What Calif. Pot Permit Ruling Means For Enviro Compliance

By **Whitney Hodges and Barbara Machado** (August 17, 2023)

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In its recent decision in Lucas v. City of Pomona,[1] the Court of Appeal of the State of California, Second Appellate District, affirmed Pomona's use of a statutory exemption for its Commercial Cannabis Overlay Permit Program under Section 15183 of the California Environmental Quality Act, or CEQA, Guidelines,[2] finding the overlay program required no additional environmental review.

While this is good news for the city, the court's determination expressly cautions that an applicant seeking a cannabis license pursuant to the overlay program is not automatically, and similarly, exempt from further CEQA compliance.

The Lucas decision is particularly noteworthy given the April 1, 2022, sunset of California's provisional cannabis license program. Without this program, applicants no longer have the luxury of obtaining a license while either local governments or the applicant undergo CEQA compliance.

Following the passage of the Cannabis Trailer Bill,[3] applicants are now required to comply with CEQA before obtaining an annual cannabis license from the state.[4] As a result of the elimination of provisional licenses, local agencies have been under substantial pressure to perform CEQA review, and adopt or certify CEQA-compliant environmental documents in conjunction with local cannabis ordinances.

The overlay program in Lucas is an example of how a local jurisdiction successfully responded to the state's new requirement that all cannabis operator applicants comply with CEQA before an operator can be awarded an annual cannabis license.

Additionally, this is the first decision providing guidance on CEQA Guidelines Section 15183. Specifically, the appellate court interpreted the statutory exemption broadly to hold that: (1) the city's zoning ordinance, general plan update and environmental impact report, or EIR, that do not address density may be exempt under CEQA Guidelines Section 15183; and (2) uses, including cannabis-related uses, that are not included in land use plan documents may be determined to be sufficiently similar to existing and defined land uses allowed by underlying zoning.

California's Statewide Cannabis Regulatory Scheme

Beginning on Jan. 1, 2018, California established a provisional licensing program that would allow cannabis operators to obtain a temporary license, valid for 120 days with possible extension, prior to obtaining an annual license.

However, in July 2021, the California Legislature enacted the Cannabis Trailer Bill, which, among other things, provided that applicants had until March 31, 2022, to submit applications for provisional licenses, triggering the slow phase-out of all provisional licenses.

By Jan. 1, 2026, all cannabis licensees will be required to operate under a state annual license. The Legislature also expressed its intent that no further exemptions from annual licenses be adopted.

CEQA Compliance for Cannabis Operators

Since the end of the provisional license program in 2022, applicants may only apply for an annual license. In order to obtain a state-issued annual license, a cannabis operator must demonstrate full compliance with CEQA — which has bottlenecked cannabis licensure and delayed the transition to annual licenses.

CEQA is triggered whenever a public agency issues a discretionary approval for projects that have a potential to result in a physical change in the environment. CEQA review includes analyzing the project's impacts on certain environmental categories, unless the project is otherwise expressly exempt.[5] CEQA compliance can be incredibly convoluted, cumbersome, time-consuming and costly.

Under CEQA, local jurisdictions are required to inform the state's Department of Cannabis Control, or DCC, about the potential environmental impacts of any proposed cannabis operations. However, because California has a dual licensing scheme, either a local jurisdiction — city or county — or the DCC may be the lead agency tasked with ensuring CEQA review has occurred prior to the issuance of a cannabis-related license or permit.

A local jurisdiction would be the lead agency responsible for CEQA compliance when: (1) it adopts its local cannabis ordinance; or (2) on a project-by-project basis.

When a local government prepares and certifies or adopts a programmatic CEQA-compliant environmental document — such as an EIR or mitigated negative declaration that addresses all potential environmental effects of the local cannabis ordinance, and projects permitted thereunder — subsequent project-specific permit applications would be subject to streamlined CEQA review and handled through "within the scope" analysis.

If the local government has not certified or approved an environmental document, the DCC is the lead agency for all CEQA purposes. Applicants are required to submit a complete description of the proposed project, including information about the project site, existing conditions and facilities, proposed facilities and improvements, construction methods, and operational practices. The DCC will then perform CEQA review in advance of issuing an annual license.

If the local government does not comply with CEQA concurrently with the adoption of a jurisdictional cannabis ordinance, then CEQA compliance is handled on a project-by-project basis — whether the local government or the DCC is the lead agency. In such instances, the applicant is on the hook for the costs associated with an expensive and time-intensive CEQA review, and any related legal challenges.

