



## Sonoma County Board of Zoning Adjustments STAFF REPORT

**FILE:** UPC17-0034  
**DATE:** December 12, 2019  
**TIME:** 1:20 PM  
**STAFF:** Lauren Scott, Project Planner

Appeal Period: 10 calendar days

### SUMMARY

**Applicant:** Igor Stolper; IJRS, LLC

**Owner:** Larry and Sandra Bertolone

**Location:** 1737 Wood Road, Fulton CA 95439

**APN:** 059-040-004

**Supervisorial District No.:** 4

**Subject:** Cannabis Use Permit for Mixed-Light and Indoor Cultivation

**PROPOSAL:** Request for a limited-term Use Permit for 10,000 square feet of mixed-light cannabis cultivation, 4,506 square feet of indoor cannabis cultivation, and associated processing on a 23.37-acre parcel.

**Environmental Determination:** Exempt from CEQA per CEQA Guideline Section 15061(b)(4), as the project will be rejected or disapproved by a public agency.

**General Plan:** Diverse Agriculture (DA)

**Zoning:** Diverse Agriculture (DA), Minimum lot size of 10 acres (B6 10), Scenic Resources (SR), Valley Oak Habitat (VOH)



**Ord. Reference:** Sections 26-88-250(a); 26-88-250(d); 26-88-250(f) – Commercial Cannabis Uses

**Land Conservation**

**Contract:** N/A

**Application Complete**

**for Processing:** May 8, 2018

**RECOMMENDATION:** Recommend that the Board of Zoning Adjustments deny the request for a limited-term Use Permit for 10,000 square feet of mixed-light cannabis cultivation, 4,506 square feet of indoor cannabis cultivation and associated on-site processing.

**EXECUTIVE SUMMARY:** Staff is recommending denial of the limited-term cannabis Use Permit application because:

- The applicant cannot obtain the necessary federal permits for the project. The project site is located within designated Critical Habitat for the California Tiger Salamander, a federal-listed and state-listed Threatened species for which Incidental Take Permits are required from all state and federal agencies with jurisdiction over the California Tiger Salamander. The applicant does not have and cannot obtain the required permits due to Federal policy preventing Take Permit issuance for cannabis (a controlled substance) operations.
- The project includes structures located within the 100-foot setback from designated wetlands required by the Sonoma County General Plan and California State Waterboard Cannabis Cultivation Policy. No verified wetland delineation has been submitted with this application and the applicant is unable to obtain a determination from the U.S. Army Corps of Engineers due to Federal laws pertaining to cannabis as a controlled substance.

Pursuant to the California Environmental Quality Act (CEQA) and CEQA Guidelines, the project is exempt under CEQA Guideline Section 15061(b)(4), in that it will be rejected or disapproved by a public agency.

**ANALYSIS**

**Background:**

**Regulations:** In October 2015, the Governor signed three bills into law collectively known as the Medical Cannabis Regulations and Safety Act establishing the State's first licensing system for commercial medicinal cannabis activity. In November 2016, California voters approved Proposition 64, legalizing the adult use and possession of cannabis.

On December 20, 2016, the Sonoma County Board of Supervisors adopted the Cannabis Ordinance (No. 6189) to establish a comprehensive local program to permit and regulate medical cannabis to align with State Regulations. The ordinance was intended to preserve environmental resources, protect the health and safety of communities, and ensure the industry contributes positively to the economic vitality of the County.

In June 2017, the Governor signed a bill creating a single regulatory scheme for both medical and adult use cannabis businesses, the Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA).

On October 16, 2018, the Sonoma County Board of Supervisors adopted an amendment to the Cannabis Ordinance, extending the maximum term of cannabis use permit from one year to five years, authorizing adult use in addition to medical with a use permit, and clarifying a number of additional items.

Since the Controlled Substances Act of 1970, cannabis has been classified by the Federal Government as a Schedule I controlled substance. Due to this classification, federal agencies will not participate in the permitting of operations that cultivate, manufacture, process or transport cannabis. Cannabis projects that require a permit from a federal agency are unable to obtain one.

