

ORDINANCE NO. 1444

AN UNCODIFIED INTERIM URGENCY ORDINANCE OF NAPA COUNTY IMPOSING A TEMPORARY MORATORIUM ON CULTIVATION OF INDUSTRIAL HEMP WITHIN THE UNINCORPORATED AREAS OF NAPA COUNTY

The Board of Supervisors of Napa County ordains as follows:

SECTION 1. Findings and Declarations.

The Board of Supervisors makes the following findings in support of the enactment of this interim urgency moratorium ordinance:

- A. Pursuant to Article XI, section 7, of the California Constitution, Napa County ("County") may adopt and enforce ordinances and regulations not in conflict with general laws to protect and promote the public health, safety, and welfare of its citizens.
- B. Pursuant to Government Code section 65858, to protect the public safety, health, and welfare, the County may adopt an interim ordinance prohibiting land uses that may be in conflict with contemplated land use regulations that the county is studying or considering or intends to study within a reasonable time.
- C. Pursuant to Government Code Section 25123 (d), the County may enact an ordinance for the immediate preservation of the public peace, health, or safety, which contains a declaration setting forth the facts constituting the urgency, requiring passage by a four-fifths vote, and which shall be effective immediately.
- D. The state and federal law governing the definition and cultivation of industrial hemp is complex, evolving, and as yet incomplete and uncertain, causing multiple issues which may adversely affect the public peace, health, or safety of residents or of visitors to Napa County, as outlined below.
- E. In 2013, the California Legislature adopted the California Industrial Hemp Farming Act, (SB 566 (Leno), Food and Agricultural Code (hereafter "FAC") sections 81000-81011, addressing the cultivation of industrial hemp, but it did not become effective until the Attorney General could certify that cultivation was authorized by federal law. As originally adopted, FAC § 81006 provided that industrial hemp shall be grown only as a densely planted fiber or oilseed crop, or both, in acreages of not less than five acres at the same time, and no portion of an acreage of industrial hemp shall include plots of less than one contiguous acre. Pruning, tending, and culling of individual plants was prohibited, as was possession, outside of a field of lawful cultivation, of resin, flowering tops, or leaves that were removed from the hemp plant, even though only non-psychoactive varieties of *Cannabis sativa* L. were permitted to be cultivated as industrial hemp. SB 566 also amended the definition of "marijuana" (now referred to as "cannabis") in Health and Safety Code § 11018 to exclude industrial hemp, and established the definition of industrial hemp

in § 11018.5¹. This definition and the prescribed cultural practice restrictions effectively prohibited cultivation of *Cannabis sativa* L. as feminized plants for higher levels of cannabidiol (CBD) for purposes of CBD extract or CBD oil production from the leaves or flowering tops.

- F. The 2014 Farm Bill, P.L. 113-79, § 7606, 7 U.S.C.A § 5940, authorized an institution of higher education (as defined in section 101 of the Higher Education Act of 1965 (20 U.S.C. § 1001)) or a State department of agriculture to grow or cultivate industrial hemp² if:
- (1) grown or cultivated for purposes of research conducted under an agricultural pilot program or other agricultural or academic research; and
 - (2) the growing or cultivating of industrial hemp is allowed under the laws of the State in which such institution of higher education or State department of agriculture is located and where the research occurs.
- G. Proposition 64, the Adult Use of Marijuana Act (AUMA), passed by the voters in November 2016, included provisions affecting the regulation of industrial hemp. Section 3 included among AUMA’s purposes subsections (f) that products be “comprehensively tested by independent testing services for the presence of contaminants, including mold and pesticides, before it can be sold,” (h) “licensed nonmedical marijuana businesses to follow strict environmental and product safety standards as a condition of maintaining their license,” and (aa) to allow industrial hemp to be grown as an agricultural product, and for agricultural or academic research, and regulated separately from the strains of cannabis with higher delta-9 tetrahydrocannabinol (THC) concentrations. Section 9 amended the definition of industrial hemp in Health and Safety Code § 11018.5³, and amended provisions of the Industrial Hemp Farming Act but left in place requirements for its dense planting

¹ “Industrial hemp” means a fiber or oilseed crop, or both, that is limited to nonpsychoactive types of the plant *Cannabis sativa* L. and the seed produced therefrom, having no more than three-tenths of 1 percent tetrahydrocannabinol (THC) contained in the dried flowering tops, and that is cultivated and processed exclusively for the purpose of producing the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, or any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks, except the resin or flowering tops extracted therefrom, fiber, oil, or cake, or the sterilized seed, or any component of the seed, of the plant that is incapable of germination.