CEQA provides a three-tiered process to guide agencies in carrying out or approving a project that may have a significant effect upon the environment. The first tier is jurisdictional and requires the agency to conduct a preliminary review to determine whether the proposed activity is subject to CEQA.

CEQA applies if the proposed activity is a "project" under the statutory definition, unless the project falls within one of several statutory exemptions. If the agency finds the project is exempt from CEQA under any of the stated exemptions, an agency's CEQA inquiry ends,

and the agency may proceed to file a notice of exemption citing the relevant section of the CEQA Guidelines and including a brief statement of reasons to support the finding.[6]

If, however, the project does not fall within an exemption, the agency must proceed to the second tier, and conduct an initial study.

Municipalities have varied widely in their approaches to CEQA review of both their regulatory and licensing programs, as well as their reviews of the subsequent cannabis permit applications.

Certain jurisdictions relied on a temporary statutory exemption included in the Medical and Adult Use Cannabis Regulation and Safety Act, which exempted a local government's adoption of cannabis ordinances, rules or regulations from CEQA if the promulgation required subsequent discretionary review and approval of commercial cannabis permits and licenses. However, this exemption sunsets under the Cannabis Trailer Bill.

Local governments have also relied on CEQA exemptions when issuing commercial cannabis regulations and permits, and have made findings that the ordinance is either exempt from CEQA or not a "project" as defined by CEQA.

Typically, a municipality will determine that approval of any such ordinance is exempt from CEQA under CEQA Guidelines Section 15060(c)(2), which exempts projects that would result in no physical change in the environment; Section 15061(b)(3), which exempts projects that would have no potential for causing a significant effect on the environment; or Section 15308, which exempts regulatory activities aimed at protecting the environment.

However, a similar approach taken by the city of San Diego was rejected by the California Supreme Court in 2019, in Union of Medical Marijuana Patients Inc. v. City of San Diego.[7] At issue in this case was San Diego's adoption of an ordinance authorizing the establishment of medical marijuana dispensaries and regulating their location and operation.

When approving the ordinance, San Diego determined the regulatory scheme did not constitute a project under CEQA, and did not conduct any environmental review. The Supreme Court disagreed, finding that this determination misapplied the test for determining whether a proposed activity has the potential to cause environmental under Public Resources Code Section 21065.

One exemption under CEQA Guidelines Section 15183(a) does not require additional environmental review for projects "which are consistent with the development density established by existing zoning, community plan, or general plan policies for which an EIR was certified," except as might be necessary to determine whether there are project-specific significant effects.

CEQA Guidelines Section 15183 was promulgated on the authority of Public Resources Code Section 21083.3, which provides that a public agency needs to examine only those environmental effects that are peculiar to the project and were not addressed or were insufficiently analyzed as significant effects in the prior EIR.

CEQA Exemption for the City of Pomona's Cannabis Permit Overlay

Pursuant to CEQA, Pomona's overlay program qualified as a project that may cause reasonably foreseeable environmental effects. However, the city rightfully determined that the overlay program fell within one of several statutory exemptions to CEQA, and thus did

not require additional environmental review.

Prior to establishing the overlay program, Pomona conducted a multistep analysis that included studying the scientific basis of cannabis as it relates to potential land use impacts, considering community feedback, and studying potential environmental impacts. For the exemption under CEQA Guidelines Section 15183 to apply, the city needed to find that the overlay program be "consistent with the development density established by existing zoning, community plan, or general plan policies for which an EIR was certified."[8]

In this case, that included the Pomona Municipal Code, the Pomona Zoning Ordinance, the California Building Code, the city's general plan update and the related 2014 EIR. Any environmental impacts associated with the overlay program would be similar to those anticipated in the general plan update and the 2014 EIR, taking into consideration applicable municipal code and zoning requirements.

Accordingly, no further CEQA review was required, as the overlay program would not result in any new or increased significant environmental impacts, or require mitigation beyond those identified in the 2014 EIR based on the general plan update.

When approving the overlay program, Pomona determined that the proposed land uses related to commercial cannabis were similar enough to existing and defined land uses within the Pomona Zoning Ordinance and the general plan update, or were so defined using a determination of similarity process. The city's DOS findings provided that the overlay program's proposed cannabis use was not of greater intensity or density than similar uses, and would not generate more environmental impacts.

