Cannabis Regulation Is the New Frontier in Real Estate and Land Use Control

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I. INTRODUCTION

California has positioned itself as a leader on emerging cannabis policy. While federal law, including the Comprehensive Drug Abuse Prevention and Control Act of 1970,[1] still prohibits cannabis-related activities within the State's borders, several largely progressive laws in California permit the possession, cultivation, transportation, and distribution of cannabis. Some of these laws are the first of their kind. These state laws, collectively referred to as the "Cannabis Laws" in this article, include the following:

- Compassionate Use Act of 1996 ("CUA");[2]
- Medical Marijuana Program Act ("MMPA");[3]
- Medical Cannabis Regulation and Safety Act ("MCRSA");[4]
- Certain provisions of the California Uniform Controlled Substances Act;[5]
- Control, Regulate and Tax Adult Use of Marijuana Act ("AUMA");[6] and
- Medicinal and Adult-Use Cannabis Regulation and Safety Act ("MAUCRSA").[7]

In addition to this blend of federal prohibitions and the myriad state authorizations, California has afforded local governments discretion to further regulate cannabis production and distribution for both medical and nonmedical, also known as recreational, uses. California's early authorization of medical cannabis use did not preempt or limit local land use regulation related to cannabis activities.[8] AUMA propelled the principle of preserving "local control," and soon thereafter it MAUCRSA retained this doctrine as well.[9] Interpretation of the Cannabis Laws continues to evolve as local governments experiment with various land use approaches, including licensing schemes and outright bans,

resulting in responses by the California courts such as *County of San Diego v. San Diego NORML* which held such bans can violate certain Cannabis Laws.[10]

In the first section of this Article, we address the history of cannabis regulation currently prevailing within the state. Secondly, we examine various local land use approaches to cannabis production and distribution, and the legality of previously enacted land use restrictions and authorizations. Lastly, we discuss some of the nuances a property owner should consider when negotiating a commercial lease with cannabis cultivators, manufacturers, testing laboratories, retailers, microbusinesses, or distributors.

The conundrum that everyone who deals with cannabis encounters is that despite the progressive Cannabis Laws in California and a handful of other states, the possession, cultivation, and distribution of cannabis remains illegal under federal law unless performed in conjunction with federally approved research. Under the federal regime outlined in CSA, cannabis has "no currently accepted . . . use at all."[11] While several state courts have determined that federal restrictions do not preempt a state from implementing state-specific cannabis-related laws,[12] it is imperative to note that any cannabis-related activity authorized under state law remains a violation of federal law.[13] For the sake of brevity and scope, this Article will not address federal issues related to cannabis cultivation and distribution, including issues associated with banking and credit.[14]

Cannabis laws are complex and constantly evolving. This Article provides a broad overview of a few considerations that a real property owner may encounter when contemplating whether to establish cannabis facilities or whether to lease space to a cannabis cultivator, manufacturer, testing laboratory, retailer, microbusiness or distributor which in this Article, we will collectively refer to as "Cannabis Operator." It does not address every nuance associated with land use controls and regulations and/or negotiating a lease with a Cannabis Operator.

II. THE HISTORY OF CANNABIS LEGALIZATION IN CALIFORNIA

In 1996, Californians passed Proposition ("Prop.") 215, the first statewide ballot initiative to legalize medical cannabis that was approved at state level. Upon the passage of Prop. 215 (CUA),[15] California became the first state to legalize cannabis for medical uses, thereby causing a nationwide conflict between states' rights advocates and those who support a more federalist approach.[16] CUA allowed patients, or a patient's "Primary Caregiver,"[17] with a valid doctor's recommendation, to possess and cultivate cannabis for personal medical use.[18]

Senate Bill ("SB") 420 (MMPA), passed in 2003, expanded CUA to expressly authorize the growing medical marijuana distribution system comprised of collectives and cooperatives.[19] Among other things, MMPA established a program to facilitate the documentation of qualified patients and their designated primary caregivers via a voluntary identification card program, which MMPA required counties to implement.[20]

In 2013, the California Legislature added Health & Safety Code section 11362.768 to MMPA, inserting the term "dispensary" to the regulatory vernacular, as it was not previously defined in the Cannabis Laws. This inclusion was crucial for the implementation of the law's land use requirement prohibiting the location of medical cooperatives, collectives, and dispensaries within a 600-foot radius of sensitive receptors likes schools and residential neighborhoods.[21] Section 11362.768 also directly authorized local authorities to regulate medical cannabis facilities.[22]

The state legislature then passed a trio of bills further regulating medical cannabis, effective January 1, 2016 and collectively referred to as MCRSA.[23] The first bill, Assembly Bill ("AB") 266 authorized commercial medical cannabis businesses to cultivate, test, manufacture, label, dispense, deliver, and transport medical cannabis upon issuance of both state and local licenses.[24] AB 266 also set the framework for the licensing and regulation of medical cannabis activities.[25] Lastly, AB 266 created the Bureau of Medical Cannabis Regulation,[26] which is charged with administering, enforcing, and promulgating rules under the MCRSA.[27] Like the MMPA, AB 266 expressly preserved local government constitutional land use and regulatory authority.[28]

The second bill, AB 243, required various state agencies[29] to develop regulations for the indoor and outdoor cultivation of medical cannabis, including specifications related to pesticide use, edible medical cannabis preparation, and labeling.[30] From this legislation, the Medical Cannabis Cultivation Program within the Department of Food and Agriculture was born.[31] Additionally, AB 243 required cannabis cultivation by licensees be conducted in accordance with state and local laws relating to land conversion, grading, electricity usage, water usage, agricultural discharges, and similar issues.[32] Similarly, AB 243 required state agencies to coordinate with cities and counties in addressing the environmental impacts of medical cannabis cultivation.[33] Lastly, should a licensee fail to comply with the licensing requirements, this bill provided for the assessment of civil and criminal penalties.[34]

The last bill in the trio, SB 643, established standards and regulations for physicians and surgeons recommending or prescribing medical cannabis, and mirrored the dual licensing system required under AB 266.[35]

On November 8, 2016, Californians passed the AUMA, or Prop. 64, legalizing the recreational use of cannabis.[36] This law allows adults twenty-one years of age and older to: (i) ingest cannabis; (ii) grow up to six plants in their home; and/or (iii) possess, process, purchase, obtain, or give away, without compensation, up to one ounce of cannabis.[37] AUMA creates a comprehensive regulatory and licensing scheme governing commercial nonmedical cannabis activities from "seed to sale," including the commercial cultivation, testing, manufacturing, and distribution of nonmedical cannabis. [38]

Voter-approved Prop. 64 resulted in two separate licensing and regulatory schemes under MCRSA and AUMA for medical and recreational cannabis use, respectively. To remediate this dichotomy, Governor Jerry Brown signed SB 94, a trailer bill for the Budget Act of 2017, formally repealing MCRSA and consolidating MCRSA and AUMA into a single system for administering cannabis laws in California encompassing both medical and nonmedical uses. This consolidated bill is known as MAUCRSA.[39]

III. LOCAL LAND USE CONTROLS

Local governments may regulate what they deem the appropriate use of land within their jurisdictions.[40] This authority stems from a local government's police power—the inherent power of government to provide for the peace, order, health, morals, welfare, and safety of its citizens.[41]

Specifically, land use regulations are a manifestation of the local police powers conferred by the article XI, section 7 of the California Constitution, and not the state's delegation of authority.[42] California Constitution article XI, section 7 provides that "a county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."[43]

"[C]annabis is immensely localized" with local governments acting as the gatekeepers.[44] In addition to general police power, various statutes, including the Cannabis Laws, grant local governments powers to regulate land use. Hence, local governments can regulate cannabis businesses and those businesses must comply with all local laws.[45] In this vein, "cannabis is immensely localized" with local governments acting as the gatekeeper.