Application Processing: On August 29, 2017, the applicant applied for a use permit for 4,472 square feet of indoor cannabis cultivation, 4,850 square feet of mixed-light cannabis cultivation, and 28,560 square feet of outdoor cannabis cultivation. The applicant has been enrolled and is currently operating under the Penalty Relief Program for 528 square feet of indoor cannabis cultivation, 2,651 square feet of outdoor cannabis cultivation, and 5,150 square feet of mixed-light cannabis cultivation.

The application was amended on April 23, 2018 to request a Use Permit for 4,506 square feet of indoor cannabis cultivation and 10,000 square feet of mixed light cultivation.

On May 30, 2018, Permit Sonoma deemed the application complete for processing.

On October 25, 2018 staff visited the site to discuss the project site's location in California tiger salamander critical habitat and the on-site vernal pool complex. On January 11, 2019, the applicant was sent a letter requesting a USACE wetland re-delineation, a Mitigation Monitoring and Reporting Plan (MMRP) detailing mitigation banking measures in order to address potential habitat take, evidence of correspondence with CDFW, and additional information on processing.

On January 25, 2019, the applicant was sent a letter stating that the project would be denied unless the applicant withdrew the application within 90 days from the date of the letter (refer to Exhibit L). Ninety days from January 25, 2019 occurred on April 24, 2019. The applicant did not request the application be withdrawn within the required time frame. A letter sent by Monk & Associates on behalf of the applicant (Exhibit J) was received by staff on March 22, 2019 but did not resolve the issues leading to the recommendation for denial outlined in the January 25 letter.

On September 3, 2019 a follow-up letter (EXHIBIT M) was sent to the applicant stating that the project issues had not been resolved and the project would be brought before the Board of Zoning Adjustments for denial. On October 10, following a meeting with the applicant, a letter was sent confirming the application would be brought to a hearing for denial (EXHIBIT N). On December 2, 2019, a letter was submitted by Monk & Associates on behalf of the applicant (Exhibit P) responding to the denial.

Property and Business Ownership:

The applicant for the project is Igor Stolper, acting on behalf of IJRS, LLC. The landowners are Sandra and Larry Bertolone.

**Project Description**

The applicant requests a limited-term Use Permit for 10,000 square feet of mixed-light cannabis cultivation and 4,506 square feet of indoor cannabis cultivation and associated processing. The project would operate with three full-time employees year-round and an additional 20 employees during the trimming and planting seasons, which will occur four times a year for approximately one month.

Description of Cultivation: The 10,000 square feet of mixed-light cannabis cultivation would occur within six greenhouse structures. Three of the six greenhouses currently exist and contain 5,150 square feet of mixed-light cultivation as allowed under the project site's Penalty Relief Program status. The three proposed greenhouses would result in an additional 4,850 square feet of mixed-light cannabis cultivation. Indoor cultivation would occur within an existing garage and two proposed metal barns measuring 2,880 square feet each. The garage would contain 528 square feet of indoor cultivation while the metal barns would each contain 1,989 square feet of indoor cultivation.

Processing: The applicant proposes to use the existing structures as well as construct new structures at the project site for processing. Five proposed storage containers measuring 960 square feet each would be used for processing activities as well as portions of the existing house, garage, and greenhouses. The project also includes the construction of a new, 800 square-foot metal barn for the drying of cannabis.

Water and Sewer Service: Water would be provided via two on-site wells. Wastewater would be disposed of via an on-site septic system.

Construction: The project includes the construction of:

- Two metal barns for indoor cultivation measuring 2,880 square feet each (5,760 square feet total)
- Five storage containers for processing and cloning measuring 960 square feet each (4,800 square feet total)
- One metal barn for processing activities measuring 800 square feet
- Three greenhouses for mixed-light cultivation measuring 1,120 square feet, 1,080 square feet, and 2,650 square feet, respectively (4,850 square feet total)

In total, the project includes 16,210 square feet of new construction for cannabis cultivation and processing. A boiler heating shed, compost area, and trash enclosure are also proposed as part of the project. The project also includes the demolition or relocation of several structures to accommodate the mixed light portion of the operation, specifically a boiler heating shed, two mixing tanks, a shed, and a portion of a fence.

Hours of Operation: The project would operate from the hours of 8:00 am to 8:00 pm seven days a week. Deliveries and shipping would be limited to the hours of 8:00 am to 5:00 pm seven days a week.