² 7 U.S.C.A. § 5940, provides: “The term “industrial hemp” means the plant *Cannabis sativa* L. and any part of such plant, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.”

³ “(a) ‘Industrial hemp’ means a fiber or oilseed crop, or both, that is limited to ~~nonpsychoactive~~ types of the plant *Cannabis sativa* L. ~~and the seed produced therefrom,~~ having no more than three-tenths of 1 percent tetrahydrocannabinol (THC) contained in the dried flowering tops, *whether growing or not,* ~~and that is cultivated and processed exclusively for the purpose of producing the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant;~~ *the resin extracted from any part of the plant; and* ~~or any other every~~ compound, manufacture, salt, derivative, mixture, or preparation *of the plant, its seeds or mature stalks,* ~~except the resin or flowering tops extracted produced therefrom, fiber, oil, or cake, or the sterilized seed, or any component of the seed, of the plant that is incapable of germination.~~

(b) The possession, use, purchase, sale, cultivation, processing, manufacture, packaging, labeling, transporting, storage, distribution, use and transfer of industrial hemp shall not be subject to the provisions of this division or of Division 10 (commencing with Section 26000) of the Business and Professions Code, but instead shall be regulated by the Department of Food and Agriculture in accordance with the provisions of Division 24 (commencing with Section 81000) of the Food and Agricultural Code, inclusive. [deletions shown as strikeouts, additions as italics.]

as a fiber or oilseed crop, and restrictions on pruning, tending, or culling. Section 9.6 of AUMA amended the effective date of the Industrial Hemp Farming Act to January 1, 2017, without regard to federal law. AUMA also added a definition of “marijuana products” as Health and Safety Code § 11018.1, which “means marijuana that has undergone a process whereby the plant material has been transformed into a concentrate, including, but not limited to, concentrated cannabis, or an edible or topical product containing marijuana or concentrated cannabis and other ingredients.” One promise of AUMA was that cannabis derived products for human consumption by ingestion or topical application would be produced while adhering to product safety and environmental standards, and be tested for contaminants. Industrial hemp regulation was still inconsistent with its cultivation for production of CBD.

- H. In 2017, SB 94, the Medicinal and Adult Use Cannabis Regulation and Safety Act (MAUCRSA), was enacted to integrate cannabis regulation provisions of AUMA with the Medical Cannabis Regulation and Safety Act originally adopted by the Legislature in 2015. MAUCRSA also amended the provision related to the regulation of industrial hemp in Health and Safety Code § 11018.5 (b)⁴ which left regulation of cannabis products for human consumption with applicable production quality standards and product testing in place.
- I. In September 2018, SB 1409 was enacted, in which the definition of industrial hemp in Health and Safety Code § 11018.5(a) was yet again amended, deleting the reference to its being a crop for fiber or oilseed production. The Industrial Hemp Farming Act was also amended to its current form, including amendment of § 81006 to remove requirement for dense planting and restrictions against pruning, tending, or culling. SB 1409 includes the finding, “By removing limitations on the manner in which industrial hemp may be grown and the uses for which it may be grown, this act removes barriers to the growth of industrial hemp as an agricultural product, and for agricultural or academic research,” however the bill does not address the product safety or testing requirements of other law regarding cannabis products. In § 81007, the California Department of Food and Agriculture is authorized establish by regulation an agricultural pilot program pursuant to Section 7606 of the federal Agricultural Act of 2014, 7 U.S.C.A. § 5940.
- J. In December 2018, the President signed into law the 2018 Federal Farm Bill, H.R. 2, P.L. 115-334, which removed industrial hemp⁵ from the federal list of controlled substances⁶ and authorizes the U.S. Department of Agriculture to create quality control standards for commercial hemp production, further giving states that desire to have primary regulatory authority over the production of hemp the ability to adopt their own state plans. The state plan may include a reference to a law of the state regulating the production of hemp, to the extent consistent with federal law. The U.S. Department of Agriculture has not yet promulgated regulations for the