Most cities in California utilize "permissive zoning," which means that any uses not enumerated in the zoning code are expressly prohibited.[46] Engagement in a prohibited use constitutes a public nuisance, subject to code enforcement action and related penalties.[47] In permissive zoning jurisdictions, property owners must be authorized to engage in cannabis use by right or by obtaining a separate, discretionary approval issued by the local government.[48]

Each iteration of the Cannabis Laws recognized the importance of and provided for local land use controls. Take, for example, MCRSA, which provided separate mechanisms for local control in each of the bills. First, AB 266 expressly preserved local government constitutional land use and regulatory authority.[49] Second, AB 243 stated that any medical cannabis cultivation must be conducted in accordance with local city or county regulations and a person could not cultivate medical cannabis without first obtaining a permit from the applicable local government.[50] This preservation of local land use control and regulatory authority is reiterated in SB 643, which requires commercial cannabis facilities to possess valid state and local permits or licenses.[51]

Likewise, MAUCRSA acknowledges local authority to regulate or ban activities related to the use of cannabis, and creates a more streamlined system for collaboration between state licensing agencies and local governments to enforce licensee compliance with local laws.[52] Specifically, MAUCRSA does not prevent local governments from adopting and enforcing local ordinances that regulate or completely prohibit nonmedical cannabis businesses and their commercial activities, including cannabis deliveries.[53] MAUCRSA permits local governments to regulate, or, to completely prohibit, all personal outdoor cultivation activity.[54] However, it expressly prohibits any ban on personal cultivation of up to six cannabis plants within a person's "private residence, and only allows local governments to "reasonably regulate" personal cultivation.[55] Like MMPA, MAUCRSA restricts non-medicinal cannabis operations within a 600-foot radius of certain "sensitive receptors" or uses.[56] All Cannabis Operators must comply with local ordinances and obtain any locally required regulatory permits.[57] While MAUCRSA includes certain prohibitions related to cannabis smoking, it also allows local governments to prohibit cannabis possession and smoking in buildings owned, leased, or occupied by the state or local government and to maintain a drug-free workplace by prohibiting cannabis use, consumption, transfer, transportation, sale, display, or growth in the workplace.[58]

Because of the inherent and express acknowledgement of a local government's autonomy in determining proper cannabis-related regulations in these laws, land use control implementation across the state varies widely, hinging upon the specific political make-up of the community in that locality.[59] Urban areas in Northern California, the center of California's fledgling cannabis market, and rural areas like "Emerald Triangle"—where the three cannabis-growing counties of Humboldt, Mendocino, and Trinity meet—typically have liberal regulatory schemes, including county-sanctioned gardens.[60] In contrast, San Diego County and San Bernardino County initially refused to acknowledge the state's mandated medical cannabis identification card program, a position ultimately invalidated by the California Supreme Court.[61] To further complicate things, some jurisdictions are medical-use-only jurisdictions, such as the City of Linwood.[62] At this time, an ever-changing patchwork of rules vary from jurisdiction to jurisdiction, with no two exactly alike.

A. Court Reactions Sustain Local Government Control of Cannabis Activity

In *City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.,* ("*Inland Empire*")[63] the California Supreme Court ruled unanimously that CUA and the MMPA do not preempt local ordinances that completely and permanently ban cannabis facilities. In reaching this conclusion, the court recognized that the local police power "includes broad authority to determine, for purposes of public health, safety, and welfare, the appropriate uses of land within a local jurisdiction's borders, and preemption by state law is not lightly presumed."[64] The court concluded that CUA and the MMPA neither expressly nor impliedly preempt local zoning authority.[65] Instead, both laws have a very limited and specific reach.[66] The *Inland Empire* court reasoned that MMPA immunizes only "the cooperative or collective cultivation and distribution of medical cannabis by and to qualified patients and their designated caregivers from prohibitions that would otherwise apply under state law," but does "not thereby *mandate* that local governments authorize, allow, or accommodate the existence of such facilities."[67]

In *Maral v. City of Live Oak,*[68] plaintiffs argued that the city's cultivation ban ordinance (i) violated equal protection of disabled persons; (ii) reflected procedural and Ralph M. Brown Act[69] "irregularities;" and (iii) brought "negative impacts" to "long-cherished property rights." Relying on *Inland Empire*, the court rejected these claims, stating that there is "no right—and certainly no constitutional right—to cultivate medical cannabis."[70] Much like *Inland Empire*, the court in *Maral* determined that neither CUA nor the MMPA preempts a city's police power to prohibit cannabis cultivation citywide.[71]

MAUCRSA expressly preserves local government constitutional land use and regulatory authority, including regulation or prohibition of cannabis activity consistent with *Inland Empire* and *Maral*.[72] MAUCRSA also grants local governments the authority to adopt regulations more stringent than the minimum state standards.[73]

In *Safe Life Caregivers v. City of Los Angeles,*[74] the court found that an initiative measure banning cannabis businesses did not have to comply with either (i) the state's minimal procedural requirements for zoning ordinances in Government Code section 65804, which require compliance with Government Code section 65854, a public hearing held by the planning commission, or (ii) the city's charter requirements for passage of an ordinance because it was passed by the electorate and not by the city council. The measure also provided immunity from prosecution of nuisance violations for cannabis businesses that fell within certain limited categories and complied with a set of regulations.[75] The court held that the measure did not unlawfully grant, in violation of substantive and procedural requirements, a variance or a conditional use permit, nor did the initiative grant any type of land use right; it merely provided limited immunity under certain conditions.[76] Finally, the court held MCRSA did not preempt local regulation.[77]

In addition to these cases, many cannabis advocates have unsuccessfully challenged local bans, regulations, and permitting schemes on equal protection, due process, and other constitutional grounds, including:

- In *County of Los Angeles v. Hill,*[78] the court rejected a claim that Cannabis Laws preempted a conditional use permit requirement and locational restrictions for cannabis dispensaries. The court found zoning requirements for cannabis dispensaries did not violate the Equal Protection Clause because dispensaries created unique public safety concerns and were not similarly situated to pharmacies.

- The holding in *420 Caregivers, LLC v. City of Los Angeles,*[79] rejected due process and right-to-privacy challenges to an ordinance restricting cannabis dispensaries.

- *County of Tulare v. Nunes*[80] upheld a zoning ordinance that restricted the location of cannabis collectives and cooperatives, and ruled that limitations on quantity of cultivation do not render ordinances

unconstitutional in context other than criminal prosecution. In making these determinations, the court specifically found that the county's public safety concerns constituted a rational basis for differential treatment of cannabis dispensaries.