Waste Management: All garbage and refuse generated by the operation at the project site would be dealt with as described in the applicant's waste management plan. All waste would be disposed of in accordance with local and state codes, laws, and regulations.

Odor Control: Mixed-light cultivation would comply with the 300-foot setback from residences and the 100-foot setback from property lines. Cultivation areas would be equipped with carbon filters. No other odor control methods are proposed by the applicant.

**Site Characteristics:**

Location: The parcel is located northwest of the City of Santa Rosa and southeast of the Sonoma County Airport (Charles M. Schulz), on the north side of Wood Road to the west of Fulton Road.

Description: The project site is a relatively flat 23.37-acre lot. The project site is characterized by annual grassland and a large vernal pool complex (a type of wetland) located on the north and south portions of the property. There is a driveway extending north from Wood Road to clustered development near the southwest property lines. There are several existing structures on-site, including a residence, a garage, three greenhouses, and several storage sheds/containers. There are several trees concentrated along the driveway and near the existing structures. A majority of the parcel, excluding the driveway and existing clustered development, is designated as Prime Farmland of Local Importance under the California Farmland Mapping and Monitoring Program. The driveway and existing structures are designated Urban and Built-Up Land. The project parcel is not subject to the Williamson Act.

Natural Resources: The site is located within the Santa Rosa Plain Conservation Strategy Area, within California Tiger Salamander Critical Habitat Area, and within the Santa Rosa Valley Priority Groundwater Basin. The project site is located in the Alton Conservation Area under the

Santa Rosa Plain Conservation Strategy. The project parcel also has a known presence of Burke's goldfields (*Lasthenia burkei*), a federal and state-listed endangered plant species found in vernal pools on the Santa Rosa Plain and Sonoma sunshine (*Blennosperma bakeri*), also federal and state-listed endangered plant species. No critical habitat has been designated for these species. The project site has approximately three acres of hydrologically connected vernal pool habitat. Much of the vernal pool habitat is located on the northern portion of the parcel with some occurring in the southeast corner of the parcel. A now expired Wetland Delineation for the project site was conducted on October 31, 2006 and verified by the U.S. Army Corps of Engineers (USACE) (a map of the Corps verified wetlands can be seen in Exhibit H). The site is also zoned Valley Oak Habitat.

### **Surrounding Land Use and Zoning:**

Land uses directly abutting the subject parcel on the north side of Wood Road are zoned Agricultural Resources (AR) to the west and south and Diverse Agriculture (DA) to the north and east. To the south of Wood Road, the parcels are zoned DA. Incorporated City of Santa Rosa is approximately 2,750 feet to the east of the project site.

The area is characterized by a mix of large agricultural parcels and clustered residential development on smaller parcels. To the west of the project site is clustered residential development while to the north, east, and south are agricultural uses with low densities.

## **DISCUSSION OF ISSUES**

**Issue #1:** Location of the Project Site in Adopted Federal Critical Habitat and Presence of Endangered Species

Sonoma County Municipal Code Section 26-88-254 specifies development criteria and operating standards for commercial cannabis cultivation.

*Biotic Resources. Proposed cultivation operations, including all associated structures, shall require a biotic resource assessment at the time of application that demonstrates that the project is not located within, and will not impact sensitive or special status species habitat, unless a use permit is obtained. Any proposed cultivation operation, including all associated structures, located within adopted federal critical habitat areas must have either all appropriate permits from the applicable state and federal agencies with jurisdiction over the listed species, or a biotic assessment concluding that the project will not result in "take" of a protected wildlife species within the meaning of either the federal or California Endangered Species Acts. (Section 26-88-254(f)(11))*

The project is located within designated Critical Habitat for the California Tiger Salamander (CTS), a federal-listed Endangered and state-listed Threatened species (refer to Exhibit G: CTS Map). Critical habitat is a geographic area that contains features essential to the conservation of an endangered or threatened species and that may require special management and protection. Critical habitat may also include areas that are not currently occupied by the species but will be needed for its recovery. Under the Cannabis Ordinance, incidental take permits are required from all state and federal agencies with jurisdiction over California Tiger Salamander, unless the Department can confirm that the project will not result in take. Applicable agencies and processes include:

California Department of Fish and Wildlife

Incidental Take Permit under Section 2081(b) of the State Fish and Game Code; and

U.S. Department of Fish and Wildlife

Incidental Take Permit under the Federal Endangered Species Act, either Section 10a(1)(B) Habitat Conservation Plan process or the Section 7(a)(2) federal agency consultation process.

