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The Role of Local Jurisdictions in Legalized California Cannabis

Northern Section: California Chapter,
2019 American Planners Association
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Presented by:

Robert W. Selna

Chair, Cannabis Practice Group



What Today's Talk Will Cover

- Overview of State and Federal Cannabis Laws
- California's Cannabis Regulations
- Overview of Local Codes
 - Permitting
 - Retail and everything else
 - Application process
 - Agency roles
 - Taxes
 - License Caps
 - RFPs (and caps)
- Special Topics
 - Delivery, events

California's Cities and Counties

- 58 Counties
- 482 Cities
- Approx. only one-third allow commercial cannabis



Federal Laws

- Supremacy Clause
- Controlled Substances Act
- Anti-Money Laundering Laws
- Note: 43 states have legalized cannabis in some form. 10 have legalized “recreational” cannabis

The Controlled Substances Act (1970)

- Schedule I: opiates, hallucinogens, CANNABIS
- Schedule II: methamphetamines, cocaine
- Schedule III-V: codeine, steroids

Anti-Money Laundering Laws

- Intended to prevent individuals and businesses from ***knowingly participating in transactions*** with money that is known to be derived from federally-illegal activities.
 - ***What about State and Local Governments?***
- All businesses must report the receipt of cash payments greater than \$10,000.00.
- Bank Secrecy Act Reporting

Practical Impacts of Federal Laws

- Traditional banking is largely unavailable
- Paying taxes is challenging
- No Federal trademarks for cannabis strains
- Bankruptcy Court unavailable
- 280E and Business Tax Deduction Restrictions
- Landlords can use as leverage against cannabis tenants depending on lease
- Banks may call loans due on property owner/borrowers
- Insurance Companies may deny claims based on “no illegal use” terms

Federal Law Enforcement Update

- Last big case, Harborside, ended in 2016
- Limited federal funds for enforcement
- Bi-partisan “STATES” Act in the works
- Bi-partisan Safe Banking Act in the works

California Cannabis Legalization Timeline

1996 • Voters Approve Prop 215 med cannabis for patients but no guidance

2004 • Oakland establishes 4 dispensaries

2015 • MCRSA creates dual licensing system for Med Cannabis

2016 • Voters approve Prop 64 – Recreational; dual licensing system remains in place

2017 • Cities issue applications
• Medical/Rec Regs Combined by State Legislature (MAUCRSA)

2018 • January – State licenses issued

State Law: MAUCRSA's Local/State Licensing

KEY: Every City and County Determines Their Own Permitting, including...

Banning Everything in the Cannabis Supply Chain

- Only allowing personal use under MAUCRSA to...

Allowing Everything in the Cannabis Supply Chain

State Taxes

- Cultivation tax
 - \$9.25 per ounce of flower
 - \$2.75 for all other forms
- Excise Tax: 15 percent on all cannabis retail goods
- Local tax gross receipts tax: average, 5 percent
- Standard state sales tax: average 8 percent on total
- Total: 30-40 percent passed on to consumers

2018 Roundup

- Regulations finalized after public comment
- Provisional Licenses added in summer 2018; available through 2022
- Only one-third of locals permit commercial cannabis
- \$2.5 billion in legal sales (well below \$5 B expected)
- Tax intake lower than expected - \$345 M, not \$1B
- Efforts to lower taxes – Bonta Bill – excise 15% to 11%
- Thriving black market (est. 3% of cultivators are licensed)
- 2,500 Temporary licenses issued
- After election, some additional Local Jurisdictions allow commercial Cannabis

2019 Roundup

- Approx. one-third of locals permit commercial cannabis
- 76% of cities and 69% of counties have banned retail stores
- Expected approx. \$3.1 billion in legal sales
- Expected approx. \$8.7 billion in illegal sales
- Recent data on license issuance 1) Retail, distribution, labs, micro businesses: 2,630; 2) Manufacturers: 392; 3) Cultivators: 3,830 total = 7,392
- In November, the state suspended 394 licenses for failure to comply with Track & Trace (5% of all license businesses)
- Hemp gaining momentum in the Legislature