- *Conejo Wellness Ctr., Inc. v. City of Agoura Hills*[81] reiterated the holding that the Cannabis Laws do not preempt a local ban on cannabis dispensaries when rejecting substantive due process, procedural due process, and right to privacy challenges to a dispensary ban.
- The court in *City of Monterey v. Carrnshimba*[82] affirmed a summary judgment against a cannabis dispensary, holding that a dispensary was not a listed use in the city's planning ordinance and, thus, was presumptively banned. In making this holding, the court rejected the plaintiff's claim that a dispensary fell within preexisting land use classifications for personal services, retail sales, and pharmacies and medical supplies.
- *The Kind & Compassionate v. City of Long Beach*[83] upheld a ban on dispensaries, determining that it did not violate state or federal laws protecting disabled persons, constitute civil rights violations under 42 U.S.C. section 1983 and/or violate various state tort laws.
- *City of Palm Springs v. Luna Crest, Inc.*[84] held that the CSA does not preempt a local ordinance requiring cannabis dispensaries to obtain permits from the city.
- *Ye set al v. City of San Bernardino*[85] is currently on appeal to review the trial court's determination that a cannabis-related voter initiative, Measure O, was invalid due to its resulting spot zoning without a rational basis. As adopted, Measure O would result in only two (2) parcels in the entire city that could qualify for dispensary licenses.
- In *Harris v. City of Fontana*,[86] the ACLU and others challenged the city's personal cultivation restrictions, alleging that the requirements to obtain permits for personal cultivation are so difficult and so expensive that the ordinance is effectively a ban prohibited under MAUCRSA.[87] The court found that the restrictions on who may cultivate cannabis for personal use and where they may cultivate in a physical residence were arbitrary and capricious because they disallow certain persons from doing what state law specifically allows them to do, and are, therefore invalid.

Together, the case laws and the Cannabis Laws, confirm that a local government has the authority to regulate or, if it so chooses, ban both cannabis dispensaries and non-personal cannabis cultivation.

It can be expected that the number of lawsuits against local government ordinances will continue to rise, in part due to activists like Stephanie Smith.[88] Ms. Smith, who leases properties to tenants for cannabis related uses, has sued the cities of Colton, San Bernardino, Moreno Valley, and Hemet.[89] She has vowed to go after other municipalities as they adopt policies she considers too restrictive.[90] Ms. Smith is also committed to putting forth voter initiatives creating more advantageous regulations for property owners in the cities and counties of Colton, San Bernardino, Kern, Hemet, Upland, and Bakersfield, where more ballot measures are apparently forthcoming.[91]

B. Application of CEQA to Local Government Ordinances[92]

The California Environmental Quality Act ("CEQA"),[93] which requires state and local agencies to identify the significant environmental impacts of "projects" and to avoid or mitigate those impacts if necessary, arguably requires environmental review of the manner in which local governments are implementing regulatory and licensing ordinances related to Cannabis Laws, as well as lead agency approval of discretionary permits related to the cultivation and distribution of cannabis in accordance with the adopted regulatory scheme. As with planning and zoning regulations, local governments have varied widely in their approaches to CEQA review of both their regulatory and licensing programs and reviews of the subsequent cannabis permit applications.[94]

The City of Los Angeles, the County of Santa Cruz, and the City of San Mateo[95] have relied on a temporary statutory exemption included in MAUCRSA, which exempts a local government's adoption of a cannabis ordinance, rule or regulation from CEQA if the promulgation requires subsequent discretionary review and approval of permits and licenses for commercial cannabis activity.[96] However, this exemption, which is effective until July 1, 2019, has not been heavily relied upon due to its impending sunset date and the fact that it does not expressly exempt the lead agency's decision to issue licenses.[97]

Local governments have also relied on other CEQA exemptions when issuing new commercial cannabis

regulations and permits and have made findings that the ordinance is either exempt from CEQA or not a "project" under CEQA.[98] Typically, a municipality will determine that approval of any such ordinance is exempt from CEQA under CEQA Guidelines[99] sections 15060(c)(2), which exempts projects that would result in no physical change in the environment; 15061(b)(3), which exempts projects that would have no potential for causing a significant effect on the environment; and 15308, which exempts regulatory activities aimed at protecting the environment. Yolo County, Riverside County, and the City of Woodlake took the approach of combining exemptions, each thereby determining that its cannabis ordinance is exempt under CEQA Guidelines sections 15061(b)(3) and 15308.[100]

Alternatively, additional CEQA exemptions may also apply to some more limited cannabis licensing programs.[101] For example, City of Coalinga determined that its ability to license cannabis business operations in existing buildings was exempt under CEQA Guidelines section 15301, which exempts the operation or minor alteration of existing facilities involving no more than negligible expansion of existing use has been used to license.[102] These exemptions have also been used when processing cannabis permit approvals.[103]

Some local governments have found that their bans or severe limitations on cannabis activities are not subject to CEQA because it is not possible that the ordinances at issue could physically impact the environment.[104] While California courts of appeal upheld these local governments' determinations that CEQA does not apply to the ordinances, the California Supreme Court unanimously granted review of the Fourth Appellate District's opinion in the *Union of Medical Marijuana Patients v. City of San Diego*.[105] Among other issues, the court is poised to address whether CEQA may cause reasonably foreseeable indirect physical changes to the environment.[106]

Other local governments have prepared the necessary environmental documents when they have determined that their cannabis regulatory programs are not exempt from CEQA. For example, San Joaquin County and the City of Cloverdale prepared negative declarations for their regulatory programs, finding that their ordinances related to cannabis activities would not result in any significant impacts.[107] When cannabis-related regulatory programs will result in impacts, but those impacts can be mitigated below a level of significance, lead agencies will prepare a mitigated negative declarations ("MND"). For example, Alameda County adopted an MND for its medical cannabis cultivation and dispensary ordinances on July 11, 2017.[108] Alameda County subsequently adopted an addendum to this MND on May 8, 2018, in connection with new regulations that would, among other things, regulate the cultivation and sale of recreational use cannabis by businesses located in the County's unincorporated area.[109]

In January 2018, Humboldt County certified an environmental impact report ("EIR")[110] for amendments to the Humboldt County Code that would add new regulations for commercial cannabis activities and expand existing regulations of medical cannabis operations.[111] Humboldt County determined that operating new commercial cannabis operations under the proposed ordinance would result in significant and unavoidable impacts on air quality, greenhouse gas emissions, utilities, and service systems.[112] Similarly, the County of Santa Barbara certified an EIR in February 6, 2018, in which it considered the broader implications and impacts of the County's proposed commercial cannabis programs. It concluded that the programs would result in significant and unavoidable impacts to numerous environmental resources, including agricultural resources, air quality, and traffic.[113]

C. Trends

As discussed in Section II.A, no two jurisdictions have adopted the same cannabis regulatory scheme. However, there are common trends. Currently, local governments are experimenting most commonly with the following: (i) caps on the numbers of licenses or operating permits distributed in the jurisdiction; (ii) a merits-based competition process for a limited number of licenses or operating permits; (iii) zoning restrictions; (iv) market-based approaches; (v) permit lotteries; (vi) a lottery and competition hybrid approach; and (vii) waiting lists.[114] Voter initiatives are also a growing trend in cannabis regulation.[115]

In addition to land use controls and permits that run with the land, some local governments are entering into development agreements with cannabis facility operators as a mechanism for control and regulation, even when no real development (e.g., retail shop) will occur on site.[116] A development agreement freezes applicable rules, regulations and policies in place when the parties sign the agreement, offering the operator a sense of security against the threat of ever-changing cannabis regulations.[117] These vested rights allow an operator to construct a project without concern that new regulations may later apply.[118] These assurances can alleviate concerns about potential ballot measures or changes in the governing body majority that could adversely affect the cannabis project after the operator has invested considerable

time and money in establishing its facility and/or business in that location.