⁴ ~~“(b) The possession, use, purchase, sale, cultivation, processing, manufacture, packaging, labeling, transporting, storage, distribution, use and transfer of industrial hemp shall not be subject to the provisions of this division or of Division 10 (commencing with Section 26000) of the Business and Professions Code, but instead shall be regulated by the Department of Food and Agriculture in accordance with the provisions of Division 24 (commencing with Section 81000) of the Food and Agricultural Code, inclusive. [deletions shown as ~~strikeouts~~, additions as *italics*.]~~

⁵ 7 U.S.C.A. § 1639o (1), “The term ‘hemp’ means the plant *Cannabis sativa* L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.”

⁶ 21 U.S.C.A § 802 (16)(B).

approval of state or tribal plans for the cultivation of industrial hemp, and is not expected to do so until sometime in 2020. Therefore, it has not approved any “plans” set forth by the any State.

- K. FAC Section 81001 calls for the Industrial Hemp Advisory Board to advise the California Secretary of Food and Agriculture and make recommendations to the Secretary pertaining to the cultivation of industrial hemp, including but not limited to, developing the requisite industrial hemp seed law and regulations, enforcement mechanisms, and the setting of an assessment rate.
- L. The California Department of Food and Agriculture has adopted regulations for the registration fee for growers of industrial hemp for commercial purposes and seed breeders in California, 3 C.C.R. § 4900, effective 4/25/2019, and for the pre-harvest sampling and testing of industrial hemp as emergency regulations, 3 C.C.R. §§ 4940 – 4946; 4950 – 4950.1, which went into effect June 10, 2019.
- M. There is now pending in the California legislature two major bills as emergency measures to take immediate effect that may significantly alter the regulatory landscape for cultivation of industrial hemp, and the production, testing and manufacture of CBD hemp products for human or domestic animal consumption in California, that have each passed one house of the legislature and are in final stages of amendment, SB 153 and AB 228. Passage of one or both bills, and signature by the Governor is anticipated by the end of this legislative session. Adoption of local regulations would best await completion of action on this pending legislation.
- N. Public comment advocating for the unregulated cultivation of industrial hemp was predominantly on the basis of making medicinal CBD available at a cheaper cost. Production of CBD for medicinal purposes is permissible and regulated under the Medicinal and Adult Use Regulation and Safety Act (MAUCRSA), Business and Professions Code section 26000, *et seq.*, which requires testing of product for purity (free of pesticides, mold, heavy metals, contaminants, etc.), potency, and labeling of cannabinoid content, whereas CBD hemp products under the Industrial Hemp Farming Law, Food and Agriculture Code section 81000 – 81011, as yet includes no such safeguards to protect the health of consumers within the California regulated cannabis marketplace.
- O. Due to the fact that industrial hemp and cannabis are derivatives of the same plant, Cannabis sativa L., the appearance and odor of industrial hemp and cannabis are indistinguishable, particularly when hemp is cultivated with feminized flowering plants for high levels of CBD for purposes of CBD extract or oil production. Absent a laboratory performed chemical analysis for tetrahydrocannabinol (THC) content, the two plants cannot be distinguished.
- P. In order for the Agricultural Commissioner’s Office, Sheriff’s office and Code Enforcement personnel to verify that harvested product in transit is permissible industrial hemp and not cannabis intended for sale in the illicit market, field analyzer kits must be purchased at an approximate cost of \$13,500 per kit. The Sheriff’s office would need at least two kits, the Agricultural Commissioner at least one and Code Enforcement would need at least one. This would cost the County a minimum of \$54,000.00, if cultivation of industrial hemp were to be permitted in Napa County.