**Staff Analysis:**

Two biological reports and one letter discussing biological impacts have been prepared for the project parcel and are listed below:

- December 15, 2006 Biological Resources Survey Report prepared by LSA Associates, Inc., hereafter 2006 LSA Report. This report was generated to assess the parcel for suitable CTS habitat and delineate the on-site wetlands as the parcel was a proposed mitigation bank. The 2006 LSA Report is attached in full as EXHIBIT H.
- April 13, 2018 (updated) Biological Resources Report prepared by Sol Ecology, Inc., hereafter referred to as 2018 Sol Ecology Report. This report was generated as part of the use permit application for the proposed cannabis operation. The 2018 Sol Ecology Report is attached in full as EXHIBIT I.
- March 22, 2019 Response to Permit Sonoma January 25, 2019 letter prepared by Monk & Associates, hereafter referred to as Monk & Associates Letter. This letter was generated in response to a Permit Sonoma letter determining that the project could not be supported by staff due to the CTS critical habitat designation and vernal pool complex. The Monk & Associates Letter is attached in full as EXHIBIT J.

The project site is approximately 0.6 miles north of the Alton Lane mitigation site, which is known to support CTS breeding and adult habitat. As the Sol Ecology Biological Resources Report (revised April 13, 2018; Exhibit I) states, CTS have a known dispersal distance of up to 1.3 miles. CTS breed and lay eggs primarily in vernal pools and other temporary rainwater

ponds following winter rains.<sup>1</sup> CTS spend most of the year in underground burrows made by squirrels and other burrowing animals. The 2006 LSA report notes that “The burrows of the Botta’s pocket gopher (*Thomomys bottae*) provide important upland habitat for California tiger salamanders on the Santa Rosa Plan. Pocket gophers are present on the site as indicated by the presence of their diggings and burrows.” (EXHIBIT H, Page 9)

Under the United States Fish and Wildlife Service’s (USFWS) Santa Rosa Plains Conservation Strategy and Programmatic Biological Opinion there are two pathways for federal Endangered Species Act authorization for impacts to critical habitat in the Santa Rosa Plains: 1) The project has a nexus to a federal permit, which allows the Army Corps of Engineers to initiate consultation with USFWS under Section 7 of the ESA and authorize take with a Section 404 permit; or 2) Direct consultation with USFWS under Section 10 of the ESA and the development of a low effect Habitat Conservation Plan authorized by an Incidental Take Permit issued by USFWS.

Permit Sonoma cannot approve a project if a Take Permit is required and the applicant does not have the capability to obtain such a permit. As USFWS is a federal agency, it will neither consult on potential impacts of or issue a take permit for a cannabis-related project. However, instead of obtaining all applicable permits, Section 26-88-254(f)(11) of the Code allows for projects located in critical habitat areas to submit a biotic assessment concluding that the project will not result in “take” of a protected wildlife species within the meaning of either the federal or California Endangered Species Acts. For CTS, this consists of undertaking a protocol level survey as directed in the 2003 CDFW guidance document for determining presence or negative finding of CTS. This is a two-year process, requiring intensive sampling of breeding pools and an upland drift fence study, or both.

No protocol level survey has ever been completed for the project site and a negative finding that no take will occur cannot be made. LSA performed three dip nets surveys in the spring of 2006 consistent with 2003 CDFW protocol survey guidance. However, protocol survey guidance states “If CTS larvae are not captured in the first 50 dipnet sweeps, covering representative portions of the pond, seines should be used” and that “If dipnetting has been unsuccessful, seines should be used to sample 100% of the surface area of ponds smaller than 1 acre...”<sup>2</sup> None of the ponds on the site are more than 1 acre in size and LSA did not take that next step in 2006 nor did they conduct at least 50 dipnet sweeps or use seines (the LSA report states “20-30 sweeps, 1 to 2 meters in length, were used to sample most pools”; EXHIBIT H, page 8), therefore the survey performed was not protocol level. Furthermore, the LSA survey was

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<sup>1</sup> U.S. Fish and Wildlife Service, California Tiger Salamander [https://www.fws.gov/sacramento/es\\_species/Accounts/Amphibians-Reptiles/ca\\_tiger\\_salamander/](https://www.fws.gov/sacramento/es_species/Accounts/Amphibians-Reptiles/ca_tiger_salamander/) Accessed 10/16/19.

