anything in the County zoning ordinance that requires all "renewals" to be treated as discretionary decisions. Rather, it relies on "land use planning vernacular." The County should be regulating land use based on its duly adopted ordinances, not a "vernacular" understanding of planning terms. Again, the problem appears to be a gap in the existing ordinance, not any ambiguity in the Initiative.

The Amended Analysis also suggests that under existing County practice, "expired" permits are considered not to have expired once an inspection occurs. (Amended Analysis at 20 ["The existing ordinance simply requires an inspection showing that the site complies with the Zoning Ordinance and permit conditions."].) The initiative adds two requirements: (1) that inspections be conducted in person, and (2) that credible complaints be resolved. Nothing in the Initiative requires the County to alter its approach to expiration and renewal as a general matter.

Finally, any uncertainty about the need for "renewal" could be avoided if the County conducts inspections *before* annual permits expire. The Initiative does not add a new, discretionary "renewal" process, and any "uncertainty" about this is misplaced.

The Initiative Does Not Prevent Growers From Holding Multiple *Non-Cultivation* Permits

The Amended Analysis continues to claim that the Initiative would prevent permittees from holding both cultivation permits and other permits related to processing, distribution, sale, and tourism activities. Once again, this claim is incorrect. As we explained in the April 20 Letter, the reference to an "active permit" in the context of Policy CC-P5 must be understood as meaning an "active commercial cannabis cultivation permit." Moreover, as discussed above, the Initiative's definition of "cannabis cultivation" does not include processing, distribution, dispensing, and sales. Permits for these activities would not be subject to the restrictions of Policy CC-P5.

The Amended Analysis also objects to our suggestion that the County may have flexibility to combine activities into a single permit. But the objection misses the point that permitting structure and processing largely remain within the County's control and are not dictated by the terms of the Initiative. Because the Initiative does not address or regulate non-cultivation activities, holding multiple separate permits for non-cultivation

activities would not violate CC-P5. But to the extent that combining activities into single permits offers the County flexibility consistent with the Initiative's purposes, the County could use that flexibility.

The Initiative Supports and Improves Coordination with Other Agencies

The Amended Analysis claims that the County already does more than the minimum required by ordinance in terms of coordinating with other agencies. If this is correct, then this is another example of the Initiative codifying and providing legal support for a current practice that the ordinance does not clearly require.

The Initiative Ensures Public Hearings Are Not Waived

The Amended Analysis asserts that in practice, the County never waives public hearings for discretionary cannabis cultivation permits; according to the analysis, "the public and all stakeholders understand that discretionary cannabis projects go to a public hearing." (Amended Analysis at 25.) If this is true, then it is difficult to understand why County staff would object to a provision ensuring that this remains the case. Again, the Initiative apparently codifies an existing practice that the ordinance doesn't presently require.

The Initiative Guarantees Hydrologic Analysis of the Impact of New Water Wells

The Amended Analysis objects to the Initiative's hydrologic analysis requirement on two grounds: (1) that the language of Initiative is "not specific," which purportedly creates uncertainty, and (2) that the County "has required analysis from a hydrogeologist to document that the water is not from a diversionary source, spring or impacting an existing well." Both objections are unfounded.

First, the language of the Initiative *is* specific. The Amended Analysis ignores Standard CC-S1, which gives specific effect to the policy language quoted in the analysis. Standard CC-S1 requires a hydrologic study that meets particular requirements. There is no ambiguity or uncertainty.

The Amended Analysis does not seriously dispute that groundwater withdrawal can affect springs and watercourses. Rather, staff's concern seems to be that "[s]ome people" believe water wells always affect surface flows and that "[m]embers of the public have disagreed with" hydrogeologic studies. (Amended Analysis at 25-26.) But the Initiative simply requires that the studies themselves confirm no impact on streams, watercourses, or other wells, not that "some people" or all "members of the public" agree

with those conclusions. Once again, there is no uncertainty in the Initiative itself on this point.

Second, the County claims that it is already requiring analysis of new water wells to ensure no such effect occurs. Once again, the Initiative provides explicit support for what the County claims it is already doing, which hardly seems a valid ground for objection.

The Initiative Prohibits Self-Certification of Category 4 Road Standards—And That's All It Does

Advancing another new argument, the Amended Analysis claims the Initiative would eliminate the County's discretion to approve cultivation on roads not meeting Category 4 standards with a Special Permit.

The Amended Analysis once again misses the key point. The Initiative does not impose *any* new substantive requirement that roads meet Category 4 standards. Rather, where Category 4 standards (or the "same practical effect") are *already otherwise required* for new or expanded permits, the Initiative would require an engineer's report to support a conclusion that a road actually meets that standard. This would eliminate County's staff's ability to accept "self-certified" evaluations. But it does not eliminate the County's discretion to determine where Category 4 road standards apply in the first place.

The Initiative Ensures Residents Receive Notice of Projects Affecting Them

The Amended Analysis claims that the County should not have to provide public notice of discretionary applications for farms over 3,000 square feet because "there are very few complaints" about "sites that are outdoor, use light deprivation, and are less than 10,000 square feet in area." (Amended Analysis at 29-30.) The analysis thus asserts that requiring public notice is overly onerous.

The Amended Analysis here offers only a policy argument, albeit one that makes clear County staff favors the narrow interests of growers over the broader interests of residents who may be affected by cultivation operations. The Initiative's public notice provisions are not onerous. Notice would be required "in a variety of forms so as to ensure that all persons who may be affected by proposed cultivation operations are reasonably likely to receive actual notice." (Policy CC-P7.) The Amended Analysis presents no evidence that the specific steps required by the Initiative in CC-S4 are impracticable. Rather, the Amended Analysis here simply argues that the burden on a

single applicant of providing public notice outweighs the interests of everyone who may be affected by cultivation. This is a policy judgment, not a presentation of facts.

The Initiative's proponents believe that the County's policy judgment—in this and many other areas—is incorrect. That is exactly why they've proposed an initiative. The final policy judgment will be made by the voters.

The Amended Analysis Fails to Remove Argumentative Language

Finally, as discussed in our April 20 Letter, the original Analysis contained a substantial amount of argumentative language characterizing the Initiative's findings as "false" or "misleading" without any factual support. The Amended Analysis neither responds to nor corrects these deficiencies in the original Analysis.

The Board Should Direct Staff to Correct the Analysis

For all of the foregoing reasons, and for the reasons stated in our April 20 Letter and our response to the Sanders Political Law letter, we respectfully request that the Board direct staff to examine the Amended Analysis again and to correct the errors and deficiencies we have identified.

Thank you for your consideration.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP

Kevin P. Bundy

cc: Kathy Hayes, Clerk of the Board of Supervisors (via email)
Natalie Duke, County Counsel's Office (via email)

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