- Q. The current County land use regulations related to crop production does not address the unique legal, land use, environmental, and public health, safety, and welfare issues and impacts associated with industrial hemp cultivation.
- R. Division 24 of the FAC, allows an "Established Agricultural Research Institution" to cultivate or possess industrial hemp with a greater than .3% THC level, causing such plant to no longer conform to the legal definition of industrial hemp, thereby resulting in such "research" plants constituting cannabis.
- S. The definition of "Established Agricultural Research Institution" as provided in FAC Section 81000 is vague. Without clear guidelines, the ability and likelihood that cultivators will exploit the "Establish Agricultural Research Institution" exemption to grow industrial hemp with more than .3% THC is great. SB 153, as currently being amended, would address this problem.
- T. Due to the fact that industrial hemp and cannabis are indistinguishable, the cultivation of industrial hemp by an "Established Agricultural Research Institution", or others, prior to the adoption of reasonable regulations poses similar threats to the public health, safety or welfare as the cultivation of cannabis.
- U. Except for the personal cultivation of up to six cannabis plants, the County currently prohibits all commercial cannabis activities, which include cultivation, possession, manufacturing, processing, storing, testing, labeling, distribution, selling, giving away, or providing medical or adult-use cannabis and cannabis products, whether or not for profit.
- V. Napa County Elections Division has validated signatures submitted in support of placing a voter initiative on the March 3, 2020 election ballot which would allow certain commercial cannabis activities in the unincorporated County. Because it is unknown whether the initiative will be approved by County voters, and because industrial hemp and cannabis are not compatible crops due to the potential for pollen drift from hemp plants to cause adverse effects on the cultivation of cannabis plants, County has a compelling interest to ensure any regulations of cannabis and industrial hemp are in harmony with one another.
- W. The Sheriff will have to investigate each industrial hemp grow conducted by an "Established Agricultural Research Institution", or others, prior to the adoption of reasonable regulations, to ensure that the grow is not cannabis. Investigations of industrial hemp grows are time consuming, labor intensive, and potentially dangerous.
- X. The cultivation of industrial hemp prior to the adoption of reasonable regulations will create an increased likelihood of criminal activity, and will attract crime and associated violence, which may include without limitation, theft, robberies, illegal firearms, shootings, and homicides.
- Y. Industrial hemp can serve as a host to mites and/or fungal disease and at this time, there are very few pesticides registered for hemp to combat them. In this circumstance, such pest issues may move into other nearby crops, including vineyards

- Z. The cultivation of industrial hemp prior to the adoption of reasonable regulations is harmful to the welfare of residents, creates a nuisance, and threatens the safety and crops of any nearby agricultural operations including vineyards and wineries.
- AA. Napa County's primary agricultural product is wine grapes worth approximately 1 billion dollars annually. Currently there is insufficient research into how growing industrial hemp in proximity to vineyards may affect grapes and vines. Therefore there is an urgent need for the Agricultural Commissioner to assess the impacts of growing industrial hemp and to explore reasonable regulatory options relating thereto due to the wine grape industry's vital role in Napa County's economy.
- BB. There is an urgent need for the Agricultural Commissioner, and the Planning Department to assess the impacts of industrial hemp grown by "Established Agricultural Research Institutions", and others, and to explore reasonable regulatory options relating thereto.
- CC. Napa County has a compelling interest in protecting the public health, safety, and welfare of its residents and businesses, in preventing the establishment of nuisances.
- DD. In order to ensure the effective implementation of the County's land use objectives and policies, a moratorium on the establishment and/or approval of industrial hemp cultivation is necessary.
- EE. CEQA. The Board of Supervisors hereby finds that this ordinance to temporarily prohibit Industrial Hemp cultivation in all zones is not subject to review under the California Environmental Quality Act (CEQA) pursuant to CEQA Guidelines, 14 California Code of Regulations, sections 15060, subdivision (c)(2) (the activity will not result in a direct or reasonably foreseeable indirect physical change in the environment) and 15061, subdivision (b)(3) (there is no possibility the activity in question may have a significant effect on the environment). In addition to the foregoing general exemptions, the board of Supervisors further finds that the ordinance is categorically exempt from review under CEQA under the Class 8 Categorical Exemption, 14 C.C.R. § 15308 (regulatory activity to assure protection of the environment).

SECTION 2. Declaration of Urgency.

