

MEMORANDUM

**ATTORNEY-CLIENT PRIVILEGED AND
CONFIDENTIAL**

FROM: Brad Johnson, Esq.

TO: Robert Adelman

RE: **CEQA Compliance**

DATE: February 22, 2018

Robert, you asked for an explanation of how the California Environmental Quality Act (Pub. Resources Code, § 21000 *et seq.* [“CEQA”]) applies to (1) Lake County’s adoption of its local commercial cannabis ordinance; and (2) individual discretionary permits that Lake County may approve under its commercial cannabis ordinance. We also understand that some clarification may be helpful concerning the various “management plans” that the state requires for certain commercial cannabis activities, and whether and to what extent those management plans satisfy applicable CEQA requirements, and how those management plans interplay with similar management plans required under the County’s draft ordinance. We address each question below.

1. CEQA Applicability to Lake County’s Commercial Cannabis Ordinance

A local government’s adoption of a land use ordinance may be subject to CEQA to the extent the ordinance has the potential to result in a direct physical change or a reasonably foreseeable indirect physical change in the environment. (Pub. Resources Code, § 21065; 14 C.C.R. § 15064; *Santa Monica Chamber of Commerce v. City of Santa Monica* (2002) 101 Cal.App.4th 786, 789, fn. 2; *see also Union of Medical Marijuana Patients, Inc. v. City of San Diego* (2016) 4 Cal.App.5th 103.) The Medicinal and Adult-Use Cannabis Regulation and Safety Act (Bus. & Prof. Code, § 26000 *et seq.* [the “State Cannabis Act”]), however, expressly exempts local zoning ordinances that regulate commercial cannabis activities from CEQA review. The State Cannabis Act provides as follows:

Without limiting any other statutory exemption or categorical exemption, Division 13 (commencing with Section 21000) of the Public Resources Code does not apply to the adoption of an ordinance, rule, or regulation by a local jurisdiction that requires discretionary review and approval of permits, licenses, or other authorizations to engage in commercial cannabis activity. To qualify for this

exemption, the discretionary review in any such law, ordinance, rule, or regulation shall include any applicable environmental review pursuant to Division 13 (commencing with Section 21000) of the Public Resources Code. This subdivision shall become inoperative on July 1, 2019.

(Bus. & Prof. Code, § 26055(h).)

The above exemption applies if the local zoning ordinance meets two conditions. First, the local ordinance must require discretionary review and approval of permits, licenses or other authorizations to engage in commercial cannabis activity. CEQA defines a “discretionary” approval as one that “requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity, as distinguished from situations where the public agency or body merely has to determine whether there has been conformity with applicable statutes, ordinances, or regulations.” (14 C.C.R. § 15357.) Second, the local zoning ordinance must require CEQA review, where applicable, of individual projects considered under the ordinance.

In its current draft form, the proposed Lake County cannabis ordinance qualifies for the State Cannabis Act’s CEQA exemption. (Bus. & Prof. Code, § 26055(h).) The County’s draft ordinance provides for discretionary approval of commercial cannabis activities by requiring either a major use permit (review and approval process set out in Article 51 of the County Zoning Ordinance) or a minor use permit (review and approval process set out in Article 50 of the County Zoning Ordinance). Both permit types require “the exercise of judgment or deliberation”, by either the Zoning Administrator, Planning Commission, or Board of Supervisors. (14 C.C.R. § 15357.) As discretionary approvals, both minor and major use permits are subject to CEQA.

2. CEQA Review of Individual Commercial Cannabis Projects

Individual commercial cannabis projects proposed under the County’s commercial cannabis ordinance (once adopted) would require compliance with CEQA. (See Pub. Resources Code, § 21065; 14 C.C.R. § 15064; Bus. & Prof. Code, § 26055(h); Articles 50 and 51 of the Lake County Zoning Ordinance.) Further, emergency regulations adopted pursuant to the State Cannabis Act identify CEQA compliance as a required condition precedent to issuance of a state license. (3 C.C.R. § 8102(p).) In other words, an applicant for a state license must show that the local jurisdiction complied with CEQA (either by identifying an applicable exemption or by adopting a CEQA document) when it approved the applicant’s underlying local permit.

The precise nature of CEQA compliance for any particular project, however, will depend on the specific activities proposed as part of that project. For example, some projects may be

exempt from CEQA under a categorical exemption, such as a Class 1 (Existing Facilities; 14 C.C.R. § 15301) or Class 4 exemption (Minor Alteration to Land; 14 C.C.R. § 15304). These exemptions apply particularly well to outdoor cultivation projects in established agricultural areas. This office has helped secure approval of a number of multi-acre cultivation projects outside of Lake County under the above exemptions.

Other proposed projects may require some degree of environmental review, which can be achieved via a Negative Declaration (“ND”), a Mitigated Negative Declaration (“MND”), or an Environmental Impact Report (“EIR”). In each case, the County (or County consultant, or applicant) must first prepare an initial study to determine the appropriate level of environmental review for the proposed project. (14 C.C.R. § 15063; *Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170.) The County may then prepare a standalone ND, MND or EIR, or the County may “tier” off a previous CEQA document. (Pub. Resources Code, § 21094; 14 C.C.R. § 15152.) As you may know, the state recently adopted its Final Program EIR for commercial cannabis activities. This document was expressly prepared for use as a “first-level” document suitable for tiered use for subsequent individual projects.

3. Draft Ordinance “Management” Plans

The County’s draft commercial cannabis ordinance requires each applicant to prepare a host of “management” plans, including an air quality management plan, a waste management plan, a cultural resources management plan, an energy management plan, a fertilizer management plan, and so forth. In all, the draft ordinance requires thirteen such plans. We understand that clarification may be helpful on two points related to these management plans.

First, the various management plans required under the draft ordinance do not comprise a CEQA analysis of the underlying project. While these management plans relate to potential environmental impact areas under CEQA, the plans do not analyze potential project impacts nor address possible mitigations. (*See, e.g., Tomlinson v. County of Alameda* (2012) 54 Cal.4th 281, 286.) Rather, these plans would form part of the “project description” for a proposed project; in other words, these management plans would be part of the overall project subject to CEQA analysis. (14 C.C.R. § 15378; see *Habitat & Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1297.)

Second, some of the draft ordinance’s management plans overlap with plans required by the state regulations, while other plans are in addition to those required by the state, as shown in the table below:

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	Lake County Draft Ordinance Management Plans	CalCannabis Emergency Regulations Management Plans
1	Air Quality Management Plan	Not required.
2	Waste Management Plan	<p>Required. State regulations require a “cultivation plan”, which consists of several components, including a pest management plan, a cultivation plan, and a cannabis waste management plan. (3 CCR §§ 8106, 8108)</p> <p>The draft ordinance’s Waste Management Plan requires far more information than the state requires, and is thus more onerous than state requirements.</p>
3	Cultural Resources Management Plan	Not required.
4	Energy Management Plan	Not required.
5	Fertilizer Management Plan	Not required.
6	Fish and Wildlife Management Plan	Not required.
7	Operations Manual	Not required. State regulations require a “cultivation plan”, which consists of several components, including a pest management plan, a cultivation plan, and a cannabis waste management plan. (3 CCR § 8106.)
8	Pest Management Plan	Required. State regulations require a “cultivation plan”, which consists of several components, including a pest management plan, a cultivation plan, and a cannabis waste management plan. (3 CCR § 8106.)
9	Property Management Plan	Not required.
10	Water Resources Management Plan	<p>Not required. State regulations require evidence of enrollment in the State Water Board General Order, or written verification that enrollment is not necessary. (3 CCR § 8102(n).)</p> <p>State regulations also require a CDFW LSAA, or written verification from CDFW that an LSAA is not required. (3 CCR § 8102(u).)</p>
11	Security Plan	Not required.

	Lake County Draft Ordinance Management Plans	CalCannabis Emergency Regulations Management Plans
12	Storm Water Management Plan	Not required. State regulations require evidence of enrollment in the State Water Board General Order, or written verification that enrollment is not necessary. (3 CCR § 8102(n).)
13	Water Use Management Plan	Required. The state regulations require supplemental information for each water source identified by the applicant. (3 CCR § 8107.) Again, the draft ordinance imposes more onerous requirements than the state regulations.

As shown, ten of the County’s draft ordinance management plans are not required by the state regulations. Of the draft ordinance’s three management plans that are also required by the state regulations, two require much more information than the state counterparts. In this regard, the draft ordinance places more requirements on applicants and a heavier administrative burden on the County than state law requires.

The County should note that the State Cannabis Act authorizes local jurisdictions like Lake County to adopt their own local land use controls regulating commercial cannabis activities. (Bus. & Prof. Code, § 26200(a)(1).) Importantly, the State Cannabis Act also specifies that state standards, requirements and regulations are the minimum standards, and that local jurisdictions may establish additional standards, requirements and regulations. (Bus. & Prof. Code, § 26201.) The County, accordingly, is within its rights to require more and more exhaustive management plans than does the state. Any plans beyond those required by the state, however, will not be reviewed by the state for purposes of issuing state licenses. Such excess plans would be solely a function of local control and enforcement. In this regard, the County should tailor its management plan requirements to match those required by the state, so that an applicant may prepare a single set of plans for both the County and the state, and so that the County is not required to monitor and enforce compliance with a multitude of other plans that are not essential for state licensure.

We prepared the flow chart on the following page to illustrate the overall interaction between proposed Lake County permit requirements, state license requirements, and CEQA.

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