<sup>2</sup> California Department of Fish and Game and U.S. Fish and Wildlife Service, Interim Guidance on Site Assessment and Field Surveys for Determining Presence of a Negative Finding of the California Tiger Salamander [https://www.fws.gov/sacramento/es/Recovery-Planning/Santa-Rosa/Documents/Appendix\\_C\\_FWS\\_CTS\\_Survey\\_Protocols.pdf](https://www.fws.gov/sacramento/es/Recovery-Planning/Santa-Rosa/Documents/Appendix_C_FWS_CTS_Survey_Protocols.pdf) (Page 5). Accessed 10/16/19.

performed more than 13 years ago, and therefore does not represent a current assessment of site conditions. Neither the 2018 Sol Ecology Biological Resources Report (EXHIBIT I) or the 2019 Monk & Associates Letter (EXHIBIT J) contain protocol level surveys necessary to make a finding that no take will occur.

The 2019 Monk & Associates Letter (Exhibit J) claims that the unpermitted greenhouses constructed for the cannabis operation were within a previously developed area with hard-packed surfaces. Aerial imagery shows that the greenhouses were constructed between July 2016 and May 2017 in previously undeveloped habitat (EXHIBIT O). Prior to May 2017, the unpermitted greenhouse area was undeveloped hay field and grassland. The unpermitted construction of additional fencing between October 2017 and February 2018 was also located in previously undeveloped areas. USFWS consultation under Section 10 should have occurred prior to construction.

The project includes additional ground disturbance for the construction and installation of two barns for indoor cultivation and storage containers for processing and seeks to legalize the unpermitted greenhouses constructed between July 2016 and May 2017. Required protocol level surveys to make a negative determination of CTS presence have never been completed for the project site nor can the applicant obtain the necessary permits as federal agencies will not consult on or issue permits to cannabis projects. Therefore, the project does not comply with ordinance standards.

The project parcel also has a known presence of Burke's goldfields (*Lasthenia burkei*), a federal and state-listed endangered plant species found in vernal pools on the Santa Rosa Plain and Sonoma sunshine (*Blennosperma bakeri*), also federal and state-listed endangered plant species. No critical habitat has been designated for these species. Both of these plant species are found in vernal pools and consultation with both CDFW and USFWS should have occurred prior to construction.

## **Issue #2:** Vernal Pools at the Project Site

The project site contains approximately three acres of hydrologically connected vernal pool habitat. Much of the vernal pool habitat is located on the northern portion of the parcel with some occurring in the southeast corner of the parcel. A Wetland Delineation for the project site was conducted on October 31, 2006 and verified by the U.S. Army Corps of Engineers (USACE) (a map of the Corps verified wetlands can be seen in Exhibit H). Verification of a wetland delineation and jurisdictional determination expire after a period of three years in the Santa Rosa Plain. The Wetland Delineation conducted for the project site expired in the Fall of 2009 and has not been reverified.

A field survey was conducted by Sol Ecology, Inc. as part of the 2018 Biological Resources Report to determine if any wetlands and waters potentially subject to jurisdiction by the USACE, Regional Water Quality Control Board (RWQCB), or California Department of Fish and Wildlife (CDFW) are present. The 2018 Sol Ecology report recommended a 100-foot wetland

buffer. However, the preliminary wetland mapping conducted for the Biological Resources Report has not been submitted by the applicant for verification by the USACE or consultation with CDFW and is therefore not a definitive determination of the presence or absence of areas within regulatory jurisdiction.

**Staff Analysis:** A 50-foot setback from an assessed wetland boundary is required by Sonoma County Municipal Code Section 11-14-110, unless a wetland assessment recommends a different setback. The biological resources report submitted with the use permit application recommended a 100-foot setback. The 2018 Sol Ecology Biological Resources Report for the site recommended reverification of the on-site wetlands if “impacts cannot be avoided in the future.” Based on the preliminary wetland mapping (Exhibit I) done by Sol Ecology, Inc. in 2018, a total of seven structures associated with the project, either existing or proposed, are within the 100-foot setback. Based on the now-expired 2006 Wetland Delineation (Exhibit H), 18 structures associated with the project are within the 100-foot setback (6 existing, 12 proposed).