Specifically, the DOS expressly provided that the six proposed commercial cannabis uses share "characteristics common with, and not of greater intensity, density or generate more environmental impact, than those uses listed in the land use district in which it is to be located." Each of the six commercial cannabis types were deemed similar in density and/or land use activity to other land use activities, such as commercial retail, manufacturing and crop raising uses.

Additionally, the court expressed that the fact that the exact word "density" or exact phrase "density-related standards" was not included in the zoning ordinances, the general plan update, or 2014 EIR did not necessarily mean that those topics were not discussed with different verbiage. Further, a review of the administrative record showed "land use distribution and density" and "zone density/intensity" were, in fact, addressed in the 2014 EIR.

Therefore, substantial evidence showed the overlay program's proposed commercial cannabis activities were similar to or consistent with existing land uses or development density established by the 2014 EIR and general plan update — and thus met the statutory exemption, per CEQA Guidelines Section 15183.

Implications

The Lucas decision seems to clarify that local governments may utilize the exemption determination under CEQA Guidelines Section 15183 for cannabis-related uses — even if such uses had not literally been identified in the land use plans and related EIR — so long as the cannabis-related project has similar intensity and land use activity characteristics as the previously analyzed and identified uses.[9]

While the court allowed Pomona to forgo additional environmental review for the overlay program, the city's scheme does not automatically exempt individual applicants from further CEQA compliance when they apply for an annual cannabis license. The overlay program designated locations within Pomona where cannabis-related land uses would be permitted, but did not grant all property owners the right to operate cannabis-related businesses.

The overlay program only granted property owners in certain districts the right to apply for a cannabis permit. Under this scheme, CEQA compliance will be handled on a project-by-project basis.

Given the ability to shift costs and liability, it is possible that Lucas v. City of Pomona will encourage local governments to approve a cannabis regulatory scheme via an exemption, requiring the individual applicants to shoulder the costs associated with CEQA review and related legal challenges. While this may save the local government time and effort in the short term, requiring the local government to review CEQA compliance on a project-by-project basis will likely also result in administrative bottlenecking.[10]

The applicant will be responsible for submitting a complete description of the proposed project, including information about the project site, existing conditions and facilities, proposed facilities and improvements, construction methods, and operational practices. The local government will then perform the time-intensive three-tiered CEQA review process, in advance of issuing the local license.

Alternatively, if the local government certifies an EIR or mitigated negative declaration related to the overall regulatory scheme, individual projects may then streamline subsequent CEQA compliance, allowing for faster project processing.

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[1] Lucas v. City of Pomona (2023) ___ Cal.App.5th ___, https://caselaw.findlaw.com/court/ca-court-of-appeal/2259562.html.

[2] CEQA – Pub. Res. Code §§ 21000, et seq; CEQA Guidelines – 14 C.C.R. §§ 15000, et seq.

[3] Assembly Bill 141 and Senate Bill 160 (2021).

[4] A prior article on this requirement can be found here: https://www.cannabislawblog.com/2022/04/no-april-fools-starting-april-1st-cannabis-operators-face-ceqa-compliance-requirements-for-state-licenses/.

[5] CEQA review includes analysis of the following environmental categories: aesthetics, agriculture and forest resources, air quality, biological resources, geology and soils, greenhouse gas emissions, energy consumption, hazards and hazardous materials, hydrology and water quality, land use and planning, noise, traffic/transportation, and

utilities.

[6] The agency must decide whether the activity qualifies for: (1) a statutory exemption, enacted by the Legislature; or (2) one of the 33 categorical exemptions articulated in the Guidelines (see Guidelines, §§ 15300–15333). A critical difference between statutory and categorical exemptions is that statutory exemptions are absolute, which is to say that the exemption applies if the project fits within its terms. Categorical exemptions, on the other hand, are subject to exceptions that defeat the use of the exemption, and the agency considers the possible application of an exception in the exemption determination.

[7] Union of Medical Marijuana Patients Inc. v. City of San Diego(2019) 7 Cal.5th 1171, https://cases.justia.com/california/supreme-court/2019-s238563.pdf?ts=1566234057.

[8] CEQA Guidelines § 15183(a).

[9] A prior article on this decision can be found here: https://www.cannabislawblog.com/2023/07/commercial-cannabis-permit-program-and-overlay-district-statutorily-exempt-under-ceqa-guideline-section-15183/.

[10] As the DCC typically requires that a local permit be obtained prior to issuance of a state license, the local governments will continue to act as the lead agency for CEQA purposes.