Most local governments are quoting six to eight months as the length of time to obtain the permitting necessary to operate cannabis related facilities.[119] However, experience has proven that the actual timing is much longer.[120] In Northern California, which, as discussed above, is generally a more liberal area in terms of cannabis regulations, has been typically processing approvals faster than Southern California.[121]

The alternative CEQA strategies employed by cities and counties, as discussed in Section II.B, are likely the result of differing conclusions about the environmental impacts of regulating cannabis activities, and differences between the types of regulatory programs proposed and the types of resources locally available. [122] In addition, local governments appear to disagree about the impacts of legalizing cannabis activities relative to the baseline environmental conditions created by preexisting illegal cannabis activities.[123]

For instance, the EIRs certified by Santa Barbara County found significant and unavoidable secondary impacts on almost all other classes of environmental resources because unlicensed cannabis operations, with more significant impacts, would continue despite legalization at the local and state levels. [124] Santa Barbara County's EIR explained,

> [G]iven that unregulated cannabis activities currently exist and are likely to continue to exist within the County, secondary impacts, with the exception of aesthetics and visual resources, are considered to result in significant and unavoidable effects on the human and natural environment due to the difficulty of effectively enforcing and regulating such unlicensed operations.[125]

Illegal growers may cause significant adverse impacts when they do not comply with grading restrictions and cause erosion, use chemicals hazardous to biological resources, divert streams, cause water supply and quality issues, and use diesel generators that contribute to air pollution and excessive greenhouse gas emissions.[126]

IV. LEASING TO CANNABIS OPERATORS

Since January 1, 2018, when California began issuing temporary licenses for recreational cannabis operations, the legal cannabis industry has rapidly developed in an attempt to meet the escalating consumer demand for legal cannabis.[127] Individual cannabis retailers alone are estimated, on average, to generate approximately $250,000 in sales per month.[128] The California State Treasury estimates that sales within the next few years could generate over seven billion dollars.[129] Such an increase in consumer demand has contributed to heightened prices for raw land, industrial buildings, and retail spaces for growing, manufacturing, distributing, and selling cannabis and cannabis products.

The apparent lack of consistency in municipal and county laws throughout California presents a variety of nuances for property owners who are looking to cash in on California's legal cannabis industry. These nuances impose new complications beyond the scope of typical terms and conditions found in traditional commercial transactions. Property owners should be aware that federal law prohibits knowingly leasing any property for the purpose of making, distributing, or using controlled drugs[130] and warns that such property is subject to civil forfeiture.[131] Although federal law is not the focus of this article, it is important to underscore the federal implications because of the obvious risks that are associated with leasing a space to a tenant for the operation of a business considered illegal under the United States Code.

As a threshold matter, property owners interested in leasing space to Cannabis Operators should consider three factors to determine whether this type of leasehold relationship is viable. First, and likely most obvious, is to confirm whether the local jurisdiction allows cannabis operations. If the answer is "yes," the second factor to consider is whether local laws permit the real property to be utilized for the specific cannabis operation in question, which includes zoning requirements and permitting for the contemplated use. Third, the property owner must identify a Cannabis Operator who is eligible to meet the business license requirements to legally operate under both state and local law. Only then should property owners and potential Cannabis Operators consider entering into a lease.

Property owners should pay special attention to certain provisions when negotiating a commercial lease with a Cannabis Operator. Some of these pertinent lease provisions are: (i) commencement of the lease, (ii) early termination rights, (ii) rent and security deposits, (iv) operating expenses, and (v) compliance with law.

A. Lease Commencement Date

As a part of the California cannabis license application process, applicants are required to identify the property boundaries where the business will take place[132] and furnish evidence of the applicant's legal right to occupy the property.[133] If the applicant is leasing the property, the applicant must provide a copy of the applicant's lease agreement to the

licensing authority as a part of the application process.[134] This often creates a chicken-and-egg conundrum for a landlord and Cannabis Operator because a property owner must finalize a lease agreement with a tenant who has not yet obtained the state and local licenses required to operate a cannabis business. There is no guarantee that the tenant will successfully secure the necessary licenses to operate, and the lease should address this point.

To resolve this dilemma, the lease may incorporate a timeline that outlines certain milestone events related to permitting and licensing, each of which must be met by the Cannabis Operator for the lease to remain in effect. Furthermore, the lease should be conditioned on the Cannabis Operator successfully procuring the necessary permits and licenses for its cannabis business. If the Cannabis Operator does not obtain its permits and licenses by a specified date, the lease should provide the landlord with a unilateral termination right. The landlord should consider including a liquidated damages clause to reimburse the landlord for any applicable tenant improvement and leasing costs incurred by the landlord up to that milestone date.

B. Early Termination Rights

Due to the constant evolution of laws related to cannabis operations and the uncertainty of federal enforcement, early termination rights are a critical issue to address when drafting a lease with a Cannabis Operator. In addition to the typical landlord termination rights, a landlord should also have the right to terminate the lease if the Cannabis Operator receives any notice from federal, state, and/or local authorities that it is being investigated or legal action is being pursued against it. In that regard, the landlord should require the Cannabis Operator to covenant that the Operator shall, within a specified time after receipt of said notice, forward to the landlord copies of all permits and any notices from federal state and local authorities related to the tenant's operations at the premises. This is especially important where the lease term exceeds twelve months, because each license under MAUCRSA must be renewed every twelve months.[135] If the Cannabis Operator falls out of compliance with any applicable state or local laws necessary to continue legally using the space as a Cannabis Operator, the landlord should again have the right to terminate the lease.

C. Rent and Security Deposits

Rent for Cannabis Operators comes at a high premium.[136] This is due in part to the limited amount of properties that are viable cannabis facilities from a land use perspective, as previously discussed, and in part to the fact that cannabis growth, consumption, and businesses operations remain illegal under federal law.[137] Coupled with the risks of a tenant's noncompliance with California and local cannabis rules and regulations, rents and security deposits for Cannabis Operators are justifiably higher than for traditional commercial tenants.

While the Cannabis Operator seeks the appropriate licenses and permits, the parties might consider whether rent should be fully or partially abated. These types of leases often include escalating rent provisions. When a Cannabis Operator obtains the appropriate licenses and permits to operate its cannabis business, the rent increases concurrently.

Practically all landlord lease forms require the tenant to furnish a security deposit or some other form of collateral that secures the tenant's performance of its obligations under the lease. Based on an evolving legal landscape and the uncertainty of annual license renewals, Cannabis Operators pose a higher credit risk than a typical commercial tenant. Security deposits related to Cannabis Operators can be particularly critical should a Cannabis Operator fail to restore the premises once a lease term expires. Landlords may consider including language that allows the landlord to retain the security deposit or such other forms of collateral for a specified period of time after the lease expires until the landlord has inspected the premises to confirm that the tenant has conducted a proper clean-up, disposal and removal of alterations at the premises, including if applicable, the removal of all cannabis products and cannabis residue.