Cities and Counties Issues to Consider

- Zoning
- Permitting
- Application process
- Agency roles
- Taxes
- CEQA (even if not “discretionary” permit)
- License Caps
- RFPs
- Special Topics
 - Equity
 - Delivery
 - Events

Examples from 3 Jurisdictions

- Oakland
- Sacramento
- San Diego



City of Oakland



Retail, Full Supply Chain and Equity

RETAIL

- **Permit Type:** Business Permit issued by the City Admin's office (no planning commission or City Council)
- **Zoning:** Commercial or Industrial and distance requirements
- **Application Process:** Hearing officer and public hearing; discretionary – impact on peace, order, welfare. Building and Fire Dept. approval
- **Taxes:** 5% gross receipts (medical), 10% (recreational)
- **Special Considerations**
 - Cap: only 8 issued per year; 4 to Equity Applicants
 - Lottery



Oakland Operations other than Retail

- **Permit types:** Everything from delivery to testing labs. No caps.
- **Zoning:**
 - Light Manufacturing Industrial
 - Research and Development
 - General Manufacturing Industrial
 - Custom Manufacturing
 - Distance requirements
- **Application Process:** Over the counter; no hearing; inspection cards, but CEQA review. Building and Fire depts.
- **Special Considerations:** Equity and Incubating



Example: Cultivation, Distribution, Labs



Equity

50% of ALL permits issued citywide must be issued to a restricted category of applicants, so a 1-1 equity to non-equity process

Equity Applicant: An entity applying whose ownership is at least 50% “Equity”

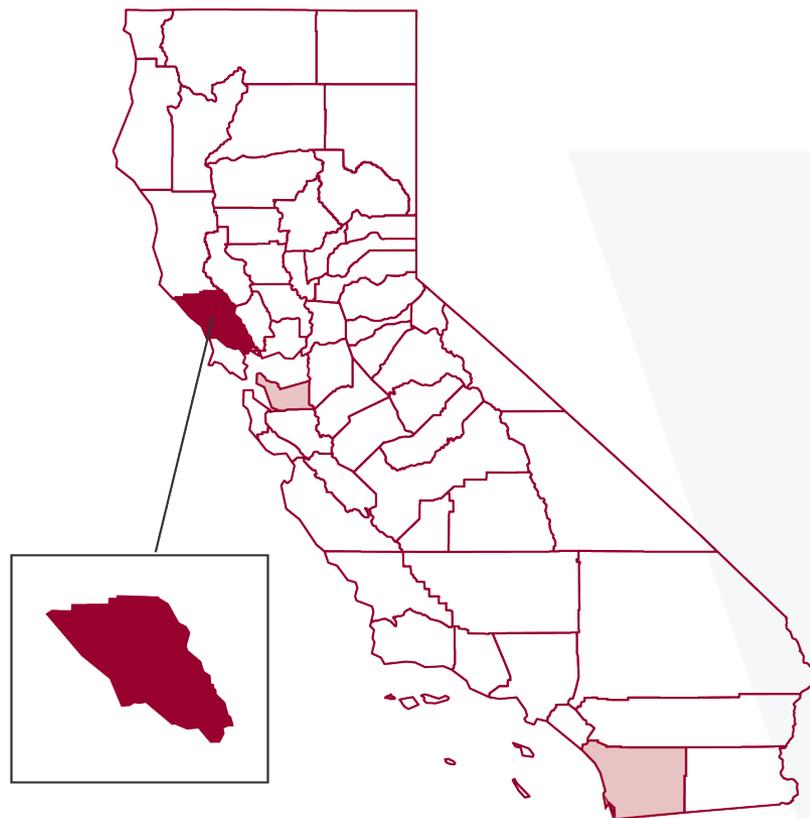
Equity Criteria:

- 1) An Oakland resident
- 2) Annual income no more than 80% of AMI, AND
- 3) Has lived for 10 of the past 20 years in one/comb of 21 police beats, OR
- 4) Arrested after Nov. 5, 1996 and convicted of a cannabis crime

* **Incubator Option** to keep your place in line



Sacramento



Sacramento

- **Permit types:** Everything from cultivation to testing labs except storefront retail (delivery-only retail allowed)
- **Zoning:**
 - Agricultural
 - Heavy Commercial
 - Light Industrial
 - Heavy Industrial
 - Distance requirements
- **Application Process: Two separate applications**
 - Conditional Use Permit
 - Separate business operator's permit



Sacramento Continued

- **Taxes:**

Gross Receipts: **4%**

- **Special Considerations:**

Cultivation caps in certain zones (example Power Inn area)

Neighborhood Responsibility Agreement

- 1) Additional 1% on gross receipts or
- 2) Fee based on a development impact study

Community Responsibility Plan



City of San Diego



The City of San Diego: All Licenses Types & Recreational Storefront Dispensaries

- **Permit types:**

- Marijuana Outlets (Retail)**

- Both medical (2014) and recreational (approved 2017)

- Four total in each of 9 Council Districts = 36 total

- Marijuana Production Facilities (individual or combined):**

- Cultivation, manufacturing, distribution, storage and testing “consistent with state requirements”

- Zoning:**

- Mostly Limited to Industrial Zones

- 1,000 feet from public parks, churches, childcare, etc.

- 100' from residential zones and from other marijuana outlets



City of San Diego Continued

- **Application Process:**
 - Conditional Use Permit**
 - **Hearing officer with an appeal to Planning Commission**
- **Taxes:** Gross receipts for retail cultivation, distribution and manufacturing = 5% until July 1, 2019 and then 8% thereafter
- **Special Considerations:**
 - 40 production facilities citywide
 - 36 Retail outlets citywide



Statewide Issues for Local Jurisdictions

- Personal Consumption
- Statewide Delivery
- Events with consumption (allowed in jurisdictions without cannabis codes)

What to Expect in 2019-2020

- Provisional licenses for 12 months; can be extended through 2022
- State and local efforts to lower taxes
- Increased Enforcement
- STATES Act
- Hemp market opens up



SB 35/AB 1485 and Update on 2019 Streamlining Legislation

Northern Section: California Chapter,
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Presented by:
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SB 35

(Government Code § 65913.4)

- Adopted in 2017, became effective January 1, 2018.
- Creates a ministerial review and approval process to expedite qualifying affordable housing projects
- Targets jurisdictions that have not yet made sufficient progress towards their allocation of regional housing needs.
- Department of Housing and Community Development (HCD) issued final guidelines for implementation on November 29, 2018.

SB 35/AB 1485

- Intent of SB 35 is to facilitate and expedite construction of affordable housing.
- Legislature found access to affordable housing is a matter of statewide concern and declared SB 35 applicable to all jurisdictions (including charter cities and counties).
- AB 1485 (Wicks) modifies provisions of SB 35

Key Aspects of SB 35

- Project approval is streamlined and ministerial (not subject to discretionary review or approval)
- If project qualifies, approval in 180 days or less
- Extremely limited public review opportunities
- Exempt from CEQA because CEQA only applies to “discretionary” actions

Is the Project Eligible?

- Project must be located in a jurisdiction that HCD has determined has issued less than its share of building permits to meet its regional housing needs, by income category within a “reporting period.” (HCD website*)
- 28 jurisdictions meet their RHNA numbers
- Above moderate housing (298 jurisdictions failing)
- Below moderate housing (low and very low) (213 jurisdictions failing)

* Determination represents Annual Progress Report data received as of June of 2019 and is to be updated “quarterly.”

SB 35 Streamlining Checklist

If the answer to all questions is “YES,” the proposed project is subject to SB 35 streamlining

- YES NO **Affordability.** Does the proposed project dedicate the **qualifying amount of affordable housing**?
- YES NO **Number of Units.** Does the proposed project contain at least **two or more residential units**?
- YES NO **Zoning and Residential Uses.** Is the project located on legal parcels that have a general designation or are zoned for residential, with at least **2/3 of the square footage dedicated to residential uses**?
- YES NO **Location.** Is the **project located on property** that is not within a coastal zone, prime farmland, wetlands, a high fire severity zone, hazardous waste site, a delineated earthquake fault zone, a flood plain, a floodway, a community conservation plan area, a habitat for protected species, or under/encumbered by a conservation easement?

SB 35 Streamlining Checklist

If the answer to all questions is “YES,” the proposed project is subject to SB 35 streamlining

- YES NO **Prevailing Wages.** If the proposed project is not itself a public work, as defined under Government Code Section 65913.4(a)(8)(A), are all construction workers employed in the execution of the development to be paid the **general prevailing rate of per diem wages** for the type of work and demographic area, as determined by the California Department of Industrial Relations?
- YES NO **Skilled and Trained Workforce.** If the development consists of 75 or more units that are not 100 percent subsidized affordable housing, will the work be performed by a **skilled and trained workforce**, as that term is defined under California Government Code 65913.4(a)(8)(B)(iii)?

SB 35 Streamlining Checklist

If the answer for any questions is “YES,” the proposed project is subject to SB 35 streamlining

- YES NO **Consistent with Objective Standards.** Is the proposed project consistent with all **applicable objective standards** at the time of SB 35 application submittal, including all dimensional, height, setback and density (for purposes of this section, any waivers, concessions or incentives conferred through the State Density Bonus Law are considered code compliant, and thus consistent with objective standards)?

SB 35 Streamlining Checklist

If the answer for any questions is “YES,” the proposed project is not subject to SB 35 streamlining

- YES NO **Historic Buildings.** Does the proposed project require demolition of a **historic structure** that is on a national, state or local historic register?
- YES NO **Subdivisions.** Unless the proposed project either: i) receives a low-income housing tax credit and is subject to the requirement that prevailing wages be paid, or ii) is subject to the requirements to pay prevailing wages and use a skilled and trained workforce, does the proposed project involve the subdivision of a parcel that is subject to the **California Subdivision Map Act**?
- YES NO **Demolition of Residential Uses.** Does the proposed project require **demolition of any housing units** that have been occupied by tenants in the last 10 years; are subject to any form of rent or price control, or subject to any recorded covenant, law or ordinance that restricts rents to levels affordable to persons and families of moderate , low or very low incomes?
- YES NO **Mobile Homes.** Is the site governed by the **Mobile Home Residency Law**, Recreational Vehicle Park Occupancy Law, the Mobile Home Parks Act or Special Occupancy Parks Act?

Timeframes

Determine Eligibility

- 60 days if project has 150 fewer housing units
- 90 days if project has more than 150 housing units

Approval

- 90 days from date application submitted if 150 fewer housing units
- 180 days from date application submitted if more than 150 housing units

Public Hearings?

- Not allowed because a ministerial project
- Can permit “design review or public oversight”
 - Can be conducted by Planning Commission or equivalent board responsible for approval of development projects, including the city council.
 - Must be “objective and strictly focus on assessing compliance with criteria required for streamlined projects, as well as any reasonable objective design standards” in effect before application submitted.
 - Cannot in any way “inhibit, chill, or preclude the ministerial approval” allowed by SB 35.

Local Government Responsibility

- HCD Guidelines require locality to provide information about its ministerial approval process, including materials required for an application and relevant objective standards used in the evaluation
- Determine consistency with objective general plan, zoning, subdivision and/or design review standards
- If objective standards are inconsistent in the locality's documents, the standard in the general plan prevails
- SB 35 requires **objective zoning, subdivision and design review standards** to be **knowable by the applicant and public official** before submission

Local Government Responsibility

- SB 35 requires the design review/public oversight process to only focus on **reasonable objective design standards** published and adopted by ordinance or resolution before submission of a development application
- In APR due each year, locality must indicate to HCD number of applications submitted, located and number of developments approved, total number of building permits issued and total number of units constructed by ownership status (rent vs. own) and income category for SB 35 projects

Public Hearings

- Not required due to “ministerial” nature
- Can undertake “**design review or public oversight**”
 - Planning commission or equivalent board responsible for approval of development projects or city council
 - Must be “objective and strictly focus on assessing compliance with criteria required for streamlined projects as well as any reasonable objective design standards” in effect before application submitted
 - Cannot in any way “inhibit, chill or preclude the ministerial approval”

Life of Project

- Projects that include public investment (*AB 1485: beyond tax credits*) in housing affordability will not expire where 50% of the units are affordable to households making below 80% of the area median income (below moderate income levels).
- Projects that do not include 50% of the units as affordable to households making below 80% of the area median income (below moderate income levels) automatically expire after three years; *AB 1485: 3 years from the date of final approval action or from date of final judgment*

Modifications to Project Approval

Guidelines allow modifications after project approval and before building permit issuance if:

By Applicant:

1. Consistent with HCD Guidelines
2. No alteration to project consistency with objective standards
3. No conflict with a plan, ordinance or policy addressing community health or safety
4. No modification of requested concessions, incentives or waiver

Modifications to Project Approval

- **By Locality (only once) if:**
 1. Necessary to comply with construction codes (including building, plumbing, electrical, fire, grading)
 2. Necessary to comply with federal or state laws; or
 3. Necessary to mitigate a specific, adverse impact upon public health or safety and no “feasible” way to “satisfactorily” mitigate or avoid the impact without modifying the development

Issues in Implementing SB 35

- 1) What are “**objective zoning/design standards**”? Must they be in writing and must they originate from an adopted ordinance or resolution. AB 1485: **substantial evidence** that allows a **reasonable person** to conclude development is consistent with standards
- 2) **Who determines** if the application meets these standards?
- 3) Does the project include “**2/3 residential use**”? *Berkeley Shellmound* case. AB 1485.
- 4) How do you tell your **elected officials** they can't hold public hearings?
- 5) Can **conditions of approval or mitigation measures** be imposed (phasing of project, indemnification provision, preparation of certain studies/reports) on the project?

Issues in Implementing SB 35

1. Can the locality (through general plan or other planning document) require preparation of CEQA-related studies and impose the measures recommended in those studies?
2. Can the locality impose a condition of a mixed-use project that requires affordable housing be built first/concurrently with other project uses?
3. HCD Guidelines state ministerial approval cannot require CUP or other discretionary local government review/approval. How does this effect inclusionary housing agreements and SIAs?
4. What steps should the locality take to assure an adequate record is prepared if denial/approval is challenged?

SB 50: Son of SB 35

- Tabled for the 2019 legislative session (push by Senate Appropriations Chair Portantino)
- Upzones “transit-rich” and “jobs-rich” properties
- Four-plexes by right in single family zones (“neighborhood multifamily project”)
- Affordability requirement: 11 plus units
- Links to Housing Accountability Act which requires localities to make specific denial findings (“specific adverse impact upon health and safety”)

2019 Housing Legislation

- AB 1485 (Wicks)
 - Aims to ease SB 35's high hurdles
 - 10% of a project's units reserved for residents with incomes 80% or less of area median income (SB 35 required 10%)
 - 20% of units for incomes less than 120% of area median income (SB 35 required 50%)
 - Affordability regulatory covenant for low and moderate income units (rental: 55 years/owned: 45 years)
 - Clarifies "2/3 residential" threshold
 - CEQA not applicable to BART and local agency zoning approvals of streamlined projects for very low, low and moderate income

2019 Housing Legislation

- SB 330 (Skinner) Housing Crisis Act of 2019
 - “Housing development” defined as residential projects, mixed use projects (2/3 square footage residential) and supportive/transitional housing
 - **Streamlines** review/approval process (**5 “hearings” max**)
 - Shortens timeframes under Permit Streamlining Act from 120 days to 90 days (60 for affordable projects) following EIR
 - **Freezes land use regulations/policies** in effect as of January 1, 2020 (includes power of electorate)
 - Prohibits imposition of moratorium/limit on number of permits issued

SB 330

- Localities must post pre-application requirements (checklist) on website and adhere
- Must specifically identify why pre-application is rejected as incomplete
- If locality disapproves project or conditions approval to render project infeasible, locality must make **written findings** based on a **preponderance of evidence**

Accessory Dwelling Units

- AB 881, SB 13 and AB 68[1]
 - Localities must ministerially approve ADU within 60 days (previously 120) after receipt of complete application
 - State law prohibits city from requiring a minimum lot size
 - ADUs now permitted on lots with multi-family units
 - Localities cannot require ADU parking within ½ mile of transit (including bus stops)



Thank You!



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