A letter was sent to the applicant on January 25, 2019, stating that without a wetland reverification, there can be no assurances that critical habitat has not and will not be impacted by the project. Additionally, the letter stated that the presence of unpermitted structures, and a fence and mixing tank located within the setback are inconsistent with the policies of the Sonoma County General Plan.

A response to the January 25, 2019 summary denial letter was prepared by Monk & Associates (Exhibit J) and submitted on March 22, 2019. However, the response did not resolve the critical issues regarding reverification as no changes were made to the proposed application and no verified wetland delineation submitted.

Neither the original, now expired, 2006 Wetland Delineation nor the preliminary assessment done as part of the Biological Assessment in 2018 can be considered current, verified determinations on the presence of wetlands. As a federal agency, the USACE will not consult on cannabis projects. As the project does not meet the required setbacks for wetlands and the applicant is unable to obtain a final determination on the presence of wetlands or project impacts on critical habitat from the appropriate agency, there is no path forward for project approval.

### **STAFF RECOMMENDATION**

Staff recommends denial of the Use Permit for the proposed Limited-Term Cannabis Cultivation operation.

### **FINDINGS FOR RECOMMENDED ACTION**

1. The project site is located in an area designated as Critical Habitat for the California Tiger Salamander, a federal-listed Endangered and state-listed Threatened species and

has the potential to impact the species or its habitat. Incidental Take Permits must be obtained for activities affecting plants and animals designated as endangered or threatened and the habitats upon which they depend under Section 10 of the Endangered Species Act. Since the Controlled Substances Act of 1970, cannabis has been classified by the federal government as a Schedule I controlled substance and due to this classification, federal agencies will not participate in the permitting of operations that cultivate, manufacture, process, or transport cannabis and such projects that require a permit from a federal agency are unable to obtain one. The applicant is unable to obtain the necessary permits from the U.S. Fish and Wildlife Service, which is required under the Sonoma County Municipal Code for commercial cannabis operations requiring a use permit as the biotic assessment submitted was unable to eliminate the potential for a take.

2. Structures associated with the project are within the 50-foot wetland setback required by the Sonoma County Zoning Code and the 100-foot setback recommended by the 2018 Biological Resource Report prepared for the project. The applicant cannot obtain the federal determination necessary to ensure that impacts to on-site wetlands associated with the project are mitigated to a less than significant level as cannabis operations are not in compliance with federal law. As the project does not meet the required setbacks for wetlands and the applicant is unable to obtain a final determination on the presence of wetlands or project impacts on critical habitat from the appropriate agency, the project is inconsistent with county code and the Sonoma County General Plan.
3. The proposed project has been reviewed for compliance with the California Environmental Quality Act (CEQA) and it has been determined that the project is exempt from the provisions of the CEQA pursuant to CEQA Guidelines Section 15061(b)(4), in that the project will be rejected or disapproved by the County of Sonoma.

## **LIST OF ATTACHMENTS**

- EXHIBIT A: Use Permit Application and Proposal Statement
- EXHIBIT B: Vicinity Map
- EXHIBIT C: General Plan Land Use Map
- EXHIBIT D: Zoning Map
- EXHIBIT E: Site Plan
- EXHIBIT F: Detailed Site Plan
- EXHIBIT G: California Tiger Salamander Map
- EXHIBIT H: 2006 LSA Associates, Inc. Biological Resources Survey Report
- EXHIBIT I: Sol Ecology Inc. Biological Resources Report – 2017, revised April 13, 2018
- EXHIBIT J: Monk & Associates Response – March 22, 2019

- EXHIBIT K: Hydrogeologic Assessment Report – 2018
- EXHIBIT L: 90-day Denial Letter to Applicant – January 25, 2019
- EXHIBIT M: September 3, 2019 Permit Sonoma Letter to Applicant
- EXHIBIT N: October 10, 2019 Permit Sonoma Letter to Applicant
- EXHIBIT O: Aerial Imagery of the site
- EXHIBIT P: Monk & Associates Denial Response – December 2, 2019
- EXHIBIT Q: Public Comment
- EXHIBIT R: Draft Resolution