D. Operating Expenses

Indoor cannabis cultivation facilities often require enormous amounts of water and electricity to sustain their cannabis crops and operations.[138] Additionally, licensed Cannabis Operators require supplementary security measures beyond those required of a traditional commercial tenant. These include security measures required under MAUCRSA,[139] which may require increased utility maintenance and servicing beyond that required by a traditional commercial tenant. At multi-tenant facilities, the landlord and Cannabis Operator should appropriately address the manner in which these excess utility and service charges pass through to the tenant. When a single tenant occupies the property, the landlord typically passes these operating costs directly to the tenant.

E. Compliance with Laws

As previously noted, an over-arching point of concern related to licensed cannabis business leases is the fluidity of the bodies of law that govern this legal landscape. Virtually all lease forms require that the landlord and tenant comply with applicable law. Based on federal law, if this provision were included in a lease with a Cannabis Operator, both the landlord and tenant would automatically be in breach of these terms. Consequently, from a landlord's perspective, compliance with law provisions should expressly place the burden of compliance strictly on the Cannabis Operator. Additionally, the section that addresses compliance with law should also include an acknowledgement that under federal law, the sale, distribution and production of cannabis is a violation of the Controlled Substances Act, and the risk of enforcement of such federal law rests solely with the Cannabis Operator. The risk of enforcement should expressly encompass all federal, state, and local laws and regulations, including zoning ordinances that are effective before and become effective during the term of the lease, regardless of the cost of compliance. Should the Cannabis Operator breach this lease section, the landlord should again be granted an early termination right.

V. CONCLUSION

California is a pioneer in the rapidly evolving legal landscape governing in-state cannabis use, cultivation, production, and sale. Despite the real risks that property owners face when leasing space to a Cannabis Operator, there is also the potential for tremendous opportunity in the premium rents that Cannabis Operators must pay to operate in this market. This opportunity may also be realized by landowners seeking to entitle land for cannabis use in compliance with an approved local regulatory program. Interested real estate owners and investors must reevaluate and reposition their real estate investment strategies to legally capitalize on this burgeoning industry. Effective representation of these types of commercial clients necessitates a similarly disciplined strategy—one that concentrates on continuously monitoring the shifting cannabis regulations that govern land use and real estate control.

Endnotes

1 Title II, Controlled Substances Act ("CSA") (21 U.S.C. §§ 801-971).

2 Cal. Health & Safety Code § 11362.5, approved by California voters as Proposition 215 in 1996.

3 Senate Bill ("SB") 420, Cal. Health & Safety Code §§ 11362.7-11362.85, which was adopted by the State legislature in 2003.

4 Assembly Bill ("AB") 266, AB 243, SB 643, signed by Governor Brown on October 9, 2015, originally referred to as the Medical Marijuana Regulation and Safety Act but amended in 2016 under a California State Budget Medical Cannabis Trailer Bill as the Medical Cannabis Regulation and Safety Act, Cal. Bus. & Prof. Code §§ 19300 -19360.

5 Cal. Health & Safety Code § 11000-11033.

6 Cal. Health & Safety Code §§ 11357-11362.9 and Cal. Bus. & Prof. Code §§ 26000-26231.2, which was approved by California voters as Proposition 64 in November 2016.

7 Enacted by SB 94 in 2017 as a trailer bill for the 2017 Budget Act, consolidating and recasting the provisions of MCRSA and AUMA into a single regulatory scheme.

8 *City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.,* 56 Cal.4th 729 (2013) (unanimously upholding local ban on medical cannabis dispensaries); *County of Los Angeles v. Hill,* 192 Cal.App.4th 861 (2011); *City of Claremont v. Kruse,* 177 Cal.App.4th 1153 (2009).

9 *See* Cal. Bus. & Prof. Code § 26200(f) (providing that MAUCRSA "shall not be deemed to limit the authority or remedies of a city, county, or city and county under any provision of law, including, but not limited to, Section 7 of Article XI of the California Constitution").

10 *County of San Diego v. San Diego NORML,* 165 Cal. App.4th 798 (2008). *See also Gonzales v. Raich,* 545 U.S. 1 (2005); *People v. Kelly,* 47 Cal.4th 1008 (2010); *People v. Mentch,* 45 Cal.4th 274 (2008); *Ross v. Raging Wire Telecommunications, Inc.,* 42 Cal.4th 920 (2008); *County of Los Angeles v. Hill,* 192 Cal.App.4th 861(2011); *Qualified Patients Ass'n v. City of Anaheim,* 187 Cal. App.4th 734 (2010); *City of Claremont v. Kruse*, 177 Cal. App.4th 1153 (2009); *People v. Trippet,* 56 Cal.App.4th 1532 (1997).

11 *U.S. v. Oakland Cannabis Buyers' Coop.,* 532 U.S. 483, 491 (2001).

12 *Qualified Patients Ass'n*, *supra*, 187 Cal.App.4th 734; *San Diego NORML*, *supra*, 165 Cal.App.4th at 818; *City of Garden Grove v. Superior Court,* 157 Cal.App.4th 355 (2007).

13 *Gonzales v. Raich,* 545 U.S. 1, 29 (2005) (state law cannot place activities involving cannabis beyond

congressional reach); *Sacramento Nonprofit Collective v. Holder,* 855 F.Supp.2d 1100 (E.D. Cal 2012); *Marin Alliance for Med. Marijuana v. Holder,* 866 F.Supp.2d 1142 (N.D. Cal 2011) (federal officials may take legal action against medical cannabis patients, dispensaries, or dispensary property landlords under Commerce Clause, Ninth Amendment, Tenth Amendment, or the Equal Protection Clause).

14 *See* Scheick, *"Do You Feel Lucky, Banker? The Shaky Prospects for Financial Transactions with Marijuana-Related Businesses."* Cal. R.P. Law Journal Vol. 36 Issue 3, pp 55–56 (2018) [a companion piece in this issue].

15 Gutwillig, Stephen and Rev. Scott Imler; *Medical Marijuana in California: A History*; Los Angeles Times, March 6, 2009 (http://www.latimes.com/health/la-oew-gutwillig-imler6-2009mar06-story.html); Health & Safety Code § 11362.5.

16 Sloman, Larry (1998). *Reefer Madness: A History of Marijuana*. New York: St. Martin's Griffin. p. 409; Montgomery, Mo, *Cities Spotlight Laws Regulating Medical Pot Spots*, The Sun Gazette, October 21, 2009 (http://www.thesungazette.com/articles/2009/10/21/news/news02.txt); see also Levine, Michael S. and Geoffrey B. Fehling, *Sixth Circuit Holds "Litany of Exclusions," Illegal Cannabis Operations, Dooms Property Coverage Claim*, Hunton Insurance Recovery Blog, September 5, 2018, https://www.huntoninsurancerecoveryblog.com/2018/09/articles/first-party-property/sixth-circuit-holds-litany-of-exclusions-illegal-cannabis-operations-dooms-property-coverage-claim/.

17 Pursuant to Cal. Health & Safety Code § 11362.5(e), a "Primary Caregiver" is defined as the "individual designated by the person . . . who has consistently assumed responsibility for the housing, health, or safety of that person." A "Primary Caregiver" must have "(1) consistently provided caregiving, (2) independent of any assistance in taking medical marijuana, (3) at or before the time he or she assumed responsibility for assisting with medical marijuana." *Mentch*, *supra*, 45 Cal.4th at 283 (a person does not qualify as a primary caregiver merely by having a patient designate him or her as such).

18 Cal. Health & Safety Code § 11362.5(d).

19 SB 420, October 12, 2003, § 1(e), http://rcrcnet.org/sites/default/files/documents/sb_420_bill_20031012_chaptered.pdf.

20 Cal. Health & Safety Code §§ 11362.71(b), 11362.72.

21 Cal. Health & Safety Code § 11362.768; *City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.,* 56 Cal.4th 729, 760 (2013).

22 Cal. Health & Safety Code § 11362.768.

23 Former Cal. Bus. & Prof. Code §§ 19300-19360. The 2016 "California State Budget Medical Cannabis Trailer Bill" resulted in minor amendments to MCRSA, including changing references from "marijuana" to "cannabis" and rebranding the law from "Medical Marijuana Regulation and Safety Act" ("MMRSA") to the "Medical Cannabis Regulation and Safety Act."

24 Former Cal. Bus. & Prof. Code §§ 19300.7, 19320, 19322.

25 Former Cal. Bus & Prof. Code § 19320.

26 Formerly known as the Bureau of Medical Marijuana Regulation.

27 Former Cal. Bus & Prof. Code §§ 19300-19360.

28 Former Cal. Bus. & Prof. Code § 19320.

29 Including the Department of Food & Agriculture.

30 Former Cal. Bus. & Prof. Code § 19332.

31 Former Cal. Health & Safety Code § 11362.777.

32 Former Cal. Bus. & Prof. Code § 19332(e)(2).

33 Cal. Health & Safety Code § 11362.769.

34 Former Cal. Bus. & Prof. Code § 19360.

35 Cal. Bus & Prof. Code §§ 2220.05, 2241.5, 2242.1, 2525-2525.5.

36 Silva, Cristina; *California Marijuana Legalization is Finally Here: Rules and Everything Else You Need to Know for Monday Sales*; Newsweek, Dec. 12, 2017. *See* https://www.newsweek.com/california-marijuana-legalization-finally-here-rules-costs-and-everything-else-763655.

37 *Id.*

38 All nonmedical cannabis businesses must have a state license to operate, which will be valid for one year. Cal. Bus. & Prof. Code § 26050(c). A separate state license is required for each commercial nonmedical cannabis location. Cal. Bus. & Prof. Code § 26055. With the exception of nonmedical cannabis testing facilities, any person or entity licensed under AUMA may apply for and be issued more than one type of state license. Cal. Bus. & Prof. Code § 26053.

39 Cal. Bus & Prof. Code §§ 26000-26231.2. MAUCRSA is the administration's attempt to reconcile the medical and adult use cannabis systems in the state. Under MAUCRSA, licenses will be identified as medical or adult use, except for testing laboratories. Among other things, MAUCRSA (i) rebrands cannabis regulations

and the Bureau of Cannabis Control ("Bureau") (ii) removes the former limitation on holding licenses in more than two separate categories; (iii) eliminates the distinction between private and public companies; and (iv) establishes a threshold of 20% interest in a company to qualify as an owner, a CEO, a board member of a nonprofit, or anyone who exercises direction, management, or control of a company; and (v) changes the definition of "volatile solvents." The Bureau will issue testing laboratory licenses, but holders of such licenses cannot hold a license in any other cannabis-related category. Deliveries may only be made by a licensed business. MAUCRSA allows licensees of the California Department of Alcoholic Beverage Control to also hold a cannabis license, but prohibits any cannabis licensee from serving alcoholic beverages or tobacco on the licensee's premises. Violations could be subject to civil and criminal penalties. *See* https://www.abc.ca.gov/trade/INDUSTRY%20ADVISORY_CannabisAndAlcoholicBeverages07252018.pdf, and https://www.omarfigueroa.com/legislature-consolidates-mcrsa-and-auma-into-maucrsa/.

40 McQuillin, The Law of Municipal Corporations §§ 24.01-24.92a (3d ed 1980); *City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.,* 56 Cal.4th 729 (2013).

41 *Id.*; *Berman v. Parker,* 348 U.S. 26 (1954); *Euclid v. Ambler Realty,* 272 U.S. 365 (1926).

42 Cal. Const. art. XI, § 7; *Scrutton v. County of Sacramento,* 275 Cal.App.2d 412 (1969); *DeVita v. County of Napa,* 9 Cal.4th 763, 768 (1995).

43 *Id.*; *Griffin Dev. Co. v. City of Oxnard,* 39 Cal.3d 256 (1985); *Santa Monica Pines, Ltd. v. Rent Control Bd.,* 35 Cal.3d 858 (1984).

44 Bricken, Hilary and Julie Hamill, *2018: Land Use and Zoning Regulation of Cannabis Business*, June, 2018.

45 *Local Laws Make Marijuana Businesses Loco*, Green Entrepreneur, August 28, 2018, https://www.greenentrepreneur.com/article/319106.

46 *County of Sonoma v. Superior Court,* 190 Cal.App.4th 1312, 1315 n. 3 (2010).

47 *City of Corona v. Naulls,* 166 Cal.App.4th 418, 431 (2008) (also upholding trial court decision that medical marijuana dispensary operated as a nonpermitted, nonconforming use and thus was a nuisance per se).

48 *City of Riverside v Inland Empire Patients Health & Wellness Ctr., Inc.,* 56 C4th 729 (2013); *City of Claremont v Kruse,* 177 CA4th 1153 (2009); *City of Corona v Naulls*, 166 CA4th 418 (2008).

49 Former Cal. Bus. & Prof. Code § 19320.

50 Cal. Health & Safety Code § 11362.769; former Cal. Health & Safety Code § 11362.777(b)(1)(A), (c)(1), (2); former Cal. Bus & Prof. Code § 19332(e)(2).

51 Former Cal. Bus. & Prof. Code § 19320.

52 Cal. Bus. & Prof. Code § 26200; Welti, Tyler, *Cannabis' CEQA Challenge*, March 7, 2018, https://www.law360.com/articles/1019078/cannabis-ceqa-challenge. It is commonly assumed that a business license or tax certificate authorizes commercial cannabis activity, or that a collective operating CUA does not require local licensing or other authorization. However, under most municipal codes, a business license is merely a tax paid to a local government to conduct business within the jurisdiction; the issuance of such license does not entitle the license holder to engage in any otherwise prohibited business. A use in violation of a local zoning code is prohibited regardless of whether or not the operator holds a business license. Hamill, Julie, *A Comprehensive Update On MAUCRSA: California Cannabis Regulation and Risks of Leasing Real Property to Cannabis Business*, Real Property law Reporter, Volume 41, Number 3, May 2018, pg. 58.

53 Cal. Bus. & Prof. Code § 26200(a).

54 Cal. Health & Safety Code § 11362.2(b)(3). It is important to note that AUMA includes a provision that purports to repeal any ordinance that bans outdoor cultivation should the California Attorney General determine that nonmedical use of cannabis is lawful in the California under federal law. Cal. Health & Safety Code § 11362.2(b)(4).

55 Cal. Health & Safety Code §§ 11362.1(a)(3), 11362.2. "Private residence" is defined by AUMA as "a house, an apartment unit, a mobile home, or other similar dwelling," and includes any personal indoor cultivation on the same property as the residence that is fully enclosed, secure, and not visible from a public space. Cal. Health & Safety Code §§ 11362.2(a)(2), 11362.2(b)(5).

56 Cal. Bus. & Prof. Code § 26054(b); http://bcc.ca.gov/law_regs/bcc_notice_emerg.pdf.

57 Bentaleb, Habib, *Cannabis Company Compliance: The Essentials*, Canna Law Blog, March 22, 2018, https://www.cannalawblog.com/cannabis-compliance-the-essentials/.

58 Cal. Health & Safety Code § 11362.45(f)-(g).

59 Bricken, Hilary and Julie Hamill, *2018: Land Use and Zoning Regulation of Cannabis Business*, June, 2018.

60 Regan, Trish; California's Emerald Triangle; Small Towns, Big Money; CNBC, April 20, 2011, *see* https://www.cnbc.com/id/36331495; Mendocino County Code Chapter 10A.17, https://library.municode.com/ca/mendocino_county/codes/code_of_ordinances?nodeId=MECOCO_TIT10AAG_CH10A.17MECACUOR; Santa Cruz County Code § 7.130, *see* http://www.codepublishing.com/CA/SantaCruzCounty/#!/SantaCruzCounty07/SantaCruzCounty07130.html#7.130; Humboldt County Code § 314-55, https://humboldtgov.org/2124/Medical-Marijuana-Land-Use-Ordinance.

61 Savage, David G; *Supreme Court Action Upholds California's Medical Pot Law*; *Los Angeles Times*, May 19, 2009 (Supreme Court denied the counties' petition for review of the appellate decision in *County of San Diego v. San Diego NORML et al.* (2008) 165 Cal.App.798; http://articles.latimes.com/2009/may/19/nation/na-court-marijuana19.

62 Bricken, Hilary and Julie Hamill, *2018: Land Use and Zoning Regulation of Cannabis Business*, June, 2018.

63 *City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.,* 56 Cal.4th 729 (2013).

64 *Inland Empire*, 56 Cal.4th at 738.

65 *Id*. at 742.

66 *Id*. at 762.

67 *Id*. at 759 (emphasis added).

68 *Maral v. City of Live Oak,* 221 Cal.App.4th 975 (2013).

69 Cal. Govt. Code §§ 54950-54963. The Ralph M. Brown Act, the state's open meetings law, guarantees the public's right to attend and participate in meetings of the local legislative bodies. The Act prohibits informal, undisclosed, and secret meetings held by local elected officials, such as members of city councils, county boards, and other local government bodies.

70 *Maral*, 221 Cal.App.4th 984.

71 *Id*.

72 *Id*. at 975; *Inland Empire*, 56 Cal.4th at 729; Cal. Bus. & Prof. Code §§ 26055(e), 26200(a).

73 Cal. Bus. & Prof. Code § 26201.

74 *Safe Life Caregivers v. City of Los Angeles*, 243 Cal.App.4th 1029, 1048 (2016).

75 *Id.* at 1049.

76 *Id*. at 1047-48.

77 *Id*.

78 *County of Los Angeles v. Hill*, 192 Cal.App.4th 861 (2011).

79 *420 Caregivers, LLC v. City of Los Angeles,* 219 Cal.App.4th 1316 (2012).

80 *County of Tulare v. Nunes,* 215 Cal.App.4th 1188 (2013).

81 *Conejo Wellness Ctr., Inc. v. City of Agoura Hills,* 214 Cal.App.4th 1534 (2013).

82 *City of Monterey v. Carrnshimba,* 215 Cal.App.4th 1068 (2013).

83 *The Kind & Compassionate v. City of Long Beach,* 2 Cal.App.5th 116 (2016).

84 *City of Palm Springs v. Luna Crest, Inc.,* 245 Cal.App.4th 879 (2016).

85 *Ye set al v. City of San Bernardino,* (Superior Court of San Bernardino County Case Nos. CIVDS 1702131, CIVDS 1704278, CIVDS 1712424) (June 12, 2018).

86 *Harris v. City of Fontana* (Superior Court of San Bernardino County Case No. CIVDS1710589) (Nov. 2, 2018).

87 Cal. Health & Safety Code § 113.62.2(b)(2).

88 Bricken, Hilary and Julie Hamill, *2018: Land Use and Zoning Regulation of Cannabis Business*, June, 2018.

89 *Id.*; Staggs, Brooke, *Marijuana Landlord Turns Activist, Arguing Local Policies are Slowing Legal Weed*, *Orange County Register*, May 23, 2018; https://www.ocregister.com/2018/05/23/marijuana-landlord-turns-activist-arguing-local-policies-are-slowing-legal-weed/; *B Street v. City of Colton* (Superior Court of San Bernardino Case No. CIVDS1810207) (April 26, 2018); *Bubba Likes Tortillas v. City of San Bernardino* (Superior Court of San Bernardino CIVDS1806921) (March 23, 2018), *Smith v. City of Moreno Valley* (Superior Court of County of Riverside Case No. RIC1808145) (May 7, 2018); *Carnation Enterprises LLC v. City of Hemet* (Superior Court of Riverside County Case No. MCC1800387) (April 10, 2018).

90 Bricken, Hilary and Julie Hamill, *2018: Land Use and Zoning Regulation of Cannabis Business*, June, 2018.

91 *Id*.

92 This article does not address how the state has handled CEQA environmental review requirements.

93 Cal. Pub. Res. Code §§ 21000-21189.3; 14 C.C.R. §§ 15000-15387.

94 Welti, Tyler, *Cannabis' CEQA Challenge*, March 7, 2018; https://www.law360.com/articles/1019078/cannabis-ceqa-challenge.

95 Bricken, Hilary and Julie Hamill, *2018: Land Use and Zoning Regulation of Cannabis Business*, June, 2018; http://sccoplanning.com/PlanningHome/

Environmental/CEQAInitialStudiesEIRs/CannabisRegulationsEnvironmentalReview.aspx. In *SMC Marijuana Moratorium Coalition v. County of San Mateo* (Superior Court of San Mateo County Case No. 18-CIV-00206, April 16, 2018), (the City remediated a challenged CEQA compliant against a cannabis permitting ordinance by requiring that the each project considered under the permitting scheme to be a discretionary approval subject to CEQA).

96 Cal. Bus. & Prof. Code § 26055(h).

97 Welti, Tyler, *Cannabis' CEQA Challenge*, March 7, 2018; https://www.law360.com/articles/1019078/cannabis-ceqa-challenge.

98 *Union of Med. Marijuana Patients v. City of Upland,* 245 Cal.App.4th 1265 (2016) (ordinance banning mobile dispensaries was not "project" under CEQA partly because of speculative nature of plaintiffs' claims of environmental consequences); *Union of Med. Marijuana Patients, Inc. v City of San Diego,* (review granted Jan. 11, 2017, S238563; superseded opinion at 4 Cal. App.5th 103 (2016)) (City of San Diego did not have to conduct environmental analysis before enacting ordinance regulating establishment and location of marijuana consumer cooperatives because ordinance did not constitute "project" under CEQA).

99 All references to CEQA Guidelines shall mean California Code of Regulations, Title 14, §§ 15000–15837.

100 Welti, Tyler, *Cannabis' CEQA Challenge*, March 7, 2018, https://www.law360.com/articles/1019078/cannabis-ceqa-challenge.

101 Welti, Tyler, *Cannabis' CEQA Challenge*, March 7, 2018, https://www.law360.com/articles/1019078/cannabis-ceqa-challenge.

102 Notice of Exemption prepared by the City of Coalinga for a conditional use permit, available at https://coalinga.novusagenda.com/AgendaPublic/AttachmentViewer.ashx?AttachmentID=2694&ItemID=2250.

103 See City of San Diego, "Report to Hearing Officer," August 8, 2018, https://www.sandiego.gov/sites/default/files/ho-18-061.pdf.

104 *Union of Medical Marijuana Patients v. City of Upland,* 245 Cal.App.4th 1265 (2016); *Union of Medical Marijuana Patients v. City of San Diego,* 4 Cal.Appl.5th 103 (2016).

105 *Union of Med. Marijuana Patients, Inc. v City of San Diego,* (review granted Jan. 11, 2017, S238563; superseded opinion at 4 Cal.App.5th 103 (2016)), https://caselaw.findlaw.com/ca-supreme-court/1765649.html. This case has been fully briefed but has not been set for oral argument yet.

106 *Union of Medical Marijuana Patients v. City of San Diego,* 4 Cal.App.5th 103 (2016).

107 Welti, Tyler, *Cannabis' CEQA Challenge*, March 7, 2018, https://www.law360.com/articles/1019078/cannabis-ceqa-challenge; https://www.cloverdale.net/DocumentCenter/View/2118/.

108 Memorandum from the County of Alameda's Cannabis Interdepartmental Work Group to Board of Supervisors' Transportation/Planning Committee dated March 1, 2018, *Proposed Amendments to the Cannabis Dispensary and Cultivation Ordinances to Allow Permitted Operations to Include Both Medicinal and Adult-use Cannabis, to Increase the Number of Cultivation Sites Permitted, and to remove the Two-year Sunset Clause from the Cultivation Ordinance,* https://www.acgov.org/cda/planning/landuseprojects/documents/IV_3_5_18-TPcult_disp_ord.pdf; http://www.acgov.org/cda/planning/landuseprojects/medical-cannabis.htm; see also Mendocino County, https://www.mendocinocounty.org/home/showdocument?id=18035.

109 *Id.*

110 https://humboldtgov.org/2308/Cannabis-EIR.

111 https://humboldtgov.org/DocumentCenter/View/62689/Humboldt-County-Cannabis-Program-Final-EIR-60mb-PDF.

112 *Id.*

113 http://cannabis.countyofsb.org/resources.sbc, tp://longrange.sbcountyplanning.org/programs/Cannabis/Environmental/Draft%20PEIR/Individual%20Files/00_Executive_Summary_CannabisEIR_DEIR.pdf.

114 Bricken, Hilary and Julie Hamill, *2018: Land Use and Zoning Regulation of Cannabis Business*, June, 2018.

115 *Id.*; Kovner, Guy, *Sonoma Pushes Public Vote on Marijuana Initiative Back to 2020 Ballot*, The Press Democrat, July 23, 2018, https://www.pressdemocrat.com/news/8560438-181/sonoma-pushes-public-vote-on.

116 Bricken, Hilary and Julie Hamill, *2018: Land Use and Zoning Regulation of Cannabis Business*, June, 2018; Dersham, Daniel, *Commercial Cannabis Land Development: Development Agreements as Valuable Tool*, September 11, 2017, https://www.cannalawblog.com/commercial-cannabis-land-development-development-agreements-as-valuable-tool/.

117 Cal. Govt. Code § 65866.

118 Cal. Govt. Code § 65865.4.

119 *Id.*

120 *Id.*

121 *Id.*

122 Welti, Tyler, *Cannabis' CEQA Challenge*, March 7, 2018, https://www.law360.com/articles/1019078/cannabis-ceqa-challenge.

123 *Id.*; Herrara, Maria, *What is CEQA and Why Should You Care?*, May 19, 2018, https://www.nccannabisalliance.org/2018/03/19/what-is-ceqa-and-why-you-should-care/.

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125 *Id.* at 4-65.

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127 The 2018 baseline demand for cannabis in the State of California is estimated to be approximately 640 tons for the population 21 years and older. *Economic Impact Study of the Cannabis Sector in the Greater Sacramento Area*, Prepared by Center for Business and Policy Research, Eberhardt School of Business, McGeorge School of Law, Stockton & Sacramento, CA, October 17, 2016.

128 Weed, Julie, *Roll-Out Feels Slow, But California Could Sell $2.5 Billion of Legal Weed This Year,* Forbes.com, available at https://www.forbes.com/sites/julieweed/2018/08/22/roll-out-feels-slow-but-california-could-sell-2-5-billion-of-legal-weed-this-year/#c4c19804e7f4, August 22, 2018.

129 PR18:40, Is a Public Cannabis Bank Feasible? Treasurer Chiang Aims to Find Out Study could finally settle issue and provide concrete next steps by December, August 1, 2018, available at https://www.treasurer.ca.gov/news/releases/2018/20180801/40.asp. According to ArcView Market Research, a research company focused on the cannabis industry, sales of legal cannabis worldwide are projected to reach $57 billion by 2027, and the largest group of cannabis buyers will be in North America. Pellechia, Thomas, *Legal Cannabis Industry Poised for Big Growth, in North America and Around the World*, Forbes, March 1, 2018, *available at*: https://www.forbes.com/sites/thomaspellechia/2018/03/01/double-digit-billions-puts-north-america-in-the-worldwide-cannabis-market-lead/#1e62fc4d6510.

130 21 U.S.C. § 856(a). Critically to landlords, this section of the U.S.C. provides that it is unlawful to "(1) knowingly open, lease, rent, use or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance; (2) manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance." *Id.*

131 21 U.S.C. § 881(a)(7).

132 *See* Bureau of Cannabis Control Text of Regulations, Cal. Code Regs. tit.16, div. 42 § 5006. Applicants are required to submit detailed diagrams of the leased premises, which should include "all boundaries, dimensions, entrances and exits, interior partitions, walls, rooms, windows, doorways, and common or shared entryways." Additionally, the diagram is required to identify the location of all cameras and should be to scale. *Id.*

133 *See* Bureau of Cannabis Control Text of Regulations, Cal. Code Regs. tit. 16, div. 42 § 5007.

134 *Id. See* Application Forms, Bureau of Cannabis Control California, https://www.bcc.ca.gov/clear/forms.html.

135 *See* https://cannabis.ca.gov/faqs/.

136 Randall, David, *Legal Pot Growers to Drive Up California Warehouse Rates*, Reuters, December 30, 2016. *Available at* https://www.reuters.com/article/us-california-marijuana-warehouses-analy/legal-pot-growers-to-drive-up-california-warehouse-rates-idUSKBN1492B5.

137 21 U.S.C. § 812.

138 McVey, Eli, *Chart: Startup Costs for Wholesale Marijuana Cultivators*, Marijuana Business Daily, May 22, 2017, *available at* https://mjbizdaily.com/chart-startup-costs-wholesale-marijuana-cultivators/. To ensure a bountiful harvest, indoor cultivators are required to "artificially control all aspects of the growing environment" humidity and temperature control systems and artificial lighting. *Id.* This type of equipment and energy usage comes with a steep price tag. *See also* Silverstein, Ken, *California's Pot Sales are Escalating, Along with Growers' Energy Costs, Forbes, March 5, 2018, available at* https://www.forbes.com/sites/kensilverstein/2018/03/05/californias-pot-sales-are-escalating-along-with-growers-energy-costs/#10c343d72bb7.

139 Article 5, §§ 5042-5047 of MAUCRSA sets forth security measures required for Cannabis Operators, including but not limited to video surveillance systems, commercial grade locks, and security personnel.