- A. Based on the findings set forth above, the Board finds and declares that there is a current and immediate threat to the public health, safety and welfare arising from the absence of adequate and reasonable regulations in the County Code or the California Code of Regulations regulating cultivation of Industrial Hemp in the unincorporated areas of the County.
- B. Based on the findings above, the Board of Supervisors determines that this interim urgency ordinance is urgently needed for the immediate preservation of the public peace, health, safety, and welfare pursuant to the Government Code section 25123 (d), and 65858, and is necessary to provide additional time to prepare the studies and reports required to consider a comprehensive ordinance and/or general plan amendment addressing regulation of Industrial Hemp cultivation in the unincorporated areas of Napa County.

SECTION 3. Moratorium.

In order to protect the public health, safety and welfare pursuant to the provisions of Government Code Sections 25123 (d) and 65858, during the term of this Ordinance, including any extensions hereto, a moratorium is hereby placed on the following:

- A. Cultivation of Industrial Hemp by any person or entity for any purposes, which is expressly prohibited in all zoning districts in the unincorporated area of the County. Additionally, during this interim ordinance, including any extension hereto, "Established Agricultural Research Institutions" as defined in FAC Section 81000, will similarly be prohibited from cultivating industrial hemp for agricultural or academic research purposes.
- B. Acceptance of any application for or issuance of a registration, permit or entitlement, or approval of any type, that authorizes the establishment, operation, maintenance, development or construction of any facility or use for the purpose of the cultivation of Industrial Hemp in the unincorporated area of the County.

SECTION 4. Effective Date.

Pursuant to Government Code section 25123, subdivision (d), this urgency ordinance shall become effective immediately upon adoption.

SECTION 5. Enforceability.

Violations of this ordinance shall constitute a public nuisance and may be enforced and abated through any available remedy provided by the Napa County Code or other law.

SECTION 6. Expiration.

This moratorium shall be of no further force or effect upon the expiration of forty-five (45) days from the date of adoption, unless extended in accordance with Government Code Section 65858.

SECTION 7. Severability.

If any section, subsection, sentence, clause, phrase, or portion of this ordinance or the application thereof to any person or circumstance is held to be invalid or unenforceable by a court of competent jurisdiction, such invalidity shall not affect the remaining portions or other applications of the ordinance, and the provisions of this ordinance are declared to be severable.

The foregoing Ordinance was introduced, read, and passed at a regular meeting of the Napa County Board of Supervisors, State of California, held on July 23, 2019 by the following four-fifths vote:

AYES: SUPERVISORS DILLON, PEDROZA, WAGENKNECHT,
RAMOS and GREGORY

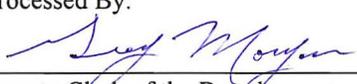
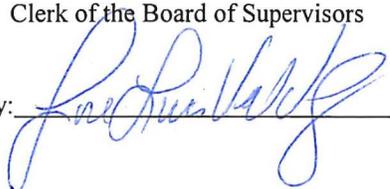
NOES: SUPERVISORS NONE

ABSTAIN: SUPERVISORS NONE

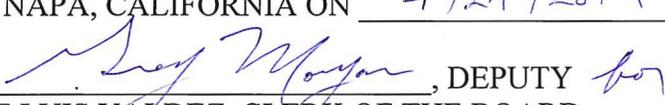
ABSENT: SUPERVISORS NONE

NAPA COUNTY, a political subdivision of the
State of California

By: 
RYAN GREGORY, Chair of the
Board of Supervisors

<p>APPROVED AS TO FORM Office of County Counsel</p> <p>By: <u>Chris R.Y. Apallas (e-sign)</u> Deputy County Counsel</p> <p>Date: <u>July 15, 2019</u></p>	<p>APPROVED BY THE NAPA COUNTY BOARD OF SUPERVISORS</p> <p>Date: July 23, 2019 Processed By:  Deputy Clerk of the Board</p>	<p>ATTEST: JOSE LUIS VALDEZ Clerk of the Board of Supervisors</p> <p>By: </p>
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I HEREBY CERTIFY THAT THE ORDINANCE ABOVE WAS POSTED IN THE OFFICE OF THE
CLERK OF THE BOARD IN THE ADMINISTRATIVE BUILDING, 1195 THIRD STREET ROOM
310, NAPA, CALIFORNIA ON 7/24/2019.

 DEPUTY *for*
JOSE LUIS VALDEZ, CLERK OF